THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO: ANUHCV 2005/144

BETWEEN:

ELIAS MAKHOUL

Claimant

And

ZELDERINE PETERS-RUSSEL

Defendant

Appearances:

Mr. John Fuller for the Claimant
Mr. Dexter Wason for the Defendant

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2006: December 12 **2007**: June 28
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JUDGMENT

[1] **Thomas J**: On 6th April 2005 the Claimant, Mr. Elias Makhoul, filed a claim form in which Ms. Zelderine Peters-Russel was named as Defendant.

[2] In the claim the Claimant alleges that the Defendant was negligent when on 27th December 2004 she was driving west on Factory Road and collided head on with the Claimant's vehicle which was traveling in the opposite direction.

[3] The particulars of negligence pleaded are:

1. Overtaking when it was unsafe to do so.
2. Failing to keep a safe and proper lookout for oncoming traffic.

3. Failing to stop, swerve or otherwise control her vehicle so as to avoid colliding with the Claimant's car.

[4] The particulars of loss pleaded are: 1. repairs to Claimant's vehicle, $12,821.38; 2. car hire costs, $6000.00.

[5] In her defence the content of the Claimant's statement of claim is denied.

[6] In her counterclaim the Defendant alleges that the collision was caused or contributed to by the negligence of the Claimant in driving, managing and controlling motor car A 282.

[7] The particulars of negligence alleged against the Claimant are:

1. Failing to keep any or any proper lookout, or to have any sufficient regard for other traffic that might reasonably be expected to be at the junction of Hawkins Drive and Factory Road the major road.

2. Failing to stop at the junction of Hawkins Road, the major road.

3. Driving into the path of the Defendant.

4. Failing to give way to the traffic on Factory Road, which is the major road.

5. Emerging onto the said junction without first ascertaining or ensuring that it was safe so to do.

6. Failing to slow down or to be ready to stop at the said junction of roads.

7. Failing to see the defendant in sufficient time to avoid colliding with him or at all.

8. Failing to stop or to slow down or in any other way so as to manage or control the said motor van as to avoid the said collision.

[8] The particulars of loss and damage claimed are: 1. Repairs to A3234, $8,853.00; 2. Parts and materials and labour $6,000.00; and 3. Loss of use (i.e. 10 days @ $120.00 per day, $1200.00.

[9] The Claimant in his defence to counterclaim denies paragraph 3 of the counterclaim and repeats paragraph 2 of the statement of claim and also denies being negligent.

[10] At paragraph 2 of the defence to counterclaim the following is pleaded:

> **"2. The Claimant states that he had already emerged from the junction and was traveling east on Factory Road when the Defendant, traveling in the opposite direction, pulled out from behind another vehicle, overtook it and collided with the Claimant, ramming the Claimant's vehicle and pushing same back over 30 feet."**

EVIDENCE

ELIAS MAKHOUL

[11] In his witness statement filed on 10th January 2006, the Claimant, Elias Makhoul, says that he is the owner of a motor van bearing the registration number C5223. He says also that on 27th December 2004 after emerging from a side road to the north he headed east on Factory Road when he noticed two vehicles coming towards him from the opposite direction.

[12] According to Mr. Makhoul, the Defendant was the driver of the second and most easterly vehicle that approached him. The registration number of that vehicle was A3334 and it was travelling quickly.

[13] The Claimant contends further that the Defendant's vehicle collided head on with his vehicle as she overtook the vehicle in front of her and traveling in the same direction when it was unsafe to do so.

[14] In cross-examination Mr. Makhoul denied that there was more than one person in the van with him. He also said that at the junction he stopped and cleared his road and maintained this after it was put to him that he did not.

[15] Concerning the position at the junction the Claimant said: "At the junction I could see east from about 500 metres to my left. When I came to the junction I did not see the Defendant's car. When I stopped I did not see any other car."

[16] It was put to the Claimant that the reason he did not see any other vehicle is because he was talking to the other passengers in his vehicle. This was denied and he added that he only had one passenger.

[17] Continuing his cross-examination the witness testified that when he drove for about 10 metres he saw two cars coming towards him. They came from straight down the road, being Factory Road, and travelling east to west.

[18] According to the witness, there was an impact and his van was damaged on the bumper. The middle of the car was also damaged but could not remember if the left side was also damaged. The witness denied that the back of his vehicle was less than 5 metres from the entrance to the corner. The witness testified further that the vehicle went backwards after the impact rather than that of the Defendant.

[19] In so far as the major road is concerned the witness testified that he has been driving in Antigua and Barbuda for 4 years and is aware that he is supposed to stop at that point. He added that he only moves if he is sure that no car is coming.

[20] In re-examination Mr. Makhoul said that at the junction he stopped, looked east but did not see any cars coming on his side. According to the Claimant the Defendant overtook the first car and collided with him.

ZELDERINE PETERS-RUSSEL

[21] On 12th January 2006 Zelderine Peters-Russel filed a witness statement.

[22] In terms of the collision the witness says: 1. She was traveling from east to west on Factory Road at about 2:45 am; 2. She overtook a white car which was traveling in the same direction. 3. After overtaking she noticed a van coming out of a side road (Hopkins Road) and it did not stop at the end of Hopkins Road; 4. The vehicle was still moving when the impact was felt; 5. The right side and front of the vehicle were damaged as a result of the impact.

[23] It is the evidence of the Defendant that she remained in her vehicle and saw three men come out of the Claimant's vehicle and someone called the police.

[24] In cross-examination Ms. Zelderine Peters-Russel testified that when the vehicles collided the Claimant's vehicle was not facing east – "not quite". She added that the point of impact was close to the by-road on Factory Road. According to her the Claimant was turning and she had overtaken the vehicle a good distance away – about 24 feet from the corner.

[25] Finally, the Defendant testified that at the time of the accident it was about 2:00 am and she was on her way to pick up some friends at King's Casino.

ISSUE

THE ISSUE FOR DETERMINATION IS WHETHER THE CLAIMANT OR THE DEFENDANT IS LIABLE FOR THE COLLISION OR BOTH

SUBMISSIONS

[26] The following submissions were advanced on behalf of the Defendant by learned counsel Mr. Dexter Wason:

1. **Even the Claimant is aware that he is coming from minor to a major road and he has a duty to stop.**
2. **The Claimant said he could see 500 metres down the road to his left which is about 1200 to 1500 feet so that in order for the Defendant to impact she would have to be traveling at about 60 miles per hour or 88 feet per second.**
3. **The Claimant said he did not see the Defendant.**
4. **The Claimant should have waited until he was sure that it was clear, as 10 to 30 feet after he moved out there was an impact.**
5. **The onus is on the Claimant to show that there was negligence on the part of the Defendant.**

[27] On behalf of the Claimant the following submissions were made by learned counsel Mr. John Fuller:

1. **The Claimant's case is that he saw no cars on his side of the road and he pulled out.**
2. **The Defendant came shortly after the Claimant pulled out.**

3. **The Claimant did not have to delay to ensure that the Defendant did not pull out on his (the Claimant's) side of the road.**

4. **The Defendant overtook at a junction.**

5. **The Defendant had to accelerate in order to overtake the other vehicle.**

6. **The Claimant could not be travelling at great speed.**

7. **The Defendant told the police that the point of impact was 10 feet from east of Hawkins Drive on Factory Road.**

ANALYSIS

[28] It has been said that negligence is "… the omission to do something which a reasonable man guided upon those consideration which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would do."[1] To this dictum must be added the duty of care imposed by law. Therefore, a comprehensive definition according to **CHARLESWORTH ON NEGLIGENCE (6th ed.)** at paragraph 19 is as follows:

> **"Negligence is a tort which is breach of a duty to take care imposed by common law or statute law resulting in damage to the complainant."**

[29] The foregoing gives rise to the following constituents of the tort: 1. a duty of care arising in the particular circumstances. 2. a breach of that duty of care based on the standard of a reasonable man and 3. damage suffered by the Claimant as a result of the breach.

DUTY OF CARE

[30] One of the circumstances recognized as giving rise to a duty of care is in relation to users of the road[2]. Therefore this is a matter of settled law.

BREACH OF THE DUTY OF CARE

[31] The breach of the duty of care is measured by the standard of a reasonable man in the particular circumstances. In this connection the following are accepted by the Court as fact. Inferences are also drawn from these facts:

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[1] Per Baron Alderson in Blyth v Birmingham Waterworks [1843-60] ALL ER Rep 478, 479

[2] See: Gilbert Kodilinye, Tort – Text, Cases and Materials at page 74

1. The collision took place close to the junction of Hawkins and Factory Road.
2. The Defendant's admission under cross-examination that at the material time the Claimant's vehicle was not facing east – not quite.
3. The Defendant's vehicle of the two vehicles heading west, was the one closest to the junction.
4. The Claimant's vehicle could not have developed any degree of speed to give rise to the nature and extent of the collision.
5. The collision was head on and the Claimant's vehicle was hit in the middle and on the right side.
6. The Claimants vehicle moved backward as a consequence of the collision with the Defendant's vehicle.
7. Given the fact that the Court accepts that the Claimant's vehicle moved backward as a result of the collision, it is the inference of the Court that the Defendant was travelling at a considerable speed.
8. The collision took place on the Claimant's side of the road.
9. The Court accepts that the collision took place at about 2:00 am.
10. If the Defendant had successfully overtaken the other vehicle "a good distance away" this cannot explain why the collision took place on the Claimant's side of the road.

[32] At the same time the Court does not accept the following aspects of the evidence:

1. The collision took place a good distance away from the corner. This relates to the Defendant's own evidence that the Claimant's vehicle was not facing east – not quite at the time of the collision.
2. That the Defendant's vehicle moved backwards as a result of the collision.
3. The Court does not accept the Defendant's doubt cast on the speed at which she was driving.

[33] The question then becomes whether the reasonable man would have done as the Defendant did.

[34] It is clear to the Court that the Defendant in the early hours of the morning was on her way to pick up her friends. In doing so she was travelling at excessive speed. At the same time she attempted to overtake another vehicle travelling in the same direction. She did so almost at the junction of the two streets with the Claimant's vehicle facing "not quite" east. This accounts for the head on collision and the other damage to the Claimant's vehicle.

[35] The facts and inferences point to a narrow issue of the Defendant seeking to overtake when it was unsafe so to do and at excessive speed. This cannot be the standard of a reasonable man.

CONCLUSION

[36] It is therefore the conclusion of the Court that the Defendant is in breach of the duty of care owed to the Claimant.

DAMAGE AND DAMAGES

[37] The other constituent in an action for negligence is damage. This is evident from the pleadings and the evidence.

[38] In terms of damages the amounts claimed are $12,821.38 for repairs and $6000.00 for car hire costs.

[39] In the bundle of agreed documents there are two estimates – one for $12,821.38 and the other for $14,853.00. However the lower estimate is claimed.

[40] In terms of car hire two receipts are in evidence in the amounts of $3000.00 each.

[41] No issue was raised in cross-examination with respect to the cost of repairs or the car hire. The amounts are therefore allowed together with interest at the rate of 6% from the date of the filing of the claim to the date of this judgment.

DEFENDANTS COUNTERCLAIM

[42] Having regard to the Court's determination of the Defendant's liability, the counterclaim is dismissed.

CONCLUSION

[43] It is therefore the conclusion of the Court that the Defendant is liable in negligence for the damage to the Claimant's vehicle.

ORDER

[44] **IT IS HEREBY ORDERED AND DECLARED** as follows:

1. The Defendant is liable in negligence for the damage to the Claimant's vehicle.
2. The Defendant must pay the Claimant the sum of $18,853.38 in damages.
3. The damages bear interest at the rate of 6% from the date of the filing of the claim to the date of this judgment.
4. The Defendants counterclaim is dismissed.
5. The Defendant must pay the Claimant's cost in accordance with Part 65.5 of CPR 2000.

Errol L. Thomas
Judge