[2016] JMSC Civ.259

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 04718

BETWEEN	**NORMAN GRAHAM**	**CLAIMANT**
AND	**JERMAINE BAILEY**	**1ST DEFENDANT**
AND	**KNUTSFORD EXPRESS LIMITED**	**2ND DEFENDANT**

IN CHAMBERS

Ms. Danielle Archer instructed by Kinghorn and Kinghorn for the claimant.

Mr. Kwame Gordon instructed by Samuda and Johnson for the defendants.

Heard: 30th July 2015 & 19th April 2016.

Negligence - Liability.

CRESENCIA BROWN BECKFORD, J

INTRODUCTION

[1] This claim is brought by Mr. Norman Graham against Mr. Jermaine Bailey the 1st defendant and Knutsford Express Limited the 2nd defendant. The claim arises from a motor vehicle collision between a motor car being driven by the claimant and a motor bus being driven by the 1st defendant and owned by the 2nd defendant. The claimant claims to have suffered personal injury, loss, and damage as a result of the 1st defendant's negligence.

[2] The defendants have denied that the 1st defendant was negligent and aver that the accident was caused or contributed to by the claimant's own negligence. The

defendants have claimed from the claimant contribution and indemnity against any successful judgment had by the claimant, against the 1st defendant.

[3] The issue for the court's determination is the cause of the accident. I find that the collision was caused by the claimant and due solely to the negligence of the claimant.

THE LAW - NEGLIGENCE

[4] The definition of negligence is now trite law. The classic statement of negligence and the duty of care was made by Alderson B. in Blythe v. The Birmingham Waterworks Company 11 Exch. 781 where he said

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."*

In Blyth the defendants had installed water mains along the street with hydrants located at various points. One of the hydrants across from plaintiff's house developed a leak as a result of exceedingly cold temperatures and caused water damage to the house. The plaintiff sued for negligence.

[5] In Glenford Anderson v. George Welch [2012] JMCA Civ.43 Harris JA said of the tort of negligence at paragraph 26:

> *"It is well established by authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owned to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty ....."*

As to the burden and standard of proof she went on to say:

> *"It is also well settled that where a Claimant alleges that he or she has suffered damages resulting from an object or thing under the Defendant's*

> *care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities"*

[6] In Bingham & Berrymans' Motor Claims Cases 11th Edition it is stated at paragraph 4.1 that:

> *"There is a duty on the driver of a motor car to observe ordinary care or skill towards persons using the highway whom he could reasonably foresee as likely to be affected."*

[7] As such a collision between two vehicles raises an inference of negligence with the burden of proof being on the defendant (Bingham & Berryman's paragraph 5.11). The Defendants having counterclaimed, the burden of proof is on each party to prove his case on a balance of probabilities.

THE EVIDENCE

[8] The 1st defendant's negligence was particularised by the claimant as follows :

(a) *Driving at too fast a rate of speed in all the circumstances.*

(b) *Colliding into motor vehicle being driven by the claimant.*

(c) *Failing to see the claimant's motor vehicle within sufficient time or at all.*

(d) *Failing to apply his brake within sufficient time or at all.*

(e) *Driving along the road in a careless manner.*

(f) *Failing to stop, slow down, swerve or otherwise conduct the operation of the motor bus so as to avoid the collision.*

(g) *Failing to exercise due care and caution for other users of the road.*

[9] The claimant's evidence in support of his case is that he was travelling along the roadway when he stopped in obedience to a traffic light signal. He lit a cigarette and took two puffs when suddenly he felt an impact to the back of his vehicle. He realized he has been hit by a bus. There was no oncoming traffic. The 1st defendant, the driver of the other vehicle, apologised to him and they exchanged particulars. At the time he was feeling pain but it was not severe. He continued his journey to his destination. The following day the pain was more severe. It

persisted and he did home remedy and took over the counter medication to alleviate the pain. Though the pain persisted, he did not seek medical attention as he was unable to afford it. He eventually saw the doctor some five months later and received treatment.

[10] In cross-examination he said he was at the intersection of the roadway for fifteen to twenty seconds before the collision occurred. He lit the cigarette some five to ten seconds after he stopped. He was looking straight ahead at the traffic light. He saw a bus bearing down on him. In the last ten seconds before it collided with his vehicle, he stiffened himself to receive the impact which sure enough came. He agreed that he could have swerved to the left in the time he waited for the bus to collide with his vehicle.

[11] The 1st defendant particularised the claimant's negligence as follows

(a) *Failing to affect any or any proper or effective control of his motor vehicle.*

(b) *Driving at an excessive speed and /or improper speed in the circumstances.*

(c) *Failing to keep any or any proper look out or to have any or any sufficient regard for other users of the road particularly the 1st defendant.*

(d) *Driving without due care and consideration for other users of the road*

(e) *Encroaching on the 1st defendant side of the road.*

(f) *Failing to steer a straight and proper course.*

(g) *Changing lanes without first ensuring it was safe to do so.*

(h) *Stopping suddenly and without warning before the 1st defendant.*

(i) *Causing and or permitting the collision*

(j) *Failing to indicate his intention to switch lanes.*

[12] The evidence of the 1st defendant is that he was driving in the lane reserved for vehicles turning right as he intended to do. He observed the claimant's vehicle in the left lane. This vehicle was in front of him and closer to the intersection he was approaching where there were traffic light signals. As both vehicles got closer to

the traffic lights, the claimant drove into the right lane directly into his path and came to a stop shortly thereafter. The claimant gave no indication of his intention to move right. He applied his brakes but due to the size and weight of the motor bus was unable to stop before colliding in the rear of the claimant's vehicle. He exchanged particulars with the claimant and then proceeded to the police station to make a report.

[13] In cross-examination he said the claimant passed him on the left and then drove into his lane. When the car passed him he assumed the car was going straight as the traffic in that lane was to do. The claimant was speeding as he passed him. The bus was about four to five feet from the car when it cut over and stopped. His vehicle weighed over 5 tons and had passengers hence it required a longer braking distance. He was travelling at about 15 kilometres per hour or less. He checked his mirror to see if he could avoid the collision in that split second but there was a median on one end and oncoming traffic on the other. If he took any steps he would be in the path of other vehicles other than the claimant. The damage he said was to the entire rear of the claimant's vehicle.

DISCUSSION AND ANALYSIS

[14] Both drivers gave diametrical versions of the accident. The two versions cannot be accommodated together. The objective or physical evidence of the damage to the claimant's motor vehicle supports both versions. The credit of the claimant and the 1st defendant was not seriously eroded by cross examination though the claimant was more troubled by it. Nevertheless the court must make a determination on the issue of liability based on the evidence. The reliability of the witnesses is therefore of paramount importance.

[15] The 1st defendant is detailed in his account of his pattern of driving which was absent from the claimant's account. In particular the 1st defendant indicated where he was travelling to, the lane he was driving in and the road he was travelling on. So he said he was travelling to his office on Dominica Drive, in the

right lane, along West Kings House Road towards the intersection of West Kings House Road and Waterloo Road, to proceed on to Waterloo Road.

[16] It was not disputed by the claimant that he was so travelling.

[17] In contrast, the claimant is imprecise in his account. For example, he indicated that he was driving along the intersection of West Kings House Road and Waterloo Road. The evidence bore out that the accident occurred before either vehicle entered the intersection. He gave no other information as to how he was travelling save that he proceeded after the accident to his destination Seymour Park Complex.

[18] There is also some inconsistency in the claimant's evidence-in-chief as contained in his witness statement and the evidence given in cross examination. In his witness statement the claimant states,

> *"then suddenly I felt a sharp hard impact in the back of my vehicle".*

In cross examination his evidence is that he expected and awaited the impact. He said he saw the light coming towards his vehicle and in the last ten seconds or so he tensed himself and prepared for the impact.

[19] [15] There is also an inconsistency concerning the lighting of a cigarette. In his witness statement the claimant states that when he stopped, he lit a cigarette and made two puffs from it and then felt the impact. In cross-examination he said he had stopped 5 to 10 seconds before lighting the cigarette.

[20] This last inconsistency is material when the 1st defendant's case is considered. The 1st defendant's evidence is that the claimant drove in front of him and stopped some 4 to 5 feet from him and that the accident happened 'quick', inferring that there would have been no time for the claimant to light a cigarette and take two puffs.

[21] I therefore find the 1st defendant's account to how the accident occurred to be more reliable. I am fortified in so finding as having observed the demeanour of the claimant and the 1st defendant under cross examination I formed the view that the 1st defendant was more candid than the claimant.

[22] I find specifically that the accident occurred when the claimant suddenly and without warning drove from the left lane into the right lane in front of the 1st defendant's vehicle and stopped some 4 to five feet away. In Bingham and Berrymans' at paragraph 5.20, the case of O'Hara v. Central Scottish Motor Traction Co. Ltd 1941 SC 363, 1941 SLT 202 was cited for the principle that:

> *"Pulling up suddenly and violently is prima facie evidence of negligence (Mars v Glasgow Corp. 1940 SC 202, 1940 SLT 165) and so is a violent swerve."*

In so doing the claimant breached a duty of care to the 1st defendant.

CONTRIBUTORY NEGLIGENCE

[23] The further question for consideration is whether the claimant was solely responsible for the accident.

[24] The Road Traffic Act provides in Section 51(2) that:

> *...it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident...*

It is a criminal offence to contravene this section.

[25] In Berrill v. Road Haulage Executive [1952] 2 Lloyds Rep 490 digested in Bingham & Berrymans' paragraph 4.7, it was held that:

> *"a driver is not bound to foresee every extremity of folly which occurs on the road. Equally he is certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of a road user teaches that people do albeit negligently."*

[26] The only direct evidence of the speed at which the 1st defendant was travelling comes from the 1st defendant himself which he puts at 15 kilometres per hour. There is no direct evidence of his distance from traffic lights at the time the claimant drove in front of him, however the 1st defendant's evidence is that the claimant's car was some 4 to 5 feet away from his vehicle when the claimant cut over. He applied his brake immediately. The further evidence of the 1st defendant is that he checked in that split second if he could avoid the accident but was bound by a motor vehicle on one side and a median on the other. This was unchallenged by the claimant. The vehicle was a coaster bus 9 to10 feet tall, 4 feet long with 42 seats and weighed 15 to 17 tons. I accept that the size and height of the vehicle required a longer braking distance than was available at 4 to 5 feet.

[27] I accept and I find that in the circumstances there was nothing more reasonably that the 1st defendant could have done to avoid the collision. In contrast, on the claimant's own account, there was no oncoming traffic and he could have driven forward on the approach of the motor bus. This I believe supports my earlier finding that the claimant drove into the 1st defendant's path. It is clear that he expected that the 1st defendant who was travelling slowly would be forced/able to stop.

[28] I find therefore that this collision was due wholly to the action of the claimant and that he breached his duty of care to the 1st defendant. The 1st defendant had done all that he could have done to avoid the collision and in no way contributed to it.

CONCLUSION

[29] The claimant has failed to prove, on the balance of probabilities, that the injury, loss, and damage he sustained were caused by the 1st defendant's negligence. I therefore grant judgment for the defendants on the claim and counter-claim with costs to be taxed if not agreed.