



[2022] JMSC Civ. 20

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. 2016 HCV 02058**

<b>BETWEEN</b>	<b>ROWAN SILVERA</b>	<b>1<sup>st</sup> CLAIMANT</b>
<b>AND</b>	<b>MARVAL TATE</b>	<b>2<sup>nd</sup> CLAIMANT</b>
<b>AND</b>	<b>WALTER GORDON</b>	<b>3<sup>rd</sup> CLAIMANT</b>
<b>AND</b>	<b>IAN BROOKS</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>ALWYN ROSE</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**Ms. Joan Thomas instructed by E.D. Davis & Associates for the Claimants**

**Ms. Racquel Dunbar instructed by Dunbar & Co. for the Defendants**

**Heard: November 8 and 9, 2021 and February 11, 2022**

***Negligence – Vicarious Liability***

**CARR, J**

**Introduction**

[1] On the 7<sup>th</sup> of March 2015, Rowan Silvera was the driver of motor vehicle registered 0198 FJ, owned by Marval Tate. Walter Gordon was a passenger in that vehicle. Mr. Silvera was travelling in the vicinity of Cambridge Road in the parish of St. Mary when he contends that Alwyn Rose, the driver of motor vehicle registered 3722 GR, swerved to the left then right as if to make a U-turn. Mr. Silvera was unable to take evasive action in time and the two vehicles collided resulting in damage to property and personal injury.

[2] Mr. Silvera did not live to see the matter come to fruition. His Attorney made an application to appoint his mother (Mable Silvera) as representative of his estate. After initial objections by Counsel for the Defendants, the application was permitted unopposed. Counsel for the First Claimant then made an application for relief from sanctions to have the witness statement of Mrs. Silvera admitted as her evidence in chief. The application was permitted, however Mrs. Silvera was unable to identify the witness statement of her son. That statement therefore, did not form a part of the evidence before the court.

### **Decision**

[3] Upon an analysis of the evidence I found that Mr. Walter Gordon was discredited. I did not accept his version of how the accident occurred and judgment is given in favour of the Defendants with costs to the Defendants.

### **Analysis and Discussion**

[4] The two main issues for determination in this case were as follows:

- a) Whether Mr. Rose was the servant and/or agent of Mr. Brooks.
- b) Whether Mr. Rose was liable to the Claimants in negligence.

[5] I propose to deal with each issue separately analyzing the evidence and the law.

### **Whether Mr. Brooks was the servant and/or agent of Mr. Rose**

[6] The evidence confirmed that Mr. Brooks was the owner of the motor vehicle driven by Mr. Rose on the day in question. It is a settled principle of law, that the driver of a motor vehicle is acting as the servant and or agent of the owner of that motor vehicle unless the contrary is shown. It is for the defence to rebut this presumption. In this case both Defendants gave evidence as to their familial relationship and the purpose for which Mr. Rose was in possession of the vehicle on that day. Mr.

Gordon in cross-examination indicated that he had no knowledge of the purpose for which Mr. Rose was driving the vehicle.

- [7] The evidence of the two Defendants is therefore all that the court has to rely on in this regard. Mr. Rose told the court that he borrowed the car from his cousin Ian Brooks on the date in issue. He denied that Mr. Brooks knew anything about his plans that morning and insisted that he only borrowed his car.
- [8] Mr. Brooks confirmed that he loaned him the vehicle and he went further to say that Mr. Rose was not doing anything for him at the time. In cross-examination he agreed that he gave him permission and authority to use the vehicle on the day in question.
- [9] The evidence is irrefutable, and therefore conclusive of the fact, that, at the time of the collision, although Mr. Rose was permitted and authorized to drive the vehicle, he was not an employee, and he was not doing any business or acting in any way on behalf of Mr. Brooks.
- [10] It is the finding of this court that on the date in issue Alwyn Rose was not acting as an agent and/or servant of Ian Brooks. The Defendant has rebutted the presumption and there can be no liability on the part of Mr. Brooks in respect of the collision which occurred.

### **Whether Mr. Rose is liable to the Defendants in negligence**

- [11] The Tort of negligence is satisfied when the Claimant can establish the following;
- a) That the Defendant owed him a duty of care,
  - b) That he breached that duty and,
  - c) That as a result of that breach the Claimant suffered damage which is not too remote.

- [12] There is a duty imposed on all road users to take reasonable care in relation to fellow road users so as to avoid injury or damage to other road users. Reasonable care has been described as the care, which would be exercised by an ordinary skillful driver.
- [13] There is no dispute that Mr. Rose owed a duty of care to Mr. Tate and Mr. Gordon. He was a driver of a motor vehicle on a public thoroughfare and he had the responsibility of ensuring that he was driving in a manner that was reasonable in the circumstances in order to prevent an accident.
- [14] Both Attorneys relied on their written submissions and expanded on this in oral submissions based on the evidence. It was agreed and accepted that the case would be determined on the credibility of the witnesses. In this case the two witnesses as to fact are Walter Gordon and Alwyn Rose.
- [15] Walter Gordon indicated in his witness statement that he and Mr. Silvera were on their way to Kingston, travelling in the vicinity of the Cambridge Road. He said the other motor vehicle being driven by Alwyn Rose entered the road that he was on from the Cambridge Road. Mr. Rose was directly in front of the vehicle that he was a passenger in. Suddenly, he observed that vehicle swerve left, and then right, as if to make a U-turn. It came directly into the path of the motor vehicle he was a passenger in. The vehicles collided and the impact caused the vehicle he was in to swerve into a ditch. Both himself and Mr. Silvera suffered injuries.
- [16] On seeing the actions of the driver of the other vehicle he called out to Mr. Silvera, but due to the sudden nature of the turn, Mr. Silvera was not in a position to do anything to avoid the collision. On further questions in examination in chief, Mr. Gordon told the court that the vehicle being driven by Mr. Rose came out of the lane drifted to the left and made a sharp U-turn. He agreed that at the time, Mr. Rose was travelling in the left lane. When asked how the vehicle ended up in the bushes, his answer was “after being hit Mr. Silvera was trying to get away from him, after it hit us it knocked our vehicle over into the bushes.”

[17] In cross-examination he agreed that the road was flat and straight at the point where the accident occurred. He agreed that on that day they were travelling in the same direction as Mr. Rose, and they were travelling directly behind him. Both vehicles were travelling in the left lane and there were no other vehicles on the road at the time. In answer to Counsel for the Defendants, Mr. Gordon indicated that the vehicle he was travelling in was a distance of about 25 ft. from Mr. Rose's vehicle.

[18] He insisted that the accident occurred more to the center lane. More to the right lane because they were trying to get away from Mr. Rose when the accident happened. He was specifically asked the following:

*Q. At the time of the collision your vehicle was beside Mr. Rose's car.*

*A. No madam, we were in front at that time.*

*Q. When you say you were in front*

*A. He made U-turn we were trying to get away from him so we end up closer to the right lane trying to get away from him.*

[19] In an attempt to explain, what he meant by saying that Mr. Silvera could do nothing to avoid the accident he said, *"it is obvious he could not avoid because he swerved and they still hit, he try to avoid it but they still hit."* He said that they were driving slowly and he would estimate the speed at approximately 30-35km per hour. He went further to say that *"we were directly in front of Mr. Rose's car at the time of the collision at the time he made the U-turn."* He denied that they were overtaking the vehicle at the time the collision occurred.

[20] Mr. Gordon was found wanting in cross-examination and his explanation as to how the accident occurred does not accord with the evidence. If, as he puts it, the vehicle he was travelling in was a distance of 25ft from Mr. Rose's vehicle, and that vehicle was travelling directly in front of them, why wasn't Mr. Silvera able to stop? If this evidence is accepted, Mr. Silvera had sufficient time to see the attempted U-turn and would be in a position to take evasive action in order to avoid

a collision, since he was travelling at 30-35km per hour at the time. Further, Mr. Gordon said that Mr. Silvera veered to the right in the same direction as the vehicle being driven by Mr. Rose. Why would he be turning in the same direction as the vehicle he was trying to get away from?

**[21]** Additionally, the damage to both vehicles was to the front. Mr. Rose indicated that his front right bumper and bonnet were damaged. According to Mr. Gordon, the damage to the vehicle that he saw was to the left side door and fender. The damage to the vehicles is more consistent with the version of the collision given by Mr. Rose. Mr. Silvera came up to his right side and collided with his right side door and his right front fender. The vehicles were beside each other and not behind each other as Mr. Gordon stated.

**[22]** Additionally, there are inconsistencies and discrepancies in the evidence of Mr. Gordon that have not been reconciled.

- a) In his witness statement, he told the court that Mr. Silvera could not do anything to avoid the collision. In cross-examination he said that Mr. Silvera veered to the right to avoid hitting the vehicle. His explanation that what he meant was that even though he veered right the collision still occurred does not ring true. The two statements are not the same. It's either Mr. Silvera attempted to avoid the collision or he did not.
- b) In his witness statement he said that the 2<sup>nd</sup> Defendant suddenly and without warning swung into the left then right and into the car which he was a passenger in. In cross-examination he said that both cars were travelling immediately behind each other. In that scenario the vehicle being driven by Mr. Silvera would have collided with either the middle or the back of the vehicle driven by Mr. Rose.
- c) Nowhere in his witness statement did Mr. Gordon mention seeing the damage to the motor vehicle he was travelling in. In cross-examination he speaks to seeing damage to the left side of the vehicle.

- d) In his cross-examination he insisted that the vehicle he was travelling in was in front of the vehicle being driven by Mr. Rose at the time of the collision, but he denied that Mr. Silvera was trying to overtake at the time of the collision. In re-examination he said that at no time were they ahead of Mr. Rose's vehicle

**[23]** I do not find that the evidence of Mr. Gordon was credible. I did not accept on a balance of probabilities his version of how the collision occurred.

**[24]** In examining the evidence of Mr. Rose I accepted him to be a witness of truth, he was not discredited in cross-examination and he maintained his version of the events. He told the court that he and his girlfriend were on their way to Highgate to deliver some items to his girlfriend's sister. While travelling along the Cambridge main road in the left lane he felt a collision. He heard and felt the collision to the right side of the vehicle. He indicated that he did not see the other car prior to the impact. The collision took place in the left lane and he was in the middle of that lane at the time. After the accident he stopped and observed the vehicle he was driving. The right front fender and the right front door were damaged. He also observed that the car that hit him was in the bushes to the right. It stopped with its front part in the bushes and the back on the right soft shoulder. Later he noticed that the other vehicle had damages to the left front fender, bonnet and bumper.

**[25]** In cross-examination he stated that he did not check his mirrors that morning because he was focused on where he was going. Much was made about the fact that Mr. Rose must have checked his mirrors and therefore must have seen the vehicle being driven by Mr. Silvera. The evidence is that he used his mirrors earlier that morning as he observed another vehicle entering the road way. This was a distance away from where the collision took place. I accept his evidence that he was focused on where he was going and that he was having a conversation with his girlfriend at the time. I do not find that there is anything substantial that turns on this.

**[26]** I accepted the evidence of Alwyn Rose and rejected that of Walter Gordon. The Claimants failed to prove their case on a balance of probabilities.

**Orders:**

1. Judgment for the Defendants.
2. Costs to the Defendants to be agreed or taxed.