

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO: ANUHCV 2008/0506

BETWEEN:

**OTTIS PAYNE Trading as Big-O Rental
BRIAN SOUTHWELL**

Claimants

and

**ZENROY ATHILL
JENNIFER ATHILL**

Defendants

Appearances:

Mr. D. Raimon Hamilton for the Claimants
Ms. Monique Francis-Gordon for the Defendants

.....
2011: June 1
August 31
.....

JUDGMENT

[1] **MICHEL, J.:** On Sunday 17th June 2007 a motor vehicle collision occurred on the Falmouth Main Road in the Parish of St. Paul in Antigua involving motor car registration number R1470 owned by the First Claimant (Ottis Payne) and being driven at the time by the Second Claimant (Brian Southwell) and motor car registration number A6539 jointly

owned by the First and Second Defendants (Zenroy and Jennifer Athill) and being driven at the time by the Second Defendant.

- [2] It was agreed by all the parties and all the witnesses in this case that the collision occurred when the Second Defendant emerged from a minor road and took a right turn onto Falmouth Main Road heading west while the Second Claimant was travelling on Falmouth Main Road heading east. As a result of the collision the left front and left front sides of both motor cars were extensively damaged and both were declared to be write-offs, while both the Second Claimant and the Second Defendant sustained personal injuries.
- [3] The issue in the case is whether the collision occurred as a result of the negligence of the Second Claimant, the Second Defendant or both and who is therefore liable for the ensuing loss and damage. If the Court makes a determination on liability, the Court must then assess and make an award for the loss and damage resulting to the innocent parties.
- [4] The Claim was instituted by the First and Second Claimants against the First and Second Defendants who in turn counterclaimed against the First and Second Claimants.
- [5] The evidence in this case came from both Claimants and from Neville Hoyte and Guerin Hunt for the Claimants and from both Defendants and Alex Rhodes for the Defendants.
- [6] The First Claimant gave evidence of being the owner of motor car registration number R1470, which he rented to the Second Defendant from 8th June 2007, and of being told on the morning of 17th June 2007 that the Second Claimant got into an accident on Falmouth Harbour Main Road. He immediately went to the scene of the accident where he saw both of the vehicles involved in the accident on the southern side of the Falmouth Main Road immediately opposite a bye road that runs from north to south along the eastern side of the Anglican Church wall. He asked what had happened, whereupon the Second Claimant gave him his version of the events. He stated that Police Corporal Hoyte, who was stationed at the Dockyard Police Station, arrived on the scene and began his investigations. The police officer took a statement from the Second Claimant, asked both

drivers to show him the point of impact, took measurements and warned both drivers that they may be prosecuted. A police report dated 24th September was later issued which determined that the Second Defendant was at fault and would be prosecuted, but the Defendants refused to accept responsibility for the accident. The First Claimant had his motor car examined by an auto body repair shop, which determined that the car was a complete write off, assessed its pre accident value at \$30,000.00 and its post accident value at \$2,500.00 and estimated the cost of repairs as \$29,983.00. The wreck is still in his possession. He is claiming loss of use of his car for three months at the daily rental rate for the car of \$486.00 and states that his vehicles are normally rented year round.

[7] The Second Claimant gave evidence of having rented motor car registration number R1470 from the First Claimant on 8th June 2007, of driving it along the Falmouth Main Road from west to east at about 9.50 a.m. on 17th June 2007, and of being involved in a collision with motor car registration number A6539 driven by the Second Defendant in the vicinity of the Anglican Church. He stated that the Falmouth Main Road runs from east to west along the southern edge of the Anglican Church yard, that the Church yard is surrounded by a stone wall approximately four feet high, that there is a telephone booth near to the Church gate, that there is a bye road immediately east of the church wall that leads from north to south where it intersects with the Falmouth Main Road in a T junction and that the church wall does not obstruct a driver's view of traffic on the Falmouth Main Road.

[8] The Second Claimant's stated that on the morning of Sunday 17th June 2007 he had a clear view of the intersection of the Falmouth Main Road and the bye road. When he reached in between the church gate and the telephone booth he saw a car coming down the bye road and he blew his horn to alert the driver that there was oncoming traffic. When he reached the intersection the car coming down the bye road, which was being driven by the Second Defendant, came to a stop, then accelerated out of the bye road in front of him, by which time he was already at the intersection and he could only swerve to avoid running into the side of the car, so he swung towards the right to avoid or lessen the collision. The Second Defendant did nothing to avoid the collision; she simply continued to

turn right onto the Falmouth Main Road. Both vehicles hit each other in the front and at the time of the collision his vehicle was on the southern side of the road. At the time there was traffic coming from the east along the Falmouth Main Road and he believes that the Second Defendant looked east but did not look west and drove out without realizing that he was coming from the west. The vehicle which he was driving was pushed as a result of the collision and hit a concrete structure and came to a rest between an electric poll and a bus stop on the southern side of the road, while the vehicle driven by the Second Defendant spun right around and was facing east. Both cars were on the southern side of the road. The First Claimant and the police later came to the scene of the collision; Corporal Hoyte, who was the investigating officer, spoke to him and asked him for an explanation and recorded his statement in the police pocket book. He pointed out to Corporal Hoyte where the point of impact was and there was glass on the road from the lights of the vehicles. Corporal Hoyte also recorded various measurements. He (the Second Claimant) did not hear the Second Defendant's explanation that morning. The front end of the car that he was driving was damaged, especially around the left wheel, and there was a little damage to the right rear door where the car struck a concrete structure. The car that he was driving was equipped with airbags and the airbag was deployed on the collision and hit him in his face. As a result of the blow to his face, he sustained injuries and was treated at the hospital and at a doctor's clinic. He was diagnosed with having a traumatic hyphema and given a prescription; he was advised that he is now at an increased risk of developing glaucoma and developing early cataracts; and that he should wear UV sunglasses. As of November 2010, he was having problems reading small and fine print.

- [9] The Second Claimant denied that he was on his cell phone while driving or that he was driving at an excessive speed, lost control of the car and was on the wrong side. He stated that he only swerved across the road in response to the Second Defendant obstructing his lane and that he was driving at about 40 mph.
- [10] The Second Claimant had some difficulty though, both under cross examination and in response to questions by the Court, explaining how the collision could have happened in

the way that he described, with the Second Defendant coming out of the bye road and obstructing his path on the major road while he sought to swerve to the right to avoid the collision (or lessen its intensity) and yet the damage to the Defendants' car was to the left front of it and not to the right side or right front of it. In fact, when called upon by the Court to demonstrate by the use of court furniture how the collision occurred, his demonstration showed damage to the right front of the Defendants' car and he could not explain how the collision could have occurred in the manner described by him and result in the damage to the Defendants' car as shown in the photographs admitted into evidence. He did say though in re-examination that when he swerved to the right, the Second Defendant "continued to turn into me" and, in response to a question by his Counsel as a result of questions by the Court, that he swerved right across the road onto the other side and the Second Defendant "would have been turning in the road."

- [11] The third witness for the Claimant, Guerin Hunt, gave evidence that on Sunday 17th June 2007 at about 9.50 a.m. he was driving from east to west on the Falmouth Main Road when an accident took place in the vicinity of the Anglican Church between the First Claimant's and the Defendants' motor cars. He had a clear view of the intersection and the accident as it happened. He stated that the Defendants' car was travelling from north to south along a bye road and approached the intersection with the Falmouth Main Road, while the First Claimant's car was travelling from west to east along the Falmouth Main Road. He saw the Defendants' car stop at the intersection and then the Second Defendant started to drive out into the road. When the Second Defendant was already in the road she stopped, the front of her car was right at the white center line on the Falmouth Main Road and then she started to speed up and continued her right turn onto the Falmouth Road. He stated that when the Second Defendant stopped, he noticed the Second Claimant swerved to the right to avoid an accident and, at the same time, the Second Defendant moved off to continue her right turn and get onto her side. As the car driven by the Second Claimant swerved to its right, the two right wheels ended up off the southern side of the road, while the Second Claimant continued to make her turn and the two cars collided in the southern lane of the road. He stated that the car driven by the First Claimant ended up on another bye road facing north, while the Defendants' car spun

almost 180 degrees facing east on the southern lane of the road. After the accident he came out of his car and assisted both drivers and then called 911 and informed the dispatcher about the accident and its location. His recollection was that before the accident the Second Claimant was using both hands to swerve away from the Defendants' car.

[12] The fourth and final witness for the Claimant was retired Police Corporal Neville Hoyte. He stated that on 17th June 2007, whilst stationed at the Dockyard Police Station, he went on duty at the Falmouth Road to investigate a reported traffic accident. On arrival there he saw motor car registration number R1470 driven by the Second Claimant and motor car registration number A6539 driven by the Second Defendant; both vehicles were damaged and motor car registration number R1740 was off the road. He spoke to both drivers and asked them to point out the point of impact, which they did, and he recorded various measurements in his pocket book. He read over the measurements to the drivers and they both agreed with the measurements. He also asked the parties for explanations, which they both gave and he recorded them in his pocket book. He also recorded in his pocket book the damage which he observed to the cars and warned both parties of intended prosecution. As a result of his investigation, he determined that the Second Defendant was at fault and he advised her that a report would be made against her for driving without due care and attention.

[13] Corporal Hoyte testified under cross examination that he did make a report against the Second Defendant for driving without due care and attention, but he is not sure whether a trial of the matter had ever taken place. He testified though that he was never called to give evidence in such a case and that it stands to reason that, as the investigator in the case, he would be called if such a prosecution were to take place. He retired from the Police Force about two and half years before giving evidence in this case on 1st June 2011, which would be around November/December 2008.

[14] The first witness for the defence was Alex Rhodes. He gave evidence that he is a technician and photographer by profession. On Sunday 17th June 2007 he was passing

along the Falmouth Main Road in the vicinity of St. Paul's Anglican Church sometime after 10.00 a.m. when he observed a motor vehicle accident. He parked his car and came out with his digital camera and began taking pictures at the scene of the accident and the immediate area. He made prints of the digitized photographs which he subsequently gave to both Defendants with whom he is well acquainted. The photographs were all tendered and admitted into evidence.

[15] The next witness for the defence was the First Defendant, who gave evidence of being the husband of the Second Defendant and the co-owner of motor car registration number A6539. He arrived on the scene shortly after the accident on 17th June 2007 and the first person to approach him at the scene of the accident was Guerin Hunt, who had a brief conversation with him in which he explained that he had witnessed the accident and offered to testify on behalf of the Second Defendant. He (the First Defendant) then went to his wife's assistance. His wife was injured and shaken and was taken to Holberton Hospital where she was treated and discharged. He stayed on the scene of the accident and witnessed the taking of the measurements. His car was badly damaged and some days after the accident he contacted a body mechanic to do an assessment of the car. The body mechanic estimated the cost of repairs to the car at \$29,660.32, but estimated the pre-accident value of the car at \$13,000.00 and the post-accident value at \$3,500.00. He drove his wife to many of her physiotherapy appointments and witnessed her excruciating pain and discomfort at times and, even as of 2011, she is not back to her former self and he sincerely doubts that she will be 100% again.

[16] The First Defendant testified that he never saw his wife identify a point of impact at any stage. He accompanied his wife to the police station to give her statement and she was not then taken back to the scene of the accident. To his knowledge, his wife was never taken back to the scene of the accident. He testified too that, coming close to the six-month limitation on traffic cases, he met Corporal Hoyte and asked him about the case and Corporal Hoyte told him that the case file was lost.

[17] Under cross examination, the First Defendant testified that he was aware that towards the latter part of September 2007 a police report was issued and that he saw the police report.

[18] The third and final witness for the defence was the Second Defendant. She gave evidence that on Sunday 17th June 2007 at approximately 10.15 a.m. she was driving motor car registration number A6539 along a minor road and stopped when she reached the junction with Falmouth Main Road. She then looked west along the Falmouth Main Road and saw that the road was clear of vehicular traffic; she looked east and saw two vehicles travelling west which were "a good distance away;" she looked west again and saw that no vehicle was coming and it was safe to proceed; she then put on her right indicator and proceeded to turn right onto the Falmouth Main Road. She was already on her left side of Falmouth Main Road and well over the white line when suddenly a white car travelling in an easterly direction came over the rising in the road at a terrific speed of about 60 to 70 mph and began veering more towards her on the left side of the road. As the white car got closer to her she could see the driver's left hand on the steering wheel and the other hand holding his cell phone up to his right ear. The white car kept coming towards her side of the road and, instead of attempting to veer away from her, the driver just honked his horn. The white car was coming very quickly towards her and she could not veer right because she was afraid that she would collide with the vehicle behind her. The white car slammed into the left front side of her car, causing her car to spin 180 degrees and end up with its front turned in the opposite direction. The white car ended further to the left of her car and off the road. She now knows that the driver of the white car was the Second Claimant.

[19] The Second Defendant stated that she was in severe pain after the collision and was taken by ambulance to Holberton Hospital where she was examined and treated by Dr. Raju. After her discharge, she was subsequently treated by Dr. Prince Ramsey and Dr. Singh and over the next year she underwent extensive physiotherapy with Dr. Patrick Matthew and Dr. Ward Alfred to relieve pain and swelling in her lower back. She continues to suffer with her lower back and continues to experience periods of extreme discomfort. Dr. Singh has now assessed her as being 6% disabled as a whole person and he believes that this percentage disability will increase as she gets older. Dr. Singh also advised her of the

possibility that she may require spinal surgery in order to prevent further increase in her physical impairment.

[20] The Second Defendant itemized her injuries and her medical expenses and provided medical reports to verify her injuries and receipts to verify her medical expenses.

[21] The Second Defendant testified that she did not speak to Corporal Hoyte before she left the scene of the accident and that she first spoke to him about the accident a few days after the accident when she was called to the Dockyard Police Station. It was there that she sat and gave an overall report and Corporal Hoyte recorded what she said. She was never taken back to the scene of the accident and she did not give the oral explanation to Corporal Hoyte contained in the bottom half of the document on page 96 of the Trial Bundle. The typewritten statement on page 108 of the Trial Bundle is the statement that she gave to Corporal Hoyte. Corporal Hoyte told her that he still needed to record a statement from her and so she repeated for him to record the typewritten statement that she had given to him.

[22] Under cross examination, the Second Defendant made some significant concessions. She conceded that she was under a duty not to emerge from a minor road unless she ensures that it is safe to do so. She conceded too that considering the two roads involved, she was the one with the duty to stop. She also conceded that when she saw the Second Claimant's car on the major road she was shocked and she did not try to break, pull to the left or pull out of the way. She said that she did not do any of those things.

[23] The Second Claimant did fortify her case somewhat under re examination when she testified that she could not have taken any evasive action before the accident because the car (meaning the car driven by the Second Claimant) came over the rising so swiftly (referring to a rising or a slight incline on the main road over which the Second Claimant passed just before she saw his vehicle). She went on to say that the Second Claimant was coming towards her and she could not swerve to her right because something else (meaning another vehicle) could be coming and she would be in the wrong lane and that

she had already straightened up on her side and was headed in a westerly direction when the accident occurred.

[24] After all seven witnesses had given their evidence, the trial concluded with a direction to the parties to file and exchange written closing submissions by 3 p.m. on Wednesday 15th June 2011. Two months beyond the stipulated time, no submissions were filed by or on behalf of either the Claimants or the Defendants and the Court office alerted Counsel for the parties to this fact, whereupon submissions dated 19th August 2011 were filed on behalf of the Claimants and a document entitled "Defendants' Skeleton Closing Arguments" was filed on behalf of the Defendants this morning.

[25] Adjudicating on this case was not a particularly easy task, in terms of deciding whether the Claimants had established their claim on a balance of probability, whether the Defendants had established their counterclaim on a balance of probability or whether both had failed to do so.

[26] The Claimants' case was weakened by the inability of the Second Claimant to explain to the Court how it is that the collision occurred in the manner indicated by him yet the damage to the Defendants' vehicle was in the manner indicated by the photographs. Their case was also weakened by the speed with which the Second Claimant must have been driving on Falmouth Main Road on that Sunday morning because, not only did he waver under cross examination on the question of the speed at which he was driving on that day but, more tellingly, the fact that both vehicles were written off as a result of the collision and the Defendants' vehicle was spun around in a 180 degree turn by the impact with the vehicle being driven by the Second Claimant, could only be the result of one of the drivers involved in the collision driving at a considerable speed, and that driver could only have been the Second Claimant, since the Second Defendant (in accordance with the evidence of all three eye witnesses) had just moved off from a stopped position at the junction and was making a right turn on the major road and so could not possibly have been driving fast at the time of the collision.

[27] The Claimants' case was however strengthened by the fact that, as conceded by the Second Defendant, she (the Second Defendant) was the one coming from the minor road onto the major road and the onus was on her to do so only when it was safe to do so. The fact that a collision ensued with a vehicle travelling on the major road is indicative of the fact that, at the time when the Second Defendant left the minor road and drove onto the major road, it was indeed not safe to do so. Then too there are the provisions of the Vehicles and Road Traffic Regulations, Cap. 460 of the Laws of Antigua and Barbuda Revised Edition 1992 cited by Counsel for the Claimants, Regulation 5(f) of which states that a driver of a motor vehicle shall not proceed from one road into another road unless he can do so without obstructing any other traffic on the road and that, for the purpose of this sub regulation, the driver shall be held to be obstructing other traffic if he causes risk of accident thereto. On the facts of this case, it was not just the risk of accident that resulted from the Second Defendant proceeding from one road into another, but an actual accident occurred in which both vehicles involved were written off.

[28] The Claimants' case was strengthened too by the fact that, as the Second Defendant conceded, when she saw the Second Claimant's vehicle veering towards her, she did not try to stop or pull to the left or pull out of the way but just continued to make her right turn.

[29] Also of significance was the fact that the Claimants clearly believed in the merits of their case in that they instituted these proceedings, they complied (generally in a timely manner) with all of the case management directions and pre-trial orders of the Court in order to move the case along to trial and they filed their written closing submissions (albeit late) in response to the Court's directive. The Defendants on the other hand, despite having their vehicle written off in the collision and the Second Defendant suffering significant personal injuries, did not institute proceedings, did not even file a Defence and Counterclaim in the proceedings instituted against them by the Claimants until after judgment in default was entered against them and the Court permitted them to file a Defence way past the stipulated time, did not comply with case management directions and pre-trial review orders in a timely manner or at all, so as to move the case along to trial, and only filed the

written closing submission directed by the Court this morning. It would appear from this that the Defendants and/or their legal advisors did not believe in the merits of their case.

[30] Of significance too is the fact that both the police investigating officer, Corporal Hoyte (who by the way was not the best and most credible of witnesses) and the sole independent eye witness, Guerin Hunt, gave evidence in favour of the Claimants and testified that the Second Defendant was the driver at fault.

[31] So, bearing in mind that the Second Claimant reduced the weakness in his case under re examination and in response to a question by his Counsel as a result of the questions by the Court when he testified under re examination that when he swerved to his right to avoid the collision the Second Defendant continued to turn into him and, in response to a question by his Counsel as a result of the questions by the Court, that when the accident was happening he swerved right across the road onto the other side and the Second Defendant would have been turning in the road and, bearing in mind as well that the issue of the Second Claimant's excessive speed can properly be treated as contributory negligence on his part rather as the cause of the collision, the Court was in the end satisfied that the more probable cause of the collision on Falmouth Main Road on Sunday 17th June 2007 was the negligence of the Second Defendant.

[32] The Court assesses the damages to which the Claimants are entitled as follows:

- General damages of \$1,890.00 will be awarded to the First Claimant, measured on the basis of two weeks loss of use of the First Claimant's motor car - the period of two weeks being sufficient time to enable the First Claimant to replace a written-off vehicle and the figure of US\$350.00 or EC\$945.00 per week being the prevailing rate for self hired vehicles of the type involved in the collision in this case.
- The sum of \$15,000.00 will be awarded by way of general damages to the Second Claimant for the pain, suffering and loss of amenities suffered by him consequent on the injuries sustained by him as a result of the collision. The sum of \$15,000.00 is the

amount claimed by Counsel for the Claimants in the written submissions filed on behalf of the Claimants and the Court accepts the validity of that claim and the authorities used in support of it.

- The sum of \$27,500.00 will be awarded by way of special damages to the First Claimant, representing the difference between the pre-accident value of the First Claimant's motor car (\$30,000.00) and the salvage value of the wreck (\$2,500.00).
- The sum of \$465.90 will be awarded by way of special damages to the Second Claimant, being the total of the following claims pleaded by the Claimants and proved by receipts received in evidence by the Court - \$115.90 for prescription medication and \$350.00 for medical consultation, which latter amount was the amount pleaded by the Claimants and, although there were receipts beyond \$350.00, this was the total amount pleaded. No award can be made for the cost of the special UV shades, the cost of the medical report, the cost of the police report and the loss of use by the Second Claimant of R1470 for one day at \$486.00 per day because, although pleaded, none of these costs were proved by receipts or other such means.
- Interest will be awarded on the special damages at the rate of 2 ½ % per annum from the date of the accident on 17th June 2007, which is when the First Claimant's car became a total loss and around when the Second Claimant incurred his medical expenses, to the date of judgment and on the general damages at the rate of 5% per annum from the date of the filing of the claim on 4th September 2008 to the date of judgment.

[33] The Court, however, determines that the Second Claimant negligently contributed to the occurrence of the collision and the loss and damage occasioned therefrom by the speed at which he drove motor car registration number R1470 on Sunday 17th June 2007. The Court assesses his contribution as one third and so the general and special damages awarded to the Claimants will be discounted by one third.

[34] In concluding this judgment the Court notes that no issue has been taken by the Defendants on the question of vicarious liability, in terms of whether or not the First Defendant is vicariously liable for the negligence of the Second Defendant in causing the collision with the First Claimant's motor car, and so the Court declines to make any pronouncement on the question. It would appear that the Defendants have proceeded on the basis of a joint claim in respect of the collision which occurred on 17th June 2007 and a corresponding joint liability in respect of any loss and damage resulting therefrom and it shall be so treated by this Court.

[35] The Claimants will be awarded prescribed costs on the total award of damages (\$16,890.00 + \$27,965.90 = \$44,855.90) together with the interest awarded (\$2,533.50 + \$2,942.25 = \$5,475.75) less the one third discount for contributory negligence (\$16,777.22). This amounts to a net award of \$33,554.43 and costs of \$9,888.61, with interest payable on the entire amount of \$43,443.04 at the rate of 5% per annum from the date of judgment (today) to the date of payment.

[36] The Court's Order is as follows:

1. The Claimants are awarded general damages of \$16,980.00 made up of \$1,890.00 to the First Claimant for loss of use of his motor car and \$15,000.00 to the Second Claimant for pain, suffering and loss of amenities;
2. The Claimants are awarded special damages of \$27,965.90 made up of \$27,500.00 to the First Claimant for the net value of his written-off motor car and \$465.90 to the Second Claimant for the expenses incurred by him for medical consultations and medications;
3. The Claimants are awarded interest on the general damages at the rate of 5% per annum from the 4th day of September 2008 to the 31st day of August 2011;
4. The Claimants are awarded interest on the special damages at the rate of 2 ½% per annum from the 17th day of June 2007 to the 31st day of August 2011.

5. The award of general and special damages plus interest to the Claimants as aforesaid is discounted by one third on account of the contributory negligence of the Second Claimant.
6. The Claimants are awarded prescribed costs of \$9,888.61.
7. Interest is payable on the entire amount of the judgment (\$43,443.04) at the rate of 5% per annum from today's date to the date of payment.



Mario Michel
High Court Judge