ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 OF 2002

BETWEEN:

ANDREW PROVIDENCE

Appellant

and

BRYAN CLARKE

Respondent

Before:

His Lordship, The Hon. Sir Dennis Byron — Chief Justice
His Lordship, The Hon. Mr. Satrohan Singh — Justice of Appeal
His Lordship, the Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances :

Mr. Ronald Burch-Smith for the Appellant
Mr. Stephen Huggins for the Respondent

2002: December 2;
2003: January 28.

JUDGMENT

[1] **BYRON, C.J.**: On 26th August 2002 the appellant filed a notice of appeal challenging the decision of Alleyne J that he was wholly liable in negligence for the damages arising from a motorcar collision.

The Background Facts

[2] In brief, the Respondent's evidence was that just before midnight on the 10th of July 1999, he was driving a motor vehicle towards Calliaqua from Kingstown, when he got to Villa on the Windward Highway in the vicinity of the Mariner's Inn, the appellant's vehicle, that was traveling in front of him in the same direction that

he was going, executed a U-Turn at the Mental Home junction and re-entered the major road in an unsafe manner. This evidence was supported by Mr. Jason Viera, who was driving behind the Respondent. A police witness Clinton Matthews gave evidence of the measurements he took at the scene.

[3] The Appellant had said that the collision took place past the Mental Home intersection and he was not carrying out a U-Turn but positioning himself to park on the opposite carriageway from that being used by the Respondent. He contended that the collision resulted from the excessive speed of the Respondent.

[4] In his assessment of the evidence the learned trial Judge stated, very clearly, that he believed the evidence of the Respondent and the witness Viera and found them consistent with the testimony of the policeman Matthews. He went on to add, that he found that the version given by the Defendant described an imprudent and hazardous maneuver because it was to close to a corner around which he had passed. He found that the defendant was negligent, on the basis of the evidence adduced on behalf of the Plaintiff which he believed. He also commented that the story given by the appellant could not have excused him from liability.

Unreasonable Findings of Fact

[5] Counsel for the Appellant submitted that the learned trial Judge's findings are so unreasonable that the court of appeal ought to vary them. He relied on the case of **Maharaj v Samuel** (1964) 6 W.I.R. 322 where Wooding CJ said at 324:

> "this is undoubtedly a strong finding against the appellant – so that an appellate tribunal must needs be convinced that it is entirely without justification before it can properly be disturbed. But, as Lord Simon said in **Watt** or **Thomas v Thomas** (2) ([1947] A.C., at p.487:
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> > "the decision of an appellant court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration".
>
> Hence, although conceding all the "advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case", it is nonetheless the right, and indeed the duty, of an appellate

> tribunal, if it is "satisfied that he has not taken proper advantage of his having seen and heard the witnesses", to deal with the matter as if it were at large: see the judgment of Lord Thankerton (ibid., at pp.487-488)."

[6] So what were the specific complaints of the Appellant? Firstly, the learned trial Judge's comment that the Appellants' version was imprudent and hazardous was inconsistent with his acceptance of the Respondent's version. Secondly, the learned trial Judge should have inferred from the evidence that the Respondent was driving fast. Thirdly, the witness Viera must have deduced rather than saw the collision and was unreliable. Fourthly, the measurements were not in fact consistent with the version of the respondent. With the greatest respect to Counsel, having read the record, I do not concede merit to any of the criticisms and am unable to conclude that this is a case in which the conclusions of the learned trial Judge were so unreasonable as to suggest that he did not take proper advantage of having seen and heard the witnesses. The submission that the trial Judge comments indicated inconsistent findings of facts are absolutely without merit. I think the trail Judge was trying to explain that even if he had believed the Appellant's evidence, which he clearly stated he did not, the resulting verdict or decision would have be the same. This was a simple issue of fact, the entire hearing was concluded on the same day and the learned trial Judge gave his decision at the conclusion of the hearing. The learned trial Judge's findings were entirely consistent with the evidence of the Respondent, the witness Viera and the police officer Matthews. There was absolutely no objective circumstances to support the version of the Appellant. The policy of appellate courts is well established, that on issues where the finding of fact is based on the credibility of witnesses, in other words on the learned trial Judge's perception of who is telling the truth, an appeal court would be reluctant to interfere. In this case there absolutely nothing on the record that could support the conclusion that the learned trial Judge was wrong to come to the conclusion that he did. In this particular case the evidence of the Respondent was supported by another independent user of the road who supported the version of the facts he have and the measurements taken by the police officer where entirely consistent with the Respondent's

evidence. I don't think that there is any thesis that would justify our court in reversing the finding as a fact made by a learned trial Judge. In my judgment there is no reason to overturn the findings of fact of the learned trial Judge.

Contributory Negligence

[7] During argument the Appellant raised the issue of contributory negligence. However, it was not pleaded nor was it included in any ground of appeal. In any event the findings of fact by the learned trial Judge rule out any basis for finding that the collision was partly due to the negligence of the Respondent.

[8] The Appellant raised two technical grounds of appeal one being that the Respondent had no *locus standi* and the other being that the learned trial Judge did not declare that the counter-claim was dismissed. The *locus standi* argument was raised because, during his testimony, the Respondent stated that he was the driver of the vehicle but not the owner. In the statement of claim, the Respondent alleged that he was the driver and owner of the vehicle and in the defence the Defendant admitted that. So, that was not an issue in the trial. That evidence was not explored in any way. For example, was the Respondent the owner at the time the damage was sustained, or the statement of case filed? There are other possible explanations which were not explored on the evidence and the Appellant did not cross-examine on the issue. When the submission was raised the learned trial Judge simply overruled it. On appeal the Respondent contended that the appellant should be estopped from raising that point because it was only raised after the matter was concluded. There was no evidence to support that contention. Counsel for the Appellant submitted that if the Respondent was not the owner of the vehicle he could not have suffered loss and therefore no damages could properly be awarded to him. The problem, with the Appellant's contention is that the factual situation is not clear and in order for the point to form the basis of any decision certain assumptions would have to be made. In circumstances where the Appellant admitted the interest of the Respondent, it

was unnecessary for the Respondent to adduce evidence to establish an admitted fact. I would reject this ground of appeal.

[9] The contention that the learned trial Judge did not declare that counter-claim was dismissed, is even less arguable because the dismissal of the counter claim is unequivocally implied in the finding of the learned trial Judge and the order he made.

[10] In these circumstances we dismiss this appeal with costs to the Respondent.

[11] We order that the judgment of the court below be varied to include the dismissal of the counter claim. The judgment of the court was an interlocutory judgment for the assessment of damages. The value of the proceedings will be established at the hearing, but it is insubstantial as the special damages claimed by the Respondent was in the vicinity of $9,000.00 dollars. In the circumstances the costs on appeal will be ordered in the sum of $2,700.00

Sir Dennis Byron
Chief Justice

I concur

Satrohan Singh
Justice of Appeal

I concur

Ephraim Georges
Justice of Appeal [Ag.]