

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2010/0474

BETWEEN

VINCENT FREDERICK

CLAIMANT

AND

FRANCIS MARKS

DEFENDANT

Appearances:

Mrs. Zhinga Horne-Edwards for the claimant.

Mr. Ronald Marks and Mrs. Patricia Marks-Minors for the defendant.

2019: Jul. 26
Aug. 14

JUDGMENT

BACKGROUND

- [1] **Henry, J.:** Mr. Vincent Frederick is an elderly gentleman who spent over 42 years living in the United Kingdom. He is a retired train driver. He returned to Saint Vincent and the Grenadines in 1998. He resides at North Union on the Eastern side of the island. On October 2nd 2010 he was driving from Kingstown on the South Western part of the island to his home. It was late in the night. As he rounded a bend in an area known as Bridgetown he collided with a lorry which was stationary on the road.
- [2] The truck belonged to Mr. Francis Marks. Earlier that day, it was being driven by his employee Osborne Paul when it stalled, would not re-start. It was left along the road in Cedars. Mr. Marks

caused it to remain on the roadside overnight. He contended that he took certain precautions to ensure that other road drivers would be provided with advance warning of its presence on the road.

[3] Mr. Frederick alleged that the truck was unlit when he happened upon and collided with it that night. He contended that Mr. Marks' and/or his servants' and agents' negligence caused the accident. He accused Mr. Marks of parking or leaving the truck stationary in a bend after dark, when it was unsafe to do so; failing to adequately light or mark the truck; causing it to become a danger to persons lawfully using the road; failing to give oncoming traffic adequate warning of its presence on the road or to take steps to prevent traffic colliding with it; and failing to have regard for the safety of other road users. He brought this claim seeking damages from Mr. Marks for negligence or alternatively for creating a nuisance.

[4] Mr. Marks denied liability. He contended that Mr. Frederick's negligence caused or contributed to the accident. Mr. Marks charged that Mr. Frederick failed to keep a proper lookout or to observe or heed the presence of his vehicle; failed to have regard to a warning signal that he (Marks) caused to be left there; drove too fast and failed to apply his brakes in a timely manner or otherwise control his vehicle to prevent the collision. I have found that Mr. Marks is not liable. Mr. Frederick's claim is dismissed.

ISSUES

[5] The issues are:

1. Whether the accident was caused by Mr. Vincent Frederick's or Mr. Francis Marks' negligence?
2. Whether the accident was caused by Mr. Francis Marks creating a nuisance in the road with the truck?
3. To what remedies, if any, is Mr. Vincent Frederick entitled?

ANALYSIS

Issue 1 – Was the accident caused by Mr. Vincent Frederick's or Mr. Francis Marks' negligence?

[6] At the time of the accident, Mr. Frederick owned a 1990 Land Rover Discovery jeep, registration number P1998. He was driving it that night. His friend Stephen Henry was sitting next to him in the front passenger seat. It was raining. Mr. Frederick recalled that around 11.15 p.m. while traveling on the main Windward Highway, he approached the bend in Bridgetown, just below Winston Shortte's residence driving at a moderate pace. He said he noticed a black object on the left side of

the road but it came into his vision only after he rounded the bend. The black object turned out to be the lorry.

- [7] Mr. Frederick explained that it was too late for him 'to pull up' because the distance between his vehicle and the lorry was too short. He said that in an effort to avoid a collision, he pulled right, but nonetheless the left side of his jeep struck the rear of the lorry. He insisted that the lorry was not lit in any way when he saw it and there was no sign or light indicating that there was a broken down vehicle on the road, or other signal to warn motorists of its presence. He asserted that it had been left unattended.
- [8] His vehicle was damaged so badly that it was written off. His insurance company paid him for the loss of his vehicle. He claimed towing fees of \$345.00 for removing his damaged vehicle from the scene, \$100.00 for the police report and compensation for the loss of his vehicle.
- [9] Mr. Marks was not present when the collision took place. He arrived some time later as did the police. He testified that around 4.00 p.m. that day he instructed his driver to travel to Rabacca in the truck (registration number TA726) to secure materials for his block making plant. He said that around 7.00 p.m. he received a call from the driver and learnt that the truck had stalled. He said he contacted a towing company but was not able to make arrangements that day for the vehicle to be removed.
- [10] Mr. Marks testified that he contacted D & E. but could not get in touch with Mr. Cliffy Gunsam. He asserted that D & E was the only tow truck company that had the size of tow truck that could move his lorry. He was asked if he tried to get any other towing company. He replied that he did not. When questioned about Eustace Auto Supplies he stated that he tried there but it was closed and no one was answering. He added that D & E was the only one which could have gotten there. He did not say that D & E was closed, just that the tow truck operator was unavailable.
- [11] It seems that in his mind that although Eustace Auto Supplies had the capacity to tow his truck, it was eliminated as a possible option because it was closed, while D & E remained an option if he was only able to get in touch with Mr. Gunsam. He said that he did not mention Eustace Auto

Supplies in his witness statement because he did not think it was relevant.

[12] Mr. Frederick argued that it defies reason that Mr. Marks considered it relevant to state that he contacted one tow company and omitted to mention the other one, even though his attempts to contact both were equally unsuccessful. He submitted that the real reason Mr. Marks made no mention of Eustace Auto Supplies in his witness statement was because he made no such efforts. He reasoned that this unconvincing attempt by Mr. Marks to bolster his evidence regarding the steps he took after his truck broke down, damages his credibility.

[13] Mr. Frederick contended that Mr. Marks omitted this salient 'fact' from his witness statement and pleadings because it did not take place. I draw no such inference. Mr. Frederick submitted that the belated disclosure was unreliable and false as was Mr. Marks' attempt to make it appear that he had taken more proactive steps to remove his truck from the roadway when in fact he did not. Mr. Marks denied this assertion.

[14] I remind myself that all witnesses do not have the same powers of recall and attention to detail. I note too that the events surrounding this case transpired almost 10 years ago. Some latitude must be accorded to the parties regarding their ability to remember exactly what took place so many years ago. There were no independent witnesses. Regrettably, although other witness statements were filed, two of the proposed witnesses had since passed away.

[15] I bear in mind that whenever the court is required to draw an inference, it must select the one which is more favourable to the party charged. I accept Mr. Mark's account that he called Eustace Auto Supplies but received no answer. I infer that this testimony was merely omitted from his witness statement as were other details which emerged during cross-examination, and not fabricated. Both parties provided concise pleadings and witness statements. I make no finding that the omission from the witness statement proves that it did not happen or that the disclosure at trial was an attempt to deceive the court.

[16] Mr. Marks indicated that he gave instructions for the driver to continue with his attempts to fix the vehicle. Those attempts failed. He said that he told his brother Karl (now deceased) to erect a

warning sign to alert road users of the presence of the truck. He said he was told that a red t-shirt was there. Mr. Marks indicated that he gave instructions for the t-shirt to be displayed broadly across a stick which was to be erected at least 20 feet from the rear of the stalled vehicle. Mr. Marks testified that about half an hour after giving those instructions he was notified by telephone that Mr. Frederick had collided with the truck. He went to the scene.

[17] He said that he saw the warning signal described by his brother, lying in the drain and Mr. Frederick's vehicle was positioned behind his truck, in a damaged condition. He expressed the belief that a red t-shirt would have been adequate at night because the area is well lit with streetlights and there are houses above the road. He explained that he instructed his brother to place the signal about 20 feet from the rear of the truck, which would have been right at the beginning of the bend and directly in the line of sight of motorists. He stated that his truck was located some distance from the corner and above Mr. Shortte's driveway.

[18] Mr. Marks claimed that Mr. Frederick would have had to drive uphill and pass the warning signal before coming to the truck. He insisted that Mr. Frederick's negligence was the sole cause of the accident. He opined that if Mr. Frederick had exercised the due care and attention of a road user and was traveled at a reasonable speed the accident would have been avoided. He averred that every attempt was made to fix his truck and after those attempts failed was a warning signal erected. He stated that based on the information he received, the truck was unattended for only a short period.

[19] The police went to the scene of the collision and took measurements. The parties accepted those measurements as being accurate and relied on them during the trial.

[20] Mr. Frederick testified that the accident took place right at Mr. Shortte's gate and not some distance away. He was adamant that he was driving at a reasonable speed and that there was no warning signal at the scene. He contended that if there was a proper signal on the lorry there would have been no collision. He saw no signal when he got there. He denied that he would have had ample time to go around TA726 if he was traveling at a moderate speed. He also explained that the electricity was off in that area and the street lights were off. He accepted that he had on his high

beams. This would have provided some illumination.

- [21] Mr. Frederick acknowledged that the width of the road at the point of impact was 21' 8"; from the right front wheel of TA726 to the right of the road was 12' 8"; and the width of P1998 was 5' 7". He admitted that based on those measurements, two vehicles of the same size as his would have been able to pass by the truck. My own observation is that it would have been a tight squeeze. In any event, it is self-evident that a vehicle of the same width as P1998 would have been able to pass by the parked lorry unless there was some obstruction on the roadway in the right lane. Mr. Frederick testified that the road was not blocked by or after the accident.
- [22] He acknowledged that the entire front of P1998 was badly damaged, although the left side was more damaged than the right side. He explained that his jeep was equipped with a crash bar to protect it from damage in case of an accident. He admitted that the crash bar was completely destroyed and the radiator was slightly damaged. He testified that even if he was travelling at 5 m.p.h. the truck would have done great damage to his jeep although he was traveling uphill.
- [23] Mr. Frederick accepted that after the accident other vehicles passed by headed in both directions. He acknowledged that the vast majority of vehicles going to and from the Windward area travel along that road. He admitted that no vehicle collided with his after the accident. He said that he moved his jeep that night but the lorry remained on the roadway in the same position in which it was when he ran into it. He testified that the police left with him that night and when they departed, they left the lorry in the same spot where he had collided with it. The police transported him to the doctor that night.
- [24] Mr. Marks stated that the truck was removed the next morning. He acknowledged that Osborne Paul was his employee. This contradicts assertions in his Defence¹ where he denied that Mr. Paul was employed as his truck driver. Mr. Frederick submitted that this contradiction damaged Mr. Marks' credibility, and consequently he should not be believed. Mr. Marks explained this inconsistency by saying that at the time he knew Mr. Paul by his nickname and only realized what was his real name a few months after the accident. This explanation is peculiar in light of the fact

¹ Filed on 25th February 2011.

that the accident happened in 2009 and the defence was filed in 2011. I reject it as a logical or truthful answer.

- [25] Mr. Marks asserted that the truck was not parked right at the bend but some 20 to 25 feet from the bend. He acknowledged that the truck is some 22' 9" in length and 8' in width as recorded in the measurements taken by the police. He accepted that from the left front wheel of his truck to the left of the road was 1' 6" and from the left rear wheel to the left of the road was 2 feet. He denied that this signifies that his vehicle was blocking the road. He reasoned that if one subtracted the width of the truck from the width of the road, the left lane would have an excess of 3 to 4 feet which was not occupied by his truck. He eventually accepted that the left lane in which TA 726 was parked would have about 2 feet of road available for passing traffic to utilize. He maintained that there was adequate space for oncoming traffic to pass comfortably in either direction in single file.
- [26] Mr. Frederick submitted that based on those measurements, he had just about 1 to 2 feet of available road on the left lane, and this would have made it impossible for any vehicle heading towards North Union to pass without going on to the right lane. He argued that these measurements are significant as they provide evidence that the truck occupied essentially the entire left lane and caused an obstruction.
- [27] Mr. Marks explained that the distance from the back of TA726 was about the length of the truck or between 20 to 25 feet. He denied that the bend is a deep one. He insisted that one can actually see for some distance. He acknowledged that he considered it was the right thing to do to erect something to warn people of the presence of the lorry. He explained that motorists sometimes speed on that stretch of road and it was necessary to warn them that there was something up ahead which would have impeded the smooth flow of traffic.
- [28] Mr. Marks testified that once one is driving at a moderate speed, one would be expected to see the truck and there should be no need for a warning signal. However, he thought that the added precaution was advisable and so he gave directions for it to be erected.
- [29] Mr. Frederick submitted that the t-shirt was not an adequate warning, particularly in the

circumstances that existed at the time of the accident. He stressed that it was raining and dark and the street lights were off. He reasoned that the positioning of the red t-shirt as a 'warning signal' is another important factor in determining Mr. Marks' culpability of the as it related to his negligence in general and more specifically in respect of the adequacy of his efforts to address 'the obvious hazard that was caused by the presence of his unlighted stationary truck on or near a bend on a public road on a rainy night.' Mr. Marks rejected the notion that the adequacy of the t-shirt as a warning signal would have been diminished if it got wet. He stressed that it would still be standing even if it got wet. He pointed out that it had a concrete block 'at the foot'.

[30] Mr. Frederick contended that he did not see a warning signal. He argued that while Mr. Marks claimed that he saw it in the gutter at the side of the road, he had not seen it otherwise and could not say where it had been erected, or whether it was standing when the accident occurred. Mr. Frederick submitted that Mr. Marks stated that the reason he instructed that a warning signal be erected was 'so that other drivers could see that there was an obstruction ahead' that 'obstruction' being his stationary truck.

[31] Mr. Marks was insistent that he, the driver and his brother took adequate precautions to warn motorists of the truck's presence on the road. Under cross-examination he opined that one would see those obstructions while driving and the first instinct would be to slow down. He explained that when he got to the scene he saw that the warning signal had been knocked over and was lying in the drain. He did not see it when it was upright. He explained that he relied on what his brother told him and showed him. He testified that he did not contact the Biabou police station to get cones because that is not a regular practice. He remarked that persons usually try to repair a downed vehicle.

[32] Mr. Marks stated that his truck stayed there all night into the morning without further accidents taking place. He reasoned that the measures were adequate because other drivers were able to go pass the truck without incident.

[33] Mr. Frederick submitted that the measures allegedly taken by Mr. Marks to address the hazard were inadequate. He contended that not enough was done to get the truck towed. He

argued that the erection of a red t-shirt would have been ineffectual as a warning signal to road users on a dark, rainy night. He submitted that the position of the truck coupled with Mr. Marks' and his servants' or agents' failure, to take reasonable steps to move the truck or to alert road users to its presence amount to negligence.

[34] Mr. Frederick submitted further that the driver of a motor vehicle owes a common law duty to observe ordinary care or skill towards other persons using the roads. He argued that this duty of care must be exercised by all road users in relation to one another. He relied on the case of **Bourhill v. Young**² and the textbook **Commonwealth Caribbean Tort Law**³ in support. He contended that in exercising this duty, road users must act as a reasonable person would in order to avoid foreseeable injury or damage. He argued that 'where this duty is breached and damage or injury is suffered as a consequence, the person in breach is guilty of negligence and is liable for the loss that results.'

[35] Mr. Frederick submitted that the court when examining the issue of liability for a motor vehicle accident, must consider the actions of all road users, be they drivers, passengers, road workers or pedestrians. He contended that in each case determination of whether any road user has fallen below the required standard of care is a question of fact. He argued that Mr. Marks as owner of the truck, and Mr. Paul as driver, had a duty to exercise reasonable care and skill in relation to TA726 to ensure that no harm came to him (Mr. Frederick) or such other persons they could reasonably foresee might be injured by failure to exercise reasonable care.

[36] Mr. Frederick reasoned that where a vehicle is left unattended on a road, in a position that causes an obstruction to other motorists thereby creating a hazard, adequate warning must be given to alert motorists of its presence. He submitted further that what is adequate warning is a question of fact and depends on the circumstances of the case. He argued that leaving a vehicle parked unlit at night on a road, even in an emergency, without giving any or

² [1943] AC 92.

³ 5th Ed., Gilbert Kodilinye at page 105.

any adequate warning may also be negligent. He cited the case of **Parish v. Judd**⁴. He submitted that the authorities establish that factors such as the length of time the vehicle was left in that position are relevant, as illustrated by the case of **Maitland v. Raisbeck and Hewitt (R. T. & J.) Ltd.**⁵

- [37] He contended further that in the courts of the Commonwealth Caribbean, negligence has sometimes been presumed where a vehicle collides with an unlit vehicle parked on a road at night as in the case of **Marcel Fevrier and Jenny Fevrier v. Bruno Canchan et. al.**⁶. Mr. Frederick submitted that English judges have also made statements to that effect, including in **Hill-Venning v. Beszant** where Lord Denning stated:

‘the presence of an unlighted vehicle on a road is prima facie evidence of negligence: on the part of the driver and it is for him to explain how it came to be unlighted and why he could not move it out if the way or give warning to oncoming traffic.’⁷

- [38] Mr. Frederick submitted that the usual rules of causation are applicable and the presence of the truck on the road must have been causative of the accident. He directed the court’s attention to the text **Clerk & Lindsell on Torts**⁸ and **Caribbean Tort Law**⁹ in this regard.

- [39] He contended that the measurement of the wheels of his jeep respectively from the left and right sides of the road, supports his assertion that he swerved to try to avoid hitting the truck, but was unable to avoid it. He submitted that measurements show that the right front wheel of his vehicle was farther right than the right rear wheel and so too was the left front wheel compared with the left rear wheel. Those measurements were respectively 8’ 10”, 9’ 5”, 5’ 10” and 5’ 10”. This suggests that the jeep was partially in the left lane and partially in the right lane. Mr. Frederick obviously tried to swerve but was too close to TA726 when he started that maneuver.

⁴ [1960] 1 WLR 867 at 870 per Edmund Davies J.

⁵ [1944] 2 All ER 272, C.A.

⁶ Claim No. 313 of 1989 (Saint Lucia).

⁷ [1950] 2 All ER 1151.

⁸ At para. 20-186.

⁹ 5th Ed., Kodilinye, at page 170.

[40] Mr. Marks relied on some of the same cases. He agreed that a correct statement of law is that all parties involved in a collision owe a duty to each other and to themselves so as to avoid the collision. He referred to the cases of **Darel Christopher v Benedicta Samuels dab Samuels Richardson & Co.**¹⁰ and **Berrill v Road Haulage Executive**¹¹. In the latter Slade J. remarked:

‘Now, what is the duty of the driver of a motor vehicle? Paraphrasing the words of Lord Uthwatt in *London Passenger Transport Board v Upson and Anor* (1949) AC 155, it is really this. You are not bound to foresee every extreme of folly which occurs on the road. Equally you are certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. You are bound to anticipate any act which is reasonably foreseeable, that is to say, anything which the experience of road users teaches them that people do, albeit negligently.’¹²

[41] Mr. Marks argued that Mr. Frederick as a driver is expected by law and was expected on the day of the accident to keep a proper look out, observe the rules and signs of the road and avoid excessive speed. He submitted that the evidence reflects that the stationary truck was located after a corner and Mr. Frederick was travelling uphill. He argued that in those circumstances Mr. Frederick should have exercised a greater degree of care as a road user on that night.

[42] He submitted that he gave evidence of the measures he took to secure the services of a tow truck and failing that to alert road users of the stationary vehicle. He argued that those measures were sufficient in the circumstances. He contended that Mr. Frederick was driving at an excessive speed, collided into the warning signal and then into the truck. He concluded that Mr. Frederick was negligent at the time of the collision.

[43] The learned authors of **Halsbury’s Laws of England** describe negligence as: ‘the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or

¹⁰ BVIHCV2008/0183.

¹¹ [1952] 2 Lloyd's Rep 490.

¹² At para. 34.

in doing something which ought to be done either in a different manner or not at all.’¹³ It is now accepted that negligence arises in circumstances when a person owes a duty of care that he fails to discharge which results in damage to another. Mr. Frederick and Mr. Marks correctly distilled the applicable principles which guide the court in determining the duty owed by road users, the breach of which attracts liability. I will apply them to the facts of this case.

[44] The parties are agreed that Mr. Marks’ truck was parked at the side of the road in close proximity to Mr. Shortte’s property and some distance around a bend. There is no dispute that most of the left lane (heading into North Union) was occupied by the truck. Consequently, motorists traveling from Kingstown would have needed to venture into the right lane to go pass the stationary vehicle. Because of its position around a bend, it was an obstruction on the road. Consequently, Mr. Marks owed a duty to other road users to provide some warning of the partial obstruction of the left lane. He accepted this.

[45] At the same time Mr. Frederick owed a duty to proceed along the road with due care and attention. In the words of Rawlins J. in **Cheryl Edwards Administratrix of the estate of Janique Lewis v Etnel Mills.**:

‘Drivers of motor vehicles are under a duty to exercise due care on the road. They are expected inter alia to determine what other users of the road are doing. They are expected to maneuver their vehicles in order to prevent and avoid accidents. ... They must exercise due care and attention at all times. This might at times require a driver to stop in order to have a proper look out so as to determine whether it is safe to proceed or to overtake another vehicle. **It all depends upon the circumstances including the weather, visibility, the number of vehicles on the road, the presence of pedestrians and the state of the road.**’¹⁴ (bold added)

Negligence – Francis Marks

[46] Mr. Frederick accused Mr. Marks of several breaches of his duty of care. Mr. Marks accepted that he left the truck around a bend after dark. He insisted that he took adequate steps to have it

¹³ Volume 78 (2018)) para. 1.

¹⁴ ANUHCv1998/0168.

removed and ultimately to warn oncoming road users. The question for the court is whether he did. Mr. Marks as a witness was seemingly unassuming. He was mostly a forthright and forceful in his responses. So was Mr. Frederick. Mr. Marks stumbled over the question why he denied that Mr. Paul was his employee. He was obviously caught off guard. Mr. Frederick insists that this shatters his credibility. It does impair the reliability of his account on that score.

[47] I have no difficulty finding that the truck TA726 was immobilized at the side of the road and that Mr. Marks, his servant Mr. Paul and his brother and agent Karl Marks used their best endeavours to get it moving or towed. I accept Mr. Marks' account that Mr. Paul and his brother stayed there until late into the night before finally erecting a warning signal to alert oncoming traffic of the vehicle at the side of the road. It is not unheard of that motorists from time to time find themselves in a similar predicament. Unlike in large developed countries roadside assistance and towing services are not available 24 hours each day. Hapless motorists in this position must summon their ingenuity to fashion appropriate methods of moving the vehicles and if necessary warning signs. I take judicial notice of this reality.

[48] Mr. Marks' chosen warning signal was a red t-shirt. It strikes me that because of the material and colour such an object would be readily discernible to oncoming motorists who are exercised in giving due care and attention to the road ahead. I cannot fault Mr. Marks and his servants and agents for the type of signal used, the manner in which it was erected or where it was placed. I believe him when he said he saw it at the scene of the accident in the drain, apparently knocked over.

[49] I am of the opinion that Mr. Marks took appropriate and adequate steps to alert road users of the parked vehicle, by causing the warning signal to be erected. I accept that he had the truck moved the following morning. This demonstrates that he was alive to the need to take quick action to remove the vehicle. I therefore make no finding that it was unsafe for him to leave the truck parked on the road in all the prevailing circumstances, especially since no trucking services were available that evening. He simply had no other option. I find that he, his servants and agents took appropriate steps to provide adequate warning to road users about the truck's presence on the road. By doing so he had due regard for the safety of other road users as he explained.

- [50] Mr. Marks accepted that the truck was not lit. While this can in certain circumstances impute negligence, it is not always so. In the case at bar, the vehicle was of considerable size. It is not clear what type of lighting was being contemplated by Mr. Frederick. I accept that street lights are located in that area as attested to by Mr. Marks. Mr. Frederick did not deny this. He did state though that the electricity was off when he arrived at that location.
- [51] By the time Mr. Marks got there the lights were back on. Mr. Frederick did say that they lights might have come back on by the time the police arrived and took measurements. He could not be sure. This is understandable in view of the passage of time. I take judicial notice that electricity outages are not prevalent in the State of Saint Vincent and the Grenadines. It was reasonable for Mr. Marks to expect that the street lights in the area would assist in making the truck more visible to oncoming traffic.
- [52] To my mind, the sheer size of the vehicle would cause it to stand out like a sore thumb on any roadway. For his part, Mr. Frederick contended that the most appropriate warning signal at night is a flashing or warning light. He pointed out that there is no evidence that Mr. Marks made any attempt by to obtain a warning light or even reflectors to illuminate the truck. The usual reflectors on the rear light panel (if present) would also be expected to aid with visibility. I hasten to add that I make no finding that there were visible reflector lights. In any event, Mr. Frederick and other road users would have been expected to exercise greater care approaching and navigating bends in the road. This would necessitate that they slow down as much as possible to afford them the ability to come to a sudden stop if necessary.
- [53] In all those circumstances, I do not consider that it was necessary for Mr. Marks to light or mark the truck if he took alternative appropriate means to alert road users of the truck's presence. I make no finding that his, his servants' or agents' failure to provide a flashing or other light constituted negligence which caused the collision, or posed a danger to persons lawfully using the road. Mr. Frederick has not established on a balance of probabilities that the collision was caused by Mr. Marks', his servants' or agents' negligence. The issue of vicarious liability does not arise.

Negligence – Vincent Frederick

- [54] Mr. Marks ascribed all fault to Mr. Frederick for the collision. I turn to examine the allegations of

negligence leveled against him. No evidence was provided which established that Mr. Frederick was driving too fast. He denied that the warning signal was present when he got to the area. Mr. Marks did not see the warning signal erect on the roadway at the time of the collision and no witness attested to this. There is no evidence of how it got into the drain. I make no finding that Mr. Frederick was driving too fast or failed to heed the presence of the warning signal.

[55] I accept the parties' account that TA726 was parked in the vicinity of Mr. Shortte's residence. Mr. Frederick said that it was in the bend. Mr. Marks said that it was about 20 to 25 feet away from the bend. Mr. Frederick gave no measurements from the vehicle to the bend. Neither did the police. I accept Mr. Marks' approximation of the distance between the rear of the truck and the bend. I note too that before leaving the scene Mr. Frederick's vehicle which was behind TA726 was moved. The truck was left in the same spot where the collision happened. It does not appear that the police stipulated that it be moved, which they were entitled to do, if it posed a danger to other road users which could not be lessened by use of an appropriate warning signal.

[56] It seems to me that a driver approaching a sharp bend must of necessity slow down and proceed cautiously to ensure that it is not surprised by any obstruction or person in the road. If the bend is not particularly deep a driver will be expected to have a better range of vision much sooner and for a greater distance, and can therefore proceed at a slightly quicker pace. In either case, a stationary object the size of TA726 should be discernible to a cautious driver almost immediately. Such cautious driver navigating a bend would be expected to be poised to make a quick stop if circumstances warrant it, particularly if it is raining heavily, which would impact the road condition.

[57] It strikes me that Mr. Frederick was not proceeding in such a careful and cautious manner on the night in question when visibility was affected due to the rain and the electricity outage. Even if the warning signal had been knocked over by the time he got there, if he was keeping a proper lookout and proceeding with due care and attention, he should have seen the truck within sufficient time to swerve or stop. It seems that he saw it only when he was right on it. That indeed is his testimony.

[58] As a driver of some years' experience, Mr. Frederick must have known that he owed a duty to anticipate that an obstruction could reasonably and foreseeably be in the road around the bend. I

take judicial notice that this is a not uncommon occurrence in the State. I find that on a balance of probabilities that Mr. Frederick did not anticipate such a real possibility and therefore failed to keep a proper lookout; or observe and heed the presence of the lorry on the road; failed to apply his brakes in a timely manner or otherwise manage or control his vehicle to prevent the collision. The accident was caused through these failures and is attributable to his negligence.

Issue 2 – Whether the accident was caused by Mr. Francis Marks creating a nuisance in the road with the truck?

[59] Mr. Frederick contended that the truck constituted a public nuisance to road users and that Mr. Marks was therefore liable for the losses he suffered when he collided with the truck. He submitted that 'a public nuisance in the context of a public road/highway often takes the form of an obstruction of the road, which may or may not also be a danger to road users.'

[60] Quoting from the case of **Morton v Wheeler**¹⁵, he submitted that Lord Denning's statement on what constitutes danger is instructive. Lord Denning said:

'But how are we to determine whether a state of affairs in or near a highway is a danger? This depends, I think, on whether injury may reasonably be foreseen. If you take all the cases in the books, you will find that if the state of affairs is such that injury may reasonably be anticipated - persons using the highway, it is a public nuisance ... but if the possibility of injury is so remote that he [the reasonable man] would dismiss it out of hand, saying "Of course, it is possible, but not in the least probable": then it is not a danger.'

[61] Mr. Frederick contended further that the very presence of the truck on the public road occupying an entire lane of a public road meant that part of the road was removed from public use. He argued that the stationary, unlit truck created an obstruction to road users, particularly those, like him, who were driving in the left lane toward North Union. He submitted that a reasonable man observing the truck in the position and at the time that it was left on the road, would foresee that it presented a hazard to other road users, including him. He concluded that the truck constituted a public nuisance.

¹⁵ (1956) The Times, February 1st.

[62] He reasoned that it matters not what (if any) steps Mr. Marks took to remove the obstruction or alleviate the danger. Mr. Frederick contended that in light of the decision in **Ware v Garston Haulage Co Ltd.**, that the truck being stationary and unlit on the public road at night, constituted a nuisance. In that case, the English Court of Appeal found that the defendant, who had left a lorry unlit on the highway into the night, was liable for the death of a motorist who had run into the lorry. The court held that the lorry constituted a nuisance and the question of the defendant's negligence was immaterial.

[63] Mr. Marks countered that the cases of **Marcel Fevrier et al v Bruno Canchan**¹⁶ and **Maitland v Raisbeck**¹⁷ address those contentions. In the latter, Lord Greene noted:

'Every person who uses the highway has to exercise due and proper care. He has a right to use the highway and, if something happens to him which in fact causes an obstruction to the highway but is in no way referable to his fault, it is quite impossible in my view, to say that *ipso facto* and immediately a nuisance is created. **It would be obviously created if he allows it to be an obstruction for an unreasonable time or in unreasonable circumstances but the mere fact that it has become an obstruction cannot turn it into a nuisance.** It must depend on the facts of each case as to whether or not a nuisance is created. If that were not so, it seems to me that every driver of a vehicle on a road would be turned into an insurer in respect of latent defects in his own machine.'¹⁷ (bold added)

[64] At common law, it is a nuisance to obstruct a highway or make it dangerous. It is a question of fact whether an act or omission amounts to a nuisance.¹⁸ If an incursion or obstruction is of a temporary nature it does not automatically constitute a nuisance.

[65] The referenced pronouncement by Lord Greene makes it abundantly clear that not every obstruction of a highway or road creates a nuisance. It must be one which makes the roadway dangerous over an extended period without reasonable justification. I observe that the learned judges in **Maitland v. Raisbeck** commented that it appeared that pronouncements made by the court in **Ware v**

¹⁶ SLUHCV1989/0313 at paragraph 40.

¹⁷ [1944] 2 All ER 272 at page 273.

¹⁸ Halsbury's Laws of England, Vol. 55 (2012), para. 325.

Garston Haulage Co Ltd. were being referred to incorrectly as being of general application. Mr. Frederick seems to be of that mind.

[66] The learned judges discouraged the approach that suggested that the existence of an obstruction on the highway automatically renders it a nuisance. Instead, they opined that a nuisance will arise only if the driver of the parked vehicle which has been left there due to an accident, some mechanical problem or other unforeseen happenstance, fails to take appropriate steps to remove the vehicle within a reasonable time.

[67] Applying those principles to the instant case, I am satisfied that no nuisance was created by the presence of TA726 on the roadway through the night. There is overwhelming evidence that the truck encountered difficulty that evening and that reasonable steps were taken to remove it which continued the following day and were eventually successful. In the intervening period Mr. Marks, his servants and agents took what can only be viewed as reasonable steps to alert road users of its presence on the road.

[68] Mr. Marks' his servants and agents acted properly in the circumstances. I therefore make no finding that the truck posed a danger and created a nuisance on the highway. Mr. Marks is not liable for the alleged nuisance.

Issue 2 - To what remedies is Mr. Frederick entitled?

[69] Having found that the accident was caused solely by Mr. Frederick's negligence, it is not necessary to make a determination regarding remedies to which Mr. Frederick is entitled. His claim for damages is dismissed.

Costs

[70] The Civil Procedure Rules 2000 ('CPR') provides that generally the successful party is entitled to recover costs. Provision is made in Part 65 of the CPR for prescribed costs to be awarded in respect of claims for an unspecified sum. Prescribed costs in such a case amounts to \$7,500.00 pursuant to CPR 65.5 (2) (b). As the successful party, Mr. Marks is entitled to his costs. Mr. Frederick is to pay Mr. Marks prescribed costs of \$7,500.00.

ORDER

[71] It is ordered:

1. Mr. Vincent Frederick's claim is dismissed.
2. Judgment is entered for Mr. Francis Marks.
3. Mr. Vincent Frederick shall pay to Mr. Francis Marks prescribed costs of \$7,500.00 pursuant to CPR 65.5 (2) (b).

[72] I am grateful to counsel for their written submissions.

**Esco L. Henry
HIGH COURT JUDGE**

By the Court

Registrar