THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2015/0058

BETWEEN:

JAMES JOSEPH

(of Fair Hall)

CLAIMANT

and

DAVID CULZAC

FIRST DEFENDANT

UNITED INSURANCE COMPANY LTD.

SECOND DEFENDANT

Appearances:

Mr. Stephen Williams with Sten Sergeant Esq. for the Claimant

Mrs. Zhinga Horne-Edwards for the Defendants

2017: December 12

2018: March 1

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[1] **BYER, J.:** A quiet Friday night was interrupted by the sound of a collision on Murray's Road in the capital Kingstown, and this claim was born.

BACKGROUND:

[2] On Friday night May 11th, 2013 the Claimant while riding along Murray's Road on mainland St. Vincent when his motorcycle PE471 was involved in a collision with the First Defendant's motor vehicle PE701. The Claimant pleaded that upon reaching the Ministry of Agriculture ("the MOA") property, he entered into the center lane to proceed to turn right into the by-road leading to the Kingstown Preparatory School, whilst at a complete stop the Defendant struck him causing him personal injury to his mid pelvis, left femur, left tibia, and the mid shaft of the right femur.

[3] The Defendant denies the accident was his fault. He pleaded in the alternative that the Claimant caused or contributed to his own injuries. In the alternative side of the story, the Defendant pleaded that when he was rounding the bend in the vicinity of the MOA, the Claimant was on the wrong side of the road and rode directly into the path of his motor vehicle.

[4] The issues in this case were therefore simple and were identified succinctly by Counsel for the Claimant in the Trial Submissions[1].

ISSUES

[5] There were therefore two issues to which the Court was asked to address its mind. These were:

a) Whether the Defendant was liable for the accident, or in the alternative

b) Whether the Claimant caused or contributed to the accident, and if so, what percentage of blame should or could be attributed to him.

ISSUE #1 – Whether the Defendant was liable for the accident?

[6] The evidence in this trial was provided solely by the Claimant and the Defendant with two very disparate versions of how the accident occurred.

[7] Before I however, delve into the evidence in issue, I wish to make a comment on the submission made by the Counsel for the Claimant that this Court should draw an adverse inference against the Defendant for his failure to present his sole witness and occupant in the vehicle that night, Josel John, to the Court.

[1] Filed 21 December 2017

[8] In that regard, I will state that the case sought to be relied upon by Counsel for the Claimant, to persuade this Court had a very dissimilar factual matrix .That case[2] sought to speak to the drawing of adverse inferences where there had been a no case submission made on behalf of the Defendant who in fact chose to call no evidence at all. I do not accept that that case therefore set any general proposition that in all situations where a party fails to call a witness who may, in fact assist on the issue in question, that an adverse inference should be made against that failing party. Therefore, in the case at bar I do refuse to draw any adverse inference against the Defendant for such failure.

[9] However, having made such a submission, Counsel for the Claimant then made the startling request of this Court to rely on the witness statement of this missing witness Josel John. I say startling, as by case management order dated 4th February 2016, Actie, M order inter alia *"witness statements do stand as examination in chief. All witnesses are to attend the hearing for cross examination unless the other side dispenses with such attendance by notice in writing".*

[10] As the trial unfolded, it was clear there was no such dispensation by the Claimant and therefore, it is clear that the operation of the Civil Procedure Rules 2000 must be applicable.

Under Part 29.8 (1) the Rules clearly state, that if a party (a) has served a witness statement or summary **and** (b) wishes to rely on the evidence of that witness, that party must call the witness to give evidence unless the Court rules otherwise.

[11] Additionally, by Part 29.2 (1), the general rule is that any fact which needs to be proved by evidence of witnesses is to be proved at "(a) trial – by their oral evidence in public" and further adds that this general rule is of course "… subject to an order of Court or a contrary provision in the rules."

[12] Therefore, it is clear to this Court that the Defendant having failed to bring Ms. John and not seek to rely on her evidence; there was no evidence from her on which this Court could rely. I therefore, reject any attempt by Counsel for the Claimant to refer the Court to the content of that witness statement which forms no part of the evidence before this Court.

[2] **Calvin Todman (As Executor of the Estate of Edward Todman, deceased) v Marguerite Hodge** HCVAP 2012/002

[13] That being said, I therefore reiterate that the evidence in this case comes down to that of the Claimant and the Defendant only. This therefore requires a somewhat detailed assessment of the same.

i) Evidence of the Claimant

[14] As indicated, the Claimant alone gave evidence on his behalf. His version of events is thusly - On the night of the 11th day of May 2013, he was at a bar at Fountain where he had been playing dominoes for approximately an hour and half. His further evidence was that during that time he drank no more than a coke. Upon leaving Fountain, he travelled to Kingstown to pick up a friend at a bar close to the Almond Tree, in the area between the National Lottery Tennis Court and the Girls' High School Net Ball Court.

[15] The Claimant through his evidence in chief by witness statement, stated that he travelled to Kingstown via Sion Hill and that he entered the centre lane designated for right turns by the Kingstown Preparatory School. While at a complete stop, the Defendant travelling from the direction of Kingstown approached him at "speed" striking him while he occupied the centre lane. The Claimant stated that he had to be hospitalised due to his injuries and claimed the Defendant was solely responsible for the accident and hence his injures.

[16] On cross examination, he attempted to maintain that he had been in the centre lane and that he had not been in the lane of the Defendant assigned to oncoming traffic from the direction of Kingstown. However, under extensive and meticulous cross examination he eventually admitted that he was not in fact at a standstill when he first saw the Defendant's vehicle and that in fact he was moving down the centre lane when an earlier unknown vehicle had passed him without incident and when he saw the Defendant's vehicle.

[17] When these inconsistencies were raised, as to whether he was moving or stationary, the Claimant sought to rely on his evidence in chief in which he said he was stationary.

[18] However, the Court must note at the site visit to the scene of the accident, the Claimant was unable to indicate where he had stopped when he awaited the passing of the Defendant's vehicle. The Court therefore accepts that on a balance of probabilities, that the Claimant had not stopped

as he sought to maintain, but was moving when the collision occurred. What that means for this Claimant the Court will examine shortly.

(ii) Evidence of the Defendant

[19] The Defendant by his witness statement painted an entirely different picture of what transpired that night.

[20] He like the Claimant had been "liming" with friends and ended up at a Barbeque with two friends who he had met at Heritage Square. Whether they meet there by accident or design is of no consequence to this Court.

[21] Having left the Barbeque and the previous hangout spot the Defendant who did not drink due to health problems at the time which have now manifested into pancreatic cancer, was driving out of Kingstown to drop one of the female passengers to Murray's Village while he was taking the other female passenger home with him to Richmond Hill.

[22] The Defendant stated that when he was driving along the main road leaving Kingstown, as he got to the area "above" the Thomas Saunders Secondary School while in his correct lane, the left lane, of the road to proceed straight out of town, he saw the Claimant approaching him.

[23] The Defendant stated that he saw the Claimant on his side of the road riding erratically. The Claimant was about 25 feet away from him at that time and he pulled to the right to avoid hitting him just in front of the Ministry of Agriculture. This point was indicated to the Court at the site visit, but the end result was that he could not avoid hitting him. His evidence was that the Claimant hit the left hand side of his vehicle went over it and landed behind his car. He told the Court that ninety percent of the Claimant's body was on his side of the road with only his ankle on the line for the centre lane.

Court's Analysis and Considerations

[24] In addressing its mind to whether the Defendant on the evidence given is solely liable for the accident, it is necessary for this Court to consider as a first consideration to clearly state what

behavior amounts to negligence to make an individual liable in law. What is clear in that regard therefore is that not every act of carelessness or negligence is actionable.[3]

[25] As was explained by Lord Wright in the case of **Lochgelly Iron and Coal Co Ltd. v. McMullan**[4] *"in strict legal analysis 'negligence' means more than heedless or careless conduct, whether in omission or commission, it properly connotes concepts of* ***duty, breach and damage*** *thereby suffered by the person to whom the duty was owing."(My emphasis)*

[26] This concept was further distilled by the writers of the text **Clerk and Lindsell on Tort**[5] who clearly indicated that a Claimant must prove the following:

> 1)The existence in law of a duty of care; 2) Careless behavior by the Defendant; 3) A causal connection between the Defendant's careless conduct and the damage; 4) Foreseeability that such conduct would have inflicted on the particular Claimant the particular damage he complains (once (1) to (4) are satisfied, the Defendant is liable in negligence and only then will the next two factors arise); 5) The extent of the responsibility for the damage to be apportioned to the Defendant where others are also held responsible and 6) The monetary estimate of the extent of damage.

[27] At the beginning of this trial it was agreed by the parties that only numbers one (1) to five (5) are to be determined by this Court and as such I will so address my mind.

[28] There is no doubt in this Court's mind that the Defendant owed a duty of care to the Claimant as a fellow road user. It was the duty of the Defendant to drive his vehicle in such a way so as to not cause injury or damage to other road users, those designated as his "neighbours".

[29] The question however, must be whether he breached such duty.

[30] The Claimant pleaded six (6) particulars of negligence and additionally relied on the doctrine of *res ipsa loquitur.*

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[3] **Commonwealth Caribbean Tort** Gilbert Kodiliyne Page 63
[4] [1934] AC 1 p25
[5] 18th ed. page 219.

[31] Before I therefore, deal with the particulars of negligence and whether the Defendant in fact was in such breach, I must say a quick word on the pleading of "*Res Ipsa*" as raised.

[32] In order for the Claimant to rely on this doctrine, he must establish two things: 1) that the thing causing damage was under the management or control of the Defendant or his servants and more importantly 2) the accident was, of such a kind, as would not in the ordinary course of things have happened without negligence on the Defendant's part. That is, the facts speak for themselves as to a prima facie case of negligence.

[33] I do not agree that this doctrine applies in the present case. Indeed the vehicle that was involved in this accident was under the control of the Defendant but I do not accept on a balance of probabilities that the negligence of the Defendant was the only possible cause for the accident.

[34] I therefore, find that this doctrine it is of no assistance to the Claimant to establish the negligence of the Defendant.

[35] Having said that, I accept that on the balance of probabilities and the evidence that was elicited from the Defendant on cross examination that he had failed to observe the road ahead, failed to keep a proper look out and heed the presence of the Claimant in sufficient time to avoid the collision.

[36] The Defendant admitted he did not see the Claimant until he was some 25 feet in front of him. On a night with little to no traffic as admitted by both parties, it is unclear to the Court how a driver could not see a lone cyclist approaching him from a distance of more than 25 feet. I accept that the Defendant was distracted by the company in his car at the time and such distraction resulted in the Defendant being unable to successfully avoid the collision completely.

[37] Additionally, the Claimant pleaded the speed at which the Defendant was travelling as one of the particulars of his alleged breach.

[38] In the case of **Richards v. Francois**[6], Mohammed J stated that one could look at the extent of damage and the point of stoppage after the accident to consider whether there was evidence of excessive speed on the part of the Defendant to establish actionable negligence. In that case, from the damage to the vehicle and the stopping distance or brake impressions of approximately 40 feet

[6] GDAHCV2010/0156

from the point of impact, the Honourable Judge came to the inescapable conclusion, that the Defendant in that case was speeding.

[39] It is with interest that I note the authority supplied by Counsel for the Claimant from **Bingham & Berryman Motor Claims Cases**[7] which proffered, that a brake impression of the region of 59 feet after impact correlated with a driving speed of between 35 – 40 mph. When one considers the very unhelpful police report that was submitted for trial, this was a similar distance measured by the Police in the case at bar. Additionally, when this Court took into account the damages noted to the left side of the Defendant's vehicle together with his evidence on cross examination that the Claimant flew over his vehicle, I accept on a balance of probabilities that the Defendant was travelling at an excessive speed in all the circumstances.

[40] This Court having found that the Defendant owed a duty to the Claimant, went onto breach that duty and that there is a causal link between the nature of the damage and that breach. I find that the Defendant is in fact liable to the Claimant and that his actions were "part of the effective cause of the collision". However, I also find as a fact that the Claimant was not "free from fault"[8].

[41] Therefore, the second issue must be now addressed.

Issue #2 – Whether the Claimant caused or contributed to the accident and what percentage of blame should be attracted to him?

[42] This Court having determined that the Claimant is not free from fault must now address its mind to the contribution if any that can be attributed to him and therefore the issue of contributory negligence and whether it applies in these circumstances must be considered.

[43] The test to be applied with regard to making a finding of contributory negligence was succinctly stated in the case of **Melvina Frett-Henry v. Tortola Concrete Limited et al**[9] where the Court of Appeal ruled that the primary questions that a Court must ask itself are two-fold. Those are whether the Claimant on a balance of probabilities established: i) foreseen harm to themselves and

[7] 11th Ed.
[8] Melvina Frett – Henry v Tortola Concrete Limited et al 24/2008 BVI High Court Appeal per Edwards JA par 44.
[9] Open Court

ii) acted as a reasonable prudent person for her or his own safety and guarded themselves against the negligence of the Defendant.

[44] Thus contributory negligence does not depend on a breach of duty to the Defendant but on a lack of care by the Claimant for his own safety[10].

[45] On a balance of probabilities, I accept that in the instant case, the Claimant had not come to a complete stop when he sought to make the right turn into the turn off to Kingstown Preparatory School. I further accept from the totality of the evidence and given the damage to the car of the Defendant, that the Claimant was travelling on the wrong side of the road, namely in the lane for outgoing traffic from Kingstown.

[46] I therefore accept that the Claimant by his own action contributed to his injuries by his failure to take reasonable care for his own safety by driving on the wrong side of the road and not stopping to ensure there was no traffic before effecting a turn. I accept that this is especially so when he stated in evidence and again at the site visit that he had seen the Defendant from some distance away, in fact one hundred feet away.

[47] I therefore find that the Claimant contributed to this accident.

[48] Having so found, the further and final issue must be with regard to the making of a finding on the relative proportions of the contributions as between these parties.

[49] I find that on a balance of probabilities, that the Claimant by and large presented the sequence of events which highlighted the failures of the Defendant. Therefore, in my mind the Claimant must bear more than a mere 5% contribution as suggested by Counsel for the Claimant.

[50] I find that in the circumstances of this case, greater responsibility should be placed on the Claimant who in flagrant disregard of his own obligations to himself, highlighted the shortcomings of the Defendant's owed duty of care to the Claimant. I therefore apportion liability to the Claimant at 65% and the Defendant 35%.

[10] **Alphonso & Ors v Deodat Ramnath** 56 WIR 183 at 188 per Singh JA

IT IS HEREBY ORDERED AS FOLLOWS:

ORDER

[1] The Defendant is liable for the accident with a finding of contributory negligence against the Claimant in proportion of 65% to the Claimant and 35% to the Defendant.

[2] Damages are to be assessed by a Master of the High Court upon application of the Claimant to be filed within 21 days of today's date with leave to the Defendant to file a response 14 days thereafter.

[3] Submissions are to be filed by the parties on the assessment of damages within 28 days of today's date.

[4] A date for the assessment is to be set by the Court Office.

[5] Costs to be prescribed costs as found on the sum awarded on the assessment of damages.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar