

ANTIGUA AND BARBUDA

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

CLAIM NO ANUHCV2011/0089

BETWEEN:

CHARLES JOSEPH

Claimant

AND

VALDENE PAYNE

Defendant

Appearances:

Mr Kelvin John, Mr Loy Weste and Mrs Lisa Weste for the Claimant
Mr Colin Derrick for the Defendant

.....
2012: November 20

2013: January 30
.....

JUDGMENT

INTRODUCTORY AND BACKGROUND

[1] **LANNS, J [Ag]:** This is a claim in negligence.

[2] On 31st July 2010, at about 3:00 am, a vehicular collision occurred along Jonas Road, St Peter's Parish, Antigua, between a Toyota Corolla Motor Vehicle owned and driven by the Claimant, Charles Joseph (Mr Joseph) and a Suzuki Vitara Motor Vehicle owned and driven by the Defendant, Valdene Payne (Mr Payne).

[3] Mr Joseph was driving North to South and Mr Payne was driving in the opposite direction, South to North.

[4] The vehicles were just about passing each other when a donkey emerged on Mr Payne's near side from the overgrown bushes and trees that border the road. Mr Payne swerved to the right crashing into Mr Joseph's vehicle approaching from the opposite direction.

[5] Both vehicles were extensively damaged and declared written off.

[6] Mr Joseph claimed that the collision was caused wholly by the negligence of Mr Payne in that he

- (1) Failed to keep left on Jonas Road;
- (2) Drove too fast;
- (3) Failed to keep any proper look out and/or to observe or heed the presence or approach of a donkey directly in his path;
- (4) Drove and/or deflect his course directly into the path of oncoming traffic and directly at the Claimant at a high velocity;
- (5) Failed to keep any, or any proper look out and /or to observe or heed the presence or approach of the Claimant;
- (6) Failed to apply his brakes in time or at all and /or so to steer or control his Motor Vehicle as to avoid the collision;
- (7) Failed to apply his brakes in time or at all and/or so to steer or control his Motor Vehicle as to avoid the collision with the Defendant'
- (8) Failed to have any, or any sufficient regard for the safety of users of the road

[7] Mr Joseph averred that as a result of Mr Payne's negligence, he suffered loss and damage, and he particularized his loss and damage as being special damages in the amount of \$65,000.00 representing the replacement value of his vehicle.

[8] By way of Defence, Mr Payne denied that the collision was caused by his negligence. He pleaded that the accident was unavoidable and inevitable. In the alternative, he pleaded that the collision was caused wholly or partly by the negligence of Mr Joseph, in that he

- (a) Failed to take any action to avoid the collision;
- (b) Failed to steer and /or control his motor vehicle in a manner that was safe in the circumstances;

- (c) Failed to apply his brake in time or at all and /or steer or control his vehicle as to avoid the collision;
- (d) Failed to keep any or any proper look out when he ought to have done so; Drove at too fast a speed when h ought not to have done so.

[9] Mr Payne counterclaimed for loss and damage allegedly suffered, and he particularized his loss and damage as follows:

(a)	Difference between pre-accident value, (i.e. \$60,000.00 and salvage value (i.e. \$10,000) of Defendant's motor vehicle	\$50,000.00
(b)	Police Report	\$ 50.00
(c)	Accident Investigator's fees	<u>\$ 3,000.00</u>
	Total	\$ 53,625.00

THE ISSUES

[10] The issues which arise for determination are

- (1) Whether Mr Payne is liable in negligence?
- (2) Did Mr Joseph contribute in any way to the accident?

THE EVIDENCE

(a) Charles Joseph

[11] In his Witness Statement, Mr Joseph described himself as a mechanic. He stated that at the time of the accident he was travelling North to South along Jonas Road in the Mount Joy area at about 20 miles per hour. Jonas Road was unlit and dark. There were no street lights where the accident took place. However, visibility from his headlamps was good. The Road is surrounded by bush, shrubs, trees, and open pastures. He was aware that there are un-tethered animals that stray in the road.

[12] Immediately before the accident, there were no vehicles in front of him. He could see Mr Payne's vehicle approaching him along Jonas Road at a fast speed from South to North. He was about 200 feet away approaching him rapidly. There was no vehicle in front of Mr Payne. As Mr Payne's vehicle was approaching Mr Charles, it swerved right suddenly without slowing down, coming directly into his driving path on his side of the road. He had no warning that the Defendant was going to swerve to his side. It happened in a split second. Despite his best efforts, he was unable to avoid the collision. It was a forceful collision. After the collision, he observed a donkey on the Defendant's side of the road.

- [13] The police arrived at the scene, and took measurements. One week later, he gave a statement to the police.
- [14] As a result of the collision, his vehicle was completely written off. The pre-accident value of his vehicle was assessed at \$65,000.00. Mr Joseph gave evidence that Mr Payne admitted that he was responsible for causing the accident, and he referred him to Sagicor, his insurers. He made a claim to the insurers but the claim was deferred and he was eventually informed that Sagicor would not compensate him; hence the institution of the suit.
- [15] Mr Joseph was cross-examined by Mr Derrick. He maintained that he was unable to apply his brakes or swerve because the accident happened so suddenly. He was adamant that he saw the donkey after the accident. He acknowledged that he gave a statement to the police on 2nd September 2010 indicating that approximately 3:00am on 31st July 2010; he was driving his car along Jonas Road in the Mount Joy area when some animals ran across the road from West to East. He kept driving straight but the vehicle travelling in the opposite direction pulled over on him and both vehicles collided. He later realized that the animals were donkeys.
- [16] Asked whether he sold the damaged vehicle, Mr Joseph said that he bought another vehicle, but the vehicle that got damaged is parked in his yard. He has not carried out any repairs on it, despite the fact that he obtained an estimate for the repairs, as he had not received any money from the insurers to do so.

(b) Constable Virlica Chatham

- [17] Constable Chatham in her witness summary stated that at about 4:00 am on 31st July 2012, she visited the scene of the accident. Both vehicles sustained severe damage. Both drivers gave her an explanation as to how the accident occurred, which she recorded. She also took measurements at the scene of the accident. As a result of her investigations, she determined that Mr Payne was at fault.
- [18] In her oral evidence, Constable Chatham stated that the width of the road was 20ft; the point of impact was 15 ft on the Claimant's side of the road. The Claimant's vehicle was pointing in a south easterly direction; and the Defendant's vehicle was pointing in an easterly direction.

(c) Keith Herbert

- [19] Keith Herbert was called as a witness for the Defendant. He identified himself as Agency Administrator of the branch office of Sagicor General Insurance Inc in Antigua. He stated that at the date of the accident, Mr Payne held a valid motor vehicle insurance policy with Sagicor. Mr Payne notified him of the accident. On or about 2nd August 2010, he attended the scene of the accident and took photographs of the scene and surroundings. He stated that he engaged the services of Trevor Browne, an Accident Investigator to investigate the accident. He paid Trevor Browne \$3,575.00 for his services. He obtained a Police Report

for which he paid \$50.00. At the end of the investigation and assessment, the Defendant's vehicle was adjudged a total constructive loss. The Defendant was offered a settlement of \$47,000.00 which he accepted, in accordance with the terms of a Deed of Release executed by the Defendant.

[20] On or about the 23rd December 2010, the Claimant's attorney made a formal claim on behalf of his client, but the claim was rejected.

[21] Mr Herbert was cross examined by Mr Weste. He stated that he was not present at the scene at the time of the accident. He further stated that the vehicles were not at the scene at the time he visited it. Asked whether he incorporated the Report from Trevor Browne in the documents he tendered in evidence, Mr Herbert replied "I didn't see the full report."

(c) Valdene Payne

[22] In his Witness Statement, Mr Payne is represented as a Window Engineer by occupation. He stated that on 31st July 2010 at approximately 3:00 am, he was driving his vehicle from South to North on Jonas Road, when a donkey emerged from the overgrown brushes and trees on his near side and he instinctively swerved to avoid colliding with the donkey and collided with Mr Joseph's vehicle being driven in the opposite direction. The donkey took him by surprise and he reacted instinctively by swerving right into the path of the oncoming vehicle. It was an unavoidable and inevitable accident.

[23] Mr Payne stated that he dialed 911, and an ambulance arrived on the scene and transported him to the hospital where he was examined and released. On the instructions of the Police, he attended at the Parham Police Station and gave a statement. His vehicle was insured to the value of Sixty Thousand Dollars (\$60,000.00) with Sagicor. He made a claim and his vehicle was considered a total loss. In accordance with the terms of a Deed of Release, his insurers paid him \$47,000.00 in full and final settlement of the Claim.

[24] He stated that he does not agree with the conclusion as set out in the Police Report. He has never been charged or prosecuted in relation to the accident. He stated that he acted as a reasonable driver would have acted in an emergency.

[25] Mr Payne said in cross-examination that he did not hit the donkey, but he did not have sufficient time to avoid the collision. When the donkey approached, it was quick from the side and he swerved. He maintained that the collision was unavoidable and inevitable.

[26] The following exchange then took place:

Q: Do you know Mr Joseph sued you so you can get some money for your car?

A: Yes

Q: Do you know that you sued him for damage to your car?

A: No.

Q: Do you believe that Mr Joseph did anything to contribute to the accident?

A: No.

Q: So, on pages 12 and 13 where you say that the Claimant failed to take any action to avoid the collision, is that true today?

A: It was a sudden reaction on my part.

[27] Mr Payne also said in cross-examination that Mr Joseph never left his side of the road. He denied that he (Mr Payne) was driving at a fast pace. He said that he was driving at 40 miles per hour on a dark unlit road. Asked whether he applied his brake when he saw the donkey, Mr Payne answered "No."

[28] Mr Payne admitted in cross-examination that after the accident, he spoke to Mr Joseph accepting responsibility for the accident. When it was suggested to him that he was responsible for causing the collision between the two vehicles, Mr Payne answered "I agree."

THE SUBMISSIONS

[29] In his closing submissions, learned counsel for the Claimant, Mr Weste, argued that the Claimant was wholly responsible for the collision. He submitted that the Defendant was under a duty to apply his brake and bring the vehicle to a complete halt upon realizing that there was a donkey in his path. For this submission, counsel placed heavy reliance on the dicta of Blenman J in the Antigua case of **Sylvena Morson v Leron Lewis**¹ wherein the facts are similar to the facts in the instant case.

[30] Mr Weste also submitted that the Defendant's action fell below the standard of care owed to the Claimant not to drive into his path. He cited the St Vincent case of **Rodney v Quow**² wherein the Court of Appeal concluded that the Respondent was wholly to blame for a fatal accident in a situation where the Respondent, turned right to avoid a donkey galloping towards his vehicle on a Road with which he was familiar. The Court of Appeal found that the Appellant had shown that the Respondent fell below the standard of care that he owed to the deceased.

[31] As to the contention that the Defendant acted instinctively, and that the accident was unavoidable and inevitable, Mr Weste submitted that that defence is untenable, given the fact that Jonas Road is an unlit road, and thus the Defendant was under a very high duty of care to drive cautiously in the circumstances. It was the further submission of counsel that the Defendant was under a duty to anticipate the presence of the donkey and to act in

¹ Claim No ANUHCV2005/0166, at paragraph 47

² St Vincent and the Grenadines Civil Appeal No 9 of 2005, at paragraph 11

a manner that a reasonable and prudent driver would. For this submission, counsel quoted Rowlatt J in the Trinidad case of **Page v Richards and Draper**³ as saying:

"It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be people or animals or things in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he has seen it. ..."

"In those circumstances, I cannot see how the defendant can avoid the dilemma in which he is put by law. Either he did not keep a good look out, in which case he was negligent, or if he did keep a good look-out then he failed to drive the car at such speed or under such control as to enable him to avoid the plaintiff's body. There is no escape from the dilemma..."

- [32] It was the further submission of counsel that the Defendant failed to observe the provisions of the Highway Code in that he did not stop and he did not slow down. He swerved directly into the Claimant's line of traffic thereby causing the collision.
- [33] Finally, as regards the Counterclaim, Mr Weste pointed out that the Defendant did not lead any evidence whatsoever in his Witness Statement which suggested that the Claimant acted in a negligent manner at the time of the accident or at all. Nor did the Defendant put any case of negligent conduct to the Claimant, counsel argued. So far as Mr West was concerned, there is no evidence that the Claimant was driving too fast or that he failed to keep a proper look out.
- [34] Mr Weste concluded his submissions just as he commenced them, that is, by submitting that it was the Defendant who was wholly responsible for causing the collision. He submitted that the Claimant did all that was required of a reasonable and prudent driver, and cannot be held liable in negligence to the Defendant. The Claimant is therefore entitled to the replacement value of this motor vehicle in the sum of \$65,000.00, and costs, submitted counsel.
- [35] Mr Colin Derrick for the Defendant submitted that the collision occurred not because of any negligence on the part of the Defendant, but as a result of the sudden emergence of the donkey. He pointed out that the Defendant's case is consistent with the Claimant's case that just before he passed, the Defendant swung into his path; that he did not see the animals until after the collision; that the Defendant swung in his path and it happened suddenly. He made reference to the fact that some four weeks after the accident the Claimant gave a similar statement to the Accident Investigator.
- [36] Mr Derrick submitted that the Claimant has never denied the Defendant's account of the cause and manner of the collision – not to the Accident Investigator; not in his evidence in chief; not in cross examination.

³ T&T HCA No 2656 of 1998 paragraph 4

- [37] Mr Derrick further submitted that in the circumstances in which the collision occurred, it is reasonable and compelling for the Court to infer that the Defendant was caught by surprise and had little time for thought or space to avoid the collision, and his reaction in the circumstances was not unreasonable.
- [38] It was the Defendant's further submission that the sole and inevitable cause of the accident was the sudden emergence of the donkey from the bushes causing the Defendant to instinctively swerve into the path of the Claimant's vehicle.
- [39] Finally, Mr Derrick submitted that the evidence tendered in the trial overwhelmingly supports the contention that, but for the sudden emergence of the donkey from the overgrown bushes and trees on the near side of the road on which the Defendant was travelling, there would not have been a collision between the Claimant and the Defendant. The Defendant, Mr Derrick submitted, acted as a reasonable driver in an emergency; and taking into consideration the exigencies of the situation at the material time, the Defendant's conduct was not unreasonable, and the court should not infer negligence on the part of the Defendant, notwithstanding the collision.
- [40] In support of his submissions and contentions, the Defendant relied on numerous cases including:
- (i) **Richie's Car Hire Ltd v Bailey (1958) 1081 Jo 348**
 - (ii) **Parkinson v Liverpool Corporation [1950] 1 All ER 367**
 - (iii) **Green v Sookdeo Trinidad and Tobago Privy Counsel Appeal No 64 of 2008; and**
 - (iv) **Quin v Scott [1965] 2 All ER 588**

Alternative contentions of the Defendant:

- [41] In the alternative, the Defendant contends that if the court is minded, on the evidence adduced at the trial to infer negligence as a cause of the collision, the court should find that the Claimant was negligent in the manner in which he drove his vehicle at the material time, and that he contributed to the cause of the collision.
- [42] In support of that contention, the Defendant relied on paragraph 3 of the statement dated 2nd September 2012 (Exhibit DH 2) made by the Claimant to the Accident Investigator when the accident was still fresh in his mind as well as paragraph 2 (i) of the Claimant's Reply. After quoting the said statement and the contents of paragraph 2 of the Reply, and excerpts of Claimant's oral evidence, in relation to him seeing the animals and his lack of opportunity to apply his brake, Mr Derrick pointed out inconsistencies in the Claimant's case, and urged the court to give credence and weight to the Statement made by the Claimant to the Accident Investigator.
- [43] In his concluding remarks, Mr Derrick urged the court to dismiss the Claimant's claim with costs, and in the alternative, the court should infer that the Claimant is partly liable in negligence for the cause of the collision, and award consequential damages in such proportions as may be deemed appropriate. Alternatively, the Claimant asked the court to

find that the Claimant and the Defendant are equally liable in negligence for the collision, and therefore, they should bear their own consequential damages arising therefrom.

[44] In support of his alternative contentions, the Defendant relied on the following cases:

- (i) **Nance v British Columbia Electric Railway Co Ltd [1995] AC 601;**
- (ii) **Baker v Market Harborough Co-operative Society Ltd [1953] 1 WLR; 1492;** and
- (iii) **W and M Wood (Haulage) Ltd v Redpath [1967] 2 QBD 520**

ANALYSIS AND FINDING

[45] There are common threads running through the evidence of the Claimant and that of the Defendant; (1) that at about 3:00 on 31st July 2010, the parties were travelling in opposite directions on Jonas Road; (2) that Jonas Road was unlit and dark, and bordered with overgrown shrubs and trees; (3) that there was a donkey in the road on the Defendant's side; (4) that the Defendant made a sudden swerve into the path of the Claimant; (5) the vehicles collided; (6) Both vehicles were extensively damaged and subsequently written off; (7) Police arrived on the scene of the accident; measurements were taken; statements given.

[46] Looking at the totality of the evidence adduced at trial, it can hardly be said that the parties themselves (as opposed to their legal representatives) part company in anything, except for the suggestion that the Defendant was speeding. The Defendant in cross-examination conceded that he was responsible for the accident; and stated that he did not believe the Claimant contributed to the accident. I take that to mean that he was wholly responsible for the accident. That bit of evidence, coming from the Defendant seemed to suggest that the issue as to liability in negligence had been established there and then, and that the sole issue left to be determined was that of quantum. Notwithstanding the Defendant's acceptance of responsibility for the accident, and his belief that the Claimant did not contribute to the accident, there are other aspects of the evidence that the court must take into consideration in the interest of justice.

[47] I find the Defendant to be a credible witness, even though to his own detriment.

[48] On the other hand, there were in fact inconsistencies in the evidence proffered by the Claimant. In particular, the Claimant's Statement in relation to him seeing animals crossing the road and driving straight without applying his brake or slowing down contradicted what he said in his Reply and what he told the court in cross examination.

[49] Mr Payne's testimony showed that he was driving carefully, and an emergency occurred. He took evasive action and an accident occurred. In **Pakinson v Liverpool Corporation**, supra, an omnibus driver applied his brake suddenly, and brought his vehicle to a stop to avoid running over a dog. A passenger was at that moment walking down the gangway with the intention of alighting at the next stop. He was thrown to the floor of the vehicle

and sustained personal injuries for which he claimed damages on the ground of negligence. He failed in his bid to recover damages. It was held that “the driver, faced with a sudden emergency caused by the dog’s appearance in front of the omnibus, acted as an ordinary and careful driver ought to act in such circumstances and, therefore, he was not guilty of negligence...”

[50] I accept that Mr Payne’s evidence established that an emergency arose when the donkey emerged from the bush to his near side of the road. I accept that he was travelling at about 40 miles an hour. Was his action in swerving to the right to avoid the donkey that of an ordinary reasonable and careful driver? The evidence is that there was visible oncoming traffic, that is, the Claimant’s vehicle. By his action, Mr Payne placed himself on the right side of the road, which put him directly in the path of the oncoming vehicle, and the two collided. In **Parkinson**, supra, the driver applied his brake. Here, Mr Payne did not apply his brake.

[51] From the evidence, there was some suddenness about Mr Payne’s action. He stated that he acted instinctively, and that the accident was unavoidable and inevitable.

[52] It appears to me, however, that in the circumstances, it ought to have occurred to Mr Payne that animals would likely have been lurking in the bushes. It ought to have occurred to him that by swerving to the right to avoid the donkey, directly in the path of the oncoming traffic he had created a potentially dangerous situation to other road users. His action was certainly not that of a prudent and careful driver. He failed to apply his brake. Having swerved to the right to avoid the donkey, he apparently had no time to return to his side of the road. This further highlights the danger created by his action. In the circumstances, I find Mr Payne liable in negligence.

[53] Did Mr Joseph contribute to the accident? Mr Joseph was traveling on the proper side of the road, at about 20 miles per hour. His oral evidence is that he did not leave his side of the road. He had no time to take evasive action. The accident happened suddenly. In his Statement to the Accident Investigator, he said he drove straight upon seeing the animals crossing the road. According to what was foreshadowed in the Reply to the Defence and Counterclaim, (to which a Statement of Truth was appended), Mr Joseph applied his brake and swerved his vehicle to the left to avoid the collision. But he changed that stance in his oral testimony. The exchange that took place is most telling:

Q: When you were travelling along that road North to South and the Defendant swerved into your path, were you not able to press brake?

A: No. It happened suddenly.

Q Nor were you able to try to swerve; is that correct?

A: Yes

[54] Based on the evidence, I am not of the view that Mr Payne was wholly liable in negligence for the accident. I am of the view that Mr Joseph contributed to the accident by his failure

to slow down, when he saw the animals crossing the road. I do not believe him when he said that he saw the animals after the accident occurred. It may be that he did not see the donkey that emerged from the bushes near to the Defendant's vehicle. But he did see other donkeys crossing the road, and he failed apply his brake, slow down or stop. Had he slowed down or stop, it may have afforded some room for the Defendant to avoid the donkey that emerged on his near side, and get back on to his side of the road. In my judgment, Mr Joseph did not do everything to avoid the collision. I find that he did in some way contribute to it. Even though the Defendant indicated that he did not believe Mr Joseph contributed to the accident, on the totality of the evidence, I would apportion blame 75/25 in favour of the Claimant.

Measure of Damage

[47] The true measure of loss and damage in a case of this nature must be the difference in the value of the motor vehicle, pre and post accident and not the replacement value, and any consequential loss claimed as a result of the collision.

[48] The Claimant claims special damages of \$65,000.00 as the replacement value of his vehicle. He has produced an estimate of the repairs from Alfred Titus Auto Body Repair Shop. This report showed the pre-accident value as \$65,000.00, and the post accident value as \$10,000.00. It means that the special damage claimed should have been \$55,000.00, since the Claimant is in possession of the wreck.

[49] In the result, it is hereby ordered that

- (1) Judgment is entered for Charles Joseph against Valdene Payne the sum of \$41,250.00 being 75 per cent of \$55,000.000.
- (3) The Counterclaim was not pursued and is therefore dismissed.
- (4) The Claimant is awarded Costs as prescribed under CPR 65.5, Appendices A and C.

[50] I would be remiss if I did not express gratitude to counsel for their very impressive submissions and authorities.


Pearlita E Lanns
Judge [Ag]