

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)

CLAIM NO. SKBHCV2011/0126

BETWEEN:

JASON KELSICK

Claimant

And

ORVILLE CROSSLEY

Defendant

Appearances:

Mr Damian E. S. Kelsick of Kelsick Wilkin and Ferdinand for the Claimant

Ms Marsha Henderson of Henderson Legal Chambers for the Defendant

2012: April 19

2012: June 29

DECISION

- [1] **THOMAS J:** This is a Claim and Counterclaim in negligence involving two motor vehicles, owned by the parties.
- [2] The Claimant alleges that on 6th April 2011 the Defendant was negligent in driving his vehicle resulting in damage and loss for him. In his Counterclaim the Defendant also seeks damages in negligence.
- [3] In the Statement of Claim it is pleaded that the Defendant :
- a) Failed to keep any proper look out for traffic coming in the opposite direction;

- b) Drove into the path and collided with P691;
- c) Failed to see P691 in time or at all;
- d) Failed to adequately or at all lead or act upon the presence, path, position and approach of P691;
- e) Failed to maintain or regain a position on the correct side of the road;
- f) Caused, permitted or suffered the motor car he was driving to drive or turn onto the wrong side of the road;
- g) Failed to have or retain any safe or sufficient control of PA668;
- h) Drove too fast in all the circumstances;
- i) Failed to stop, to slow down, to swerve or to otherwise so manage or to control the said motor [vehicle] so as to avoid the aforesaid collision.

[4] At paragraph 4 of the said Statement of Claim it is pleaded that as a result the collision the Claimant's vehicle was extensively damaged and uneconomic to repair.

[5] Damages in the amount of \$42,600.00 are claimed plus interest and costs.

Defence

[6] In the Defence the collision is admitted by the Defendant, but the particulars of negligence pleaded by the Claimant are denied.

[7] Alternatively, the Defendant contends that the said collision was caused either wholly or in part by the negligence of the Claimant. The following particulars of negligence are pleaded:

1. Failed to keep any proper lookout for traffic coming in the opposite direction;
2. Driving too fast in all the circumstances;
3. Failing to apply his brakes in time or at all and/or so as to steer or control his motor vehicle so as to avoid the said collision;

4. Failing to adequately heed or act upon the presence, path and position of P668;
5. Failing to have or retain any safe or sufficient control of P691;
6. Failing to stop to slow down, to swerve or to otherwise so manage or to control the said motor vehicle as to avoid the aforesaid collision;
7. No admission is made to the allegation of loss or damage contained in paragraph 4 of the Statement of Claim;
8. Save as is hereinbefore expressly admitted, the Defendant denies each and every allegation contained in the Statement of Claim;
9. By reason of the aforesaid matters, it is denied that the Claimant is entitled to the relief sought and/or to any relief.

Counterclaim

- [8] By reason of the Defendant's pleading that the collision was caused either wholly or in part by the Claimant's negligence, the Defendant counterclaims damages in the amount of \$33,100.00

Reply and Defence to Counterclaim

- [9] In his reply the Claimant maintains that the collision was caused solely by the Defendant. At the same time, the losses claimed by the Defendant in his Counterclaim are denied and he puts the Defendant to proof.

Issue

- [10] The issue for determination is who is liable in whole or in part for the collision on 6th April 2011 at the junction of Frigate Bay Road and the Kim Collins Highway.

Evidence

Jason Kelsick

[11] In his Witness Statement Jason Kelsick gives a short account of the collision on 6th April 2011. In this regard the witness says that he was travelling eastwards at less than 30 miles per hour on the Frigate Bay Road in his jeep Wrangler, P691. He says further that the other vehicle involved was driven by Orville Crossley, the Defendant.

[12] The Claimant testifies that the Defendant drove his vehicle across his path.

[13] In cross examination the Claimant denied a number of propositions put to him, including one which said that he could have avoided the collision but for the speed at which he was driving.

Jonathan Winterburn

[14] It is Jonathan Winterburn's evidence that on 6th April 2011 he was at the Rum Barrel and the Claimant, his friend, was with him. According to him, they left the Rum Barrel at about 7:30 pm. and went to the Pride of India Restaurant.

[15] In cross examination the witness said that they spent about three hours at the restaurant and they just ate and had water, the witness also confirmed that prior to the restaurant they were at the Rum Barrel which is owned by the Claimant.

Wrenford Evelyn

[16] In his Witness Statement the witness says that he is a mechanic and sole proprietor of Wrenford Evelyn's Garage.

[17] At paragraph 3 and 5 of his said Witness Statement the witness speaks of his examination of a Wrangler Jeep on or about 14th April 2011 and gives his findings as to the reparability of the said vehicle.

[18] In cross examination Evelyn testified in detail about the damage to P691.

John Davis

- [19] John Davis, a police officer, gave his evidence in chief at the trial in view of, a Witness Summary being filed¹ on his behalf.
- [20] In his evidence Davis gave details of his investigations and findings in response to a report of a collision Wednesday, 6th April 2011.
- [21] In cross-examination PC Davis testified that he did not prepare the [Road Accident] Report² based on information submitted to and sanctioned by Sgt Amory.
- [22] In terms of action being taken against the parties involved, the officer testified that he did serve notice of prosecution on Orville Crossley but could not recall if this was done in relation to the Jason Kelsick. Davis ended up saying that no action was taken against either party based on what was said by Jason Kelsick in the presence of Sgt Amory and himself.
- [23] PC Davis was also cross-examined on the measurements taken at the scene and the position and condition of the two vehicles.
- [24] In further cross-examination the officer revealed that after the collision he could not contact the Claimant until he saw him at the Traffic Department on 9th April 2011.

Orville Crossley

- [25] In his Witness Statement Orville Crossley testifies as to the events surrounding the collision of his vehicle and that of the Claimant. According to the witness, he was travelling at 35 miles per hour in his left hand drive along the Frigate Bay Road and indicated his intention to turn right onto the Kim Collins Highway.

¹ Witness Summary was filed on 9th January 2012

² Core Bundle at pages 39 - 41

[26] At paragraph 5 of the said Witness Statement Crossley says that while at the junction of Frigate Bay Road and the Kim Collins Highway for about 2 – 3 seconds he felt a sudden impact on his vehicle.

[27] Under cross-examination the Defendant maintained that he was travelling at 35 miles per hour and slowed down to 15 – 20 miles per hour before he made the turn. He also testified that he saw the Claimant's vehicle in the opposite direction and that he turned because of the distance from him.

Thayesha Murray

[28] Thayesha Murray in her Witness Statement details her presence in the Defendant's vehicle on 6th April 2011, and the loud bang she heard when the said vehicle was at the junction of Frigate Bay Road and the Kim Collins Highway. The witness also speaks to the injury she suffered and her observations regarding the Defendant's vehicle.

[29] The cross-examination centered on the witness' relationship with the Defendant, her whereabouts prior to the collision, her phone call and what she may or may not have seen on the road on the day in question.

Submissions

[30] The salient aspects of the submissions on behalf of the Claimant are as follows:

- "2. There is no dispute that the Defendant crossed over onto the Claimant's side of the road to turn into the Kim Collins Highway.
3. It is therefore submitted that the primary issue to be determined by the Court, in relation to liability, is whether it was safe for the Defendant to turn as he did.
4. The Defendant gave evidence that he saw P691 approaching from the opposite direction but formed the judgment that P691 was sufficiently far away to make the turn safely and in time. In order to properly make such a judgment, the Defendant would have had to have formed a judgment on two separate matters: (1) the distance of P691 from the junction at the time; and (2) the speed at which P691 was travelling.
5. In his cross-examination; the Defendant stated that immediately prior to making his turn he could not tell how far away from the junction P691 was nor how fast it was travelling. There was therefore no basis whatsoever upon which the Defendant could have formed a judgment that it was safe to make the turn and he was therefore negligent in making the turn. This evidence is determinative of the

Defendant's liability. The course he ought to have adopted in the circumstances was to wait for a few seconds it would have taken for the Claimant's vehicle to pass before making the turn.

6. It is also to be noted that both the Defendant and his passenger, Thayesha Murray, gave evidence that 5 or 6 seconds before the accident, Ms Murray answered her phone. It may well be inferred that this telephone call distracted the Defendant.
7. In his cross examination, the Defendant asserts that he completed his turn onto the Kim Collin Highway, that PA668 was completely on that Highway (with no part of his vehicle on the Frigate Bay Road) before the collision occurred; he further asserts that he completed his turn in sufficient time that he did not cause the Claimant to have to take any evasive action.
8. If this were correct, the necessary inference is that the Claimant swerved left after the Defendant turned onto Kim Collins Highway and collided with him for no reason whatsoever. It is submitted that the total implausibility of this evidence, and the necessary inferences to be drawn therefrom, show that the Defendant's evidence ought to be rejected.
9. Further, the Defendant's evidence in this regard is entirely inconsistent with the damages, inter alia, to its grill, left front fender, left front wheel and left front door. Mr Fraites report state that PA668 sustained damages to, inter alia, its radiator, front bumper and headlamp. These damages are completely inconsistent with the Defendant's evidence: in particular, it is submitted that it is simply not possible that P691 turning left into Kim Collins Highway after PA668 had completed its turn (with therefore the front of P691 trailing behind the rear of PA668) could have collided with PA668 so as to cause damage to the grill, radiator, front bumper and headlamps of PA668, which are located at the very front".

[31] The following represents the main points of the submissions on behalf of the Defendant:

- "3. It is the Defendant's case that the Claimant was not driving at 30 miles per hour as he stated under cross-examination. That the damage to the Defendant's vehicle, in particular the damage to the left door of the Defendant's vehicle as outlined by officer John Davis is consistent with the Defendant's version as to how the accident was caused. In fact; the witness for the Defendant, Thayesha Murray confirms that the Defendant appeared to be dazed after the impact, and that her left foot was bleeding. She also confirms in paragraph 4 of her witness statement which is uncontested that there was extensive damage to the left side of the Defendant's vehicle. The estimate of repairs at page 51 of the bundle prepared by Anthony Fraites verifies that the Defendant's vehicle was written off.
4. This we respectfully submit cannot be the result of an impact of a vehicle driving at 30 miles per hour. In fact, the witness for the Claimant, Wrensford Evelyn who stated under cross-examination that he was a mechanic for over 30 years that the impact [would] have had to be a hard impact, which resulted in the airbags of the Claimant's vehicle being inflated. His report at page 6 of the bundle states that after examination of the Claimant's motor vehicle he was of the view that serious damage had been sustained.

6. We submit that the Claimant's actions subsequent to the collision are indicative of some guilt on his part. It is the evidence of Officer John Davis that several attempts were made to contact the Claimant who had left the hospital and could not be located for some days after. That on the 9th day of April 2011 when both drivers were taken to the scene of the accident, in the presence of the Defendant and Sergeant, the Claimant indicated that he was not going to pursue this matter, and that both parties would take care of their own damage. Indeed, it is the Defendant's evidence that it was based on this conversation that he did not seek to correct his statement given to the officer at the hospital on the night of the accident".

Analysis

[32] In broad terms negligence means the breach of a duty of care owed which results in damage to the Claimant, or as in this case, to the counterclaimant. And a duty of care is owed whenever in the circumstances it is foreseeable that if the Defendant does not exercise due care the Claimant will be harmed³.

[33] It is well established⁴ that drivers of motor vehicles owe a duty of care to other users of the road. As such, it is the constituent of the breach of the duty of care that is paramount in this context.

[34] The following represents the essence of Jason Kelsick's evidence concerning the collision. In his witness statement the evidence in part is this:

- "(b) As I got to the junction of the Frigate Bay Road with the Bird Rock (leading to the Central Bank), I noticed a vehicle coming in the opposite direction.
- (c) I continued driving along the Frigate Bay Road and the Kim Collins Highway, the on-coming vehicle suddenly and without warning or signal whatsoever turned across onto my side of the road, and into my path, and in the direction of the entrance to the Kim Collin Highway.
- (d) I immediately turned my vehicle to the left in an attempt to avoid the collision but because the oncoming vehicle was so close to mine when it turned across my path that the collision was almost instantaneous with my attempt to turn".

[35] In cross examination Jason Kelsick maintained that he was driving at less than 30 miles per hour, and disagreed that if he was in fact travelling at that speed he could have avoided the

³ See generally: Winfield & Jolowicz on Torts para. 5.1 - 5.18, Gilbert Kodilyne, Tort: Text Cases and Materials

⁴ Kodilyne, op cit, page 74

collision. He also testified that he had to slow down at the train tracks and further that the Defendant's vehicle cut across his path. The witness further testified that the Defendant's vehicle was in front of him.

[36] On the other hand, the Defendant's evidence is that when he was at the junction of the Kim Collins Highway and the Frigate Bay Road, for about 2 -3 seconds he felt a sudden impact to the left side of his vehicle.

[37] As noted before, the Defendant testified that when he did make the turn he had slowed to 15 – 20 miles per hour and that it was safe to turn when he did.

[38] In the face of all of the evidence Mr Damien Kelsick for the Claimant contends that there was an error of judgment on the part of the Defendant in terms of the distance of the Claimant's vehicle from his vehicle and the speed at which the Claimant was travelling. On the other hand, Ms Marsha Henderson for the Defendant contends that the collision was caused solely by the speed at which the Claimant was travelling. The further contention is that the resulting damage to the vehicles is inconsistent with the Claimant's evidence that he was travelling at 30 miles per hour.

[39] In this context the Court makes the following findings of fact:

1. The Claimant's vehicle struck the Defendant's vehicle at the junction of Frigate Bay Road and the Kim Collins Highway after the Defendant's vehicle had turned.
2. The impact on the Defendant's vehicle was in the vicinity of the left front door.
3. The front of the Claimant vehicle damaged and there was structural damage and a broken windscreen.
4. The Defendant's vehicle was severely damaged with damage to the front chasis, radiation, radiator support front bumper, and headlamp. Left front suspension, L H wheel box, hood, firewall, left door and door post.
5. There was a distance of 30 feet between the two vehicles after the collision.
6. The Claimant's vehicle was 33 feet from the stop at Kim Collins highway while the Defendant's vehicle was 22 feet from the said stop.

7. No part of the Defendant's vehicle was on the Frigate Bay Road having regard the measurements in evidence and the position of the vehicles after the collision.
8. After the collision the left front wheel of the Claimant's vehicle was 6 feet 9 inches for the western side of the Kim Collins Highway while the rear left wheel of the said vehicle was 14 feet from the western side of the said highway.
9. The front of the Defendant's vehicle was five feet 4 inches from the eastern side of the road.
10. After the collision the Claimant's vehicle faced north (rather than east to get to Frigate Bay); while the Defendant's vehicle faced east (rather than north to get to Keys).
11. The back wheels of the Defendant's vehicle were resting on the island at the entrance/exit of the Kim Collins Highway after the collision.

[40] Having regarded to the foregoing findings of facts, the Court draws the reasonable inference, in agreement with the submissions on behalf of the Defendant that the Claimant could not have been driving at 30 miles per hour. In particular the Court gave particular consideration to the damage to vehicles, the measurements and the positions of the vehicles after the collision. And the fact that the Claimant said in cross examination that he slowed down before the train tracks does not help his case as it follows that a high speed was developed subsequently so as to cause the damage.

[41] In drawing the inference the Court rejects the Claimant's contention that there is no evidence before the Court to show that the damages sustained by the vehicles was inconsistent with the speeds at which the Claimant and Defendant respectfully said they were travelling.

[42] In deciding whether there has been a breach of the duty owed to the Defendant, the law requires the Court to consider whether or not a reasonable man, placed in the position of

the Defendant's position would have acted as he did. The foregoing is derived from the following dictum of Baron Alderson in *Blyth v Birmingham Water Works*⁵

"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".

[43] In so far as the measure of the reasonable man by the Court is concerned, the following is relevant⁶:

"In deciding what a reasonable man would have done in the circumstances, and in assessing the standard of care expected of the Defendant, the Court may take into account what may be called the 'risk factor'. This has four elements: the likelihood of harm; the seriousness of the injury that is risked; the importance or utility of the defendant conduct; the cost and practicality of measures to avoid harm".

[44] The Defendant under cross examination testified in part thus:

"I saw the Claimant's vehicle in the opposite direction. I turned because of the distance from me. I thought I had time to turn over. I did not stop from my judgment. When I took the correct I had cleared on my way to Keys. I did not turn to cause him [the Claimant] to take evasive action".

[45] In this context the evidence of Thayesha Murray, being the passenger in the Defendant's vehicle is interesting. She testified under cross-examination that she received a call 5 to 6 seconds prior to the collision. She also said that she was looking in front of her but did not see any on-coming traffic.

[46] In view of the Court's inference that the Claimant was travelling in excess of 30 miles per hour, the Court cannot accept the Defendant's testimony in total. This is in view of his own testimony that he saw the Claimant's vehicle.

[47] The Court therefore accepts the submission on behalf of the Claimant that the Defendant committed an error of judgment in so far as the speed of the Claimant's vehicle and the distance from his vehicle is concerned.

⁵ [1983 – 60] All ER Rep 478, 479

⁶ Gilbert Kodilyne, Tort – Text Cases and Materials, pages 80-81

[48] It is therefore the determination of the Court that the Defendant turned on to the Kim Collins Highway when it was unsafe to do so. As such, the Defendant was in breach of his duty of care owed to the Claimant. This is made even plainer when the risk factor is added to the equation.

[49] This translates to mean that there was likelihood of harm as a result of the Defendant's action. There was serious injury and there is no evidence that the Defendant took any measures to avoid the harm. But the matter does not end there.

Is the Claimant liable?

[50] The inference drawn as to the speed at which the Claimant was driving and the damage to both vehicles condemns the Claimant in negligence. He is in breach of his duty of care. A damage chassis is not a simple matter. And the evidence is that the airbags in the Claimant's vehicle were activated to protect the passenger. These are not simple matters. Again, the risk factors assist the Court in this determination.

[51] Apart from the driving of the vehicle in a negligent manner, the Court agrees with learned counsel for the Defendant that there are other factors which give to an inference that the Claimant knew that he done wrong. These include his unavailability for about two days when the evidence is that at the time the police had his telephone numbers and tried to reach him. For his part the Claimant testified that he was not aware that the police wanted him. So much for that thought.

[52] The other piece of evidence is what the Claimant said on the Saturday when both parties with the police re-visited the scene. The evidence is that the Claimant said in everyone's presence that he was in effect finished with the matter. Learned Counsel for the Claimant has sought to discount this piece of evidence by saying that it was not included in the police report. But Officer Davis testified that matters of this nature are not included in such reports.

[53] The Court accepts Officer Davis' evidence. Ms Henderson for the Defendant also points to the requirement of Section 105 of the Highway Code which says that one should drive at a speed that will permit stopping well within distance or permit stopping in cases of emergency.

[54] The evidence from the Claimant is that he swerved to the left in order to avoid the collision but while this may be so it is overpowered by the factors of speed and control of the vehicle.

Damage

[55] The other constituent of negligence is the damage resulting from the breach. But both parties were in breach and both suffered damage. The justice of the situation demands a ruling that both parties are to share the damage caused equally and as such no award will be made in damages even although negligence is established.

Costs

[56] In the circumstances there is no order as to costs.

ORDER

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

1. The Defendant was in breach of his duty of care owed to the Claimant in making the turn on to the Kim Collins Highway when it was patently unsafe to do so and there was a serious risk of damage or injury in the circumstances.
2. The Claimant was in breach of his duty of care owed to the Defendant since after having seen the Defendant's vehicle, drove his vehicle at a speed and in a manner when there was serious risk of injury or damage which in fact result from the subsequent collision.

3. Although negligence is established both on the part of the Claimant and the Defendant, in the circumstances the parties must share the damage caused equally and therefore no damages are awarded.
4. There is no order as to costs.

Errol L Thomas
High Court Judge (Ag)