



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 2002/F-013

BETWEEN	DONNA FOSTER	CLAIMANT
AND	CARLTON CLARKE	1 <sup>ST</sup> DEFENDANT
AND	DENSTON HINDS	2 <sup>ND</sup> DEFENDANT

Mr. Justin Barrow for the Claimant

Mrs. Sharon Usim instructed by Sharon A. Usim & Company for the Defendants

Heard: October 31, and November 3, 2008

McDonald J.

The claimant, a bank officer employed to National Commercial Bank in Montego Bay states that she was driving her 1991 Toyota Corolla motorcar on the 28<sup>th</sup> August 1997 at 2.10p.m. a clear day along the main road between Mcfield and Whitehorn on her way to Savanna-La-Mar.

A truck with an iron carrier about 24' in length and 8 ½ ' height driven by the 2<sup>nd</sup> defendant was traveling in front of her for about 10 minutes from Ramble which is the district before one enters Mcfield.

She said that on reaching a straight stretch of the Mcfield main road which had a downward gradient, she looked and saw that the way was clear to overtake the truck, she tooted her horn and proceeded to overtake. She could see clearly down to where the corner started.

Miss Foster said that she started to overtake at the top of the slight/little gradient and at the time the truck had already started down the stretch. She said when she did so, she saw no cars. The distance from the start of the stretch to the "end" was estimated at 30 – 35' as pointed out by her in court.

She was on the outside i.e. the right side of the road for a few seconds when she realized that the truck was going a litter faster than when she started overtaking. She also noticed that it was coming over into the right lane and she had to go further in the right lane to avoid the truck.

She said it was at that point that she saw three or four cars coming up the gradient in the right hand lane in the opposite direction. The cars had just come around a corner which is at the end of the stretch.

When she saw the vehicles she was midway the truck body going down to the head. The three vehicles stopped at the bottom on their side of the road. She tried to speed up to overtake but the truck was holding out on her.

She felt an impact to the left front of her Toyota and felt the vehicle going around. The car spin around facing the opposite direction from which she came. She felt another impact and saw that her vehicle was facing the direction she was traveling.. She said the impact was possibly to the back. One of the rear tyres of the car blew out.

Miss Foster testified that when her vehicle received the second impact it ended up in the left hand corner into the railing. It eventually stopped on the left hand side in the corner in a slant position not across. The truck stopped further down the road.

She said that her car did not stop where the oncoming vehicles had stopped, there was a space of about 2- 3 car lengths between those cars on the opposite side and her car.

She was unable to see where the truck stopped from where she was because of the corners.

It is the claimant's evidence that the Toyota Corolla was about 6' in width and 8 – 10' in length.

She estimated the width of the particular stretch of road as being able to comfortably hold four regular size cars.

She said that her normal pace is about 50 and she could not have been driving more than 60 kilometers as she had just come out from behind the truck and was speeding just a little bit to be able to pass it.

### **The Defendants' Case**

There is no dispute that the 2<sup>nd</sup> defendant Mr. Hinds was acting as the authorized servant or agent of the 1<sup>st</sup> defendant at the time of the accident.

Mr. Denston Hinds relates to the court that he was driving a tipper body international truck owned by Mr. Carlton Clarke on the 28<sup>th</sup> August 1997.

Whilst driving on the McField main road in the parish of Westmoreland, he noticed that the three vehicles coming in the opposite direction had come to a stop. They were one behind the other. He wondered what was happening, and before he could look through his rear view mirror he felt a jerk against the front right tyre of the truck.

He said a vehicle came straight across the front of the truck and hit an iron railing which was on the left of the road.

He immediately applied his brakes, swerved to the right and went between the three vehicles that had stopped and the claimant. He said that when he swerved, the left back

wheel of the truck hit the claimant's fender. The claimant's vehicle ended up in a slant position with its back in the road.

He drove the truck further down the road to park as the car was near a corner and walked back to the accident site.

He said the lady who was driving the vehicle stated that she was late for work and that she was attempting to overtake the truck at a time when it was not safe to do.

In cross-examination the 2<sup>nd</sup> defendant stated that at the point where the accident took place the width of the road was 20'. That there was a left bend in the road some point further down. He said that the bend is less than a chain from where the truck and the claimant's car first collided.

He said that the first thing he saw was a white top car come across the truck front, hit on the iron railing, come back on the road, slant way to the left hand side of the road. He had to swerve from this car and go between the car and the vehicles which were coming from the opposite direction.

He did not see her until the first collision when she went across the front of the truck.

The 2<sup>nd</sup> defendant maintains that he was driving in the left lane and was never positioned to the right most part of the left lane in preparation for the corner.

### Analysis

The burden is on the claimant Miss Foster to prove that on a balance of probabilities the defendants are liable to her in negligence for the loss and damages suffered.

It was never suggested to the defendant in cross-examination that he ever came out of his lane to the right hand side of the road into the path of the claimant as alleged by the claimant.

It was suggested to him that he didn't keep to his nearside i.e left at the time of the collision. In fact it was suggested to him that he was in the right most part of his left lane in preparation for the corner.

The claimant's statement of case under the heading Particulars of Negligence of the 2<sup>nd</sup> defendant does not specifically allege that the defendant was driving on the incorrect side of the road.

I am of the view that if as the claimant is alleging the truck came over onto her vehicle and hit it, it is more probable than not that the momentum would have sent the trajectory of her vehicle further over to the right hand side of the road and not to the left.

I find that the 2<sup>nd</sup> defendants' account of how the accident occurred is consistent with the positioning of the claimant's vehicle on the left hand side of the road after the accident.

The defendant's evidence that he kept to his correct side of the road throughout has not be challenged.

The particulars of negligence alleged against the 2<sup>nd</sup> defendant are as follows:-

- (a) driving at an excessive and/or improper speed
- (b) failing to keep any or any proper look out
- (c) driving without due care and consideration for other users of the road
- (d) failing to observe and/or heed the presence of the plaintiff's motor car on the said road in sufficient time or at all.
- (e) Failing to keep the said motor car under any or any proper or effective control.
- (f) Accelerating at a time when the plaintiff's motor car was in an advanced stage of overtaking the said motor truck.

(g) Colliding with the plaintiff's motorcar at a time the plaintiff's motorcar was in the act of overtaking the said motor truck.

(h) Failing to stop, slow down, swerve or otherwise to manage or manoeuvre the said motor truck so as to avoid the said collision.

It was not put to the 2<sup>nd</sup> defendant that he was driving at an excessive and/or improper speed.

In fact the 2<sup>nd</sup> defendant's evidence that he was traveling at approximately 25 mph was not contradicted.

It was not put to him that he accelerated at the time the plaintiff's motorcar was at an advanced stage of overtaking, nor was it put to him that he failed to stop, slow down, swerve or otherwise to manage or manoeuvre the truck so as to avoid the collision.

It was suggested to the 2<sup>nd</sup> defendant that he was not paying attention at the time of the collision and also that the collision occurred as a result of how he managed the truck on the day in question.

I agree with Mrs. Usim that these are vague suggestions, which he denied.

Mr. Barrow submitted that the fact that the 2<sup>nd</sup> defendant didn't see the claimant before the collision (i.e. the first impact) meant that he must have been negligent.

The claimant has alleged in the particulars of negligence that the 2<sup>nd</sup> defendant failed to keep any or any proper look out and failed to observe and/or heed the presence of the plaintiff's motorcar on the said road in sufficient time or at all.

Mr. Hinds' evidence in chief is that he saw three vehicles coming from the opposite direction stop and before he could look through his rear view mirror he felt a jerk against the front right tyre of the truck.

In cross-examination he said that the first thing he saw was a white top car come across the truck front.

The claimant's evidence is that she looked and saw that the way was clear for her to overtake the truck and she tooted her horn and proceeded to overtake.

Evidence as to the tooting of the horn is unchallenged. There is no further evidence before the court as to how many times she blew the horn, how long and how hard she held her hand on the horn prior to overtaking.

There is no evidence as to whether or not the truck engine carried any sound or any loud sound.

The 2<sup>nd</sup> defendant has stated when he first became aware of her presence, and from that it could be inferred that he did not hear the horn.

Prior to the first impact the 2<sup>nd</sup> defendant's evidence indicates that he was paying attention to what was going on in front of him.

At the time this 25' truck was going down the gradient, approaching a blind left hand corner which it had to negotiate.

The question arises as to whether it can be successfully argued on the claimant's behalf that she blew to alert him of her intention to overtake, that he had a duty and was negligent in not responding by checking his rearview mirror to ascertain the source and positioning of the sound and take action, whether it be to reduce his speed or move closer to his left if that was possible and time allowed.

I think not. The mere fact of the claimant blowing her horn without further detail is not sufficient in my view, taking all the circumstance of the situation into account as I find them to attach any degree of liability to the 2<sup>nd</sup> defendant.

I find that it was the claimant's vehicle which collided with the truck (whilst overtaking) and not the other way around as alleged by the claimant.

I accept the 2<sup>nd</sup> defendant as a witness of truth.

I find that it was the claimant's own negligence that caused the accident.

Judgment for the defendants with costs to be agreed or taxed.