EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV2015/0004

BETWEEN:

HAROLD MALONE

Claimant

-AND-

KIRK PHILLIPS

Defendant

Appearances: Mr. Jamal Smith of Thornton Smith, Counsel for the Claimant
Mrs. Marie Lou Creque of SCA Creque, Counsel for the Defendant

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2019: April 29th

JUDGMENT

[1] Ellis J: The Claimant claims damages of in respect of loss and personal injuries sustained as a result of a motor vehicular accident which occurred on 16th July, 2012. The Claimant asserts that he was proceeding from the intersection of Diamond Estate Public Road toward the east bound section of the Harrigan Estate Public Road when a vehicle proceeding on the west bound section of the Harrigan Estate Public Road came to a stop. The Claimant contends that the Defendant overtook that vehicle which had stopped before the intersection and so negligently drove his vehicle so as to cause it to collide with his vehicle.

[2] The collision was investigated by the Royal Virgin Islands Police and following his prosecution, the Defendant, was found guilty and convicted of the offence of driving without due care and attention contrary to section 30 of the Road Traffic Act. The Claimant relies on this recorded conviction for its full import.

[3] In his Defence, the Defendant denied overtaking a vehicle in the intersection. He denied being in breach of his statutory obligations of the Road Traffic Act and indeed, he denied all of the particulars of negligence alleged by the Claimant in paragraphs 3(a) – (d) of his Claim. The Defendant further contended that the Claimant caused and/or contributed to the collusion due to his negligent operation of his motor vehicle in traversing from a minor road into a major road. The Defendant contends that the Claimant did not yield the right of way to motor vehicles approaching on the major road as he is obliged to do under section 38(13) of the Road Traffic Act.

[4] The Claimant denied all allegations of contributory negligence in his Reply and *pleaded res ipsa loquitur* in support of his claim that the Defendant caused the accident. He contends that the nature and extent of the damage to his vehicle is of a kind that would not ordinarily occur unless the Defendant drove his vehicle too fast and failed to keep a proper look out to observe other vehicles travelling on the road. He also contends that the Defendant failed to apply brakes on to manage or control his vehicle so as to avoid the collusion.

[5] At pre-trial review, this matter was bifurcated and so the trial was confined to the issue of liability only. After considering the witness statements in the case and after hearing and observing the oral testimony of the witnesses, the Court is satisfied that the Claimant had made out his case on liability on a balance of probabilities.

[6] The Parties' recounts of the accident were conflicting and inconsistent. This meant that the Court was required to resolve these inconsistencies through a careful assessment of their demeanor and their veracity and reliability. Generally, the Court preferred the evidence of the Claimant and that of his witnesses Rodwell Stewart and Officer Lionel Lindo. Despite Counsel for the Defendant's trenchant attempt to discredit the evidence of Officer Lindo, the Court was not satisfied that there was any material inconsistency made out in his evidence.

[7] On a whole, the evidence of the Claimant's witnesses presented a more plausible explanation of how the accident occurred. The Court has no hesitation in finding that the Defendant owed a duty of care to the Claimant as a fellow road user and this included a duty not to overtake when he may come into conflict with other road users, for example, when approaching or at a road junction on

either side of the road as well as duty to approach an intersection cautiously, keeping a proper lookout for other vehicles coming from the minor onto the major road.

[8] Having heard the evidence of the Defendant it is clear to this Court that he breached his duty.

[9] On the Defendant's own evidence, he approached in the intersection of Diamond Estate Public Road and Harrigan Estate Public Road at a speed of 20 – 25 mph after overtaking or passing the vehicle owned by Mr. Lloyd. The Defendant's evidence is that he saw the Claimant exiting the Diamond Estate Public Road or the minor road but assumed that the Claimant would stop (once he had seen him) and so he did not apply his brakes to avoid the collusion.

[10] The Court finds that the Defendant did indeed overtake Mr. Boise Lloyd's stationary vehicle just before he approached intersection and if the Court accepts the Defendant's evidence, it is clear that he did not overtake that vehicle as a low enough speed which would have given him an opportunity if a vehicle did emerge into the intersection of taking evasive action. Instead, he overtook at a speed of about 20 – 25 mph that very substantially and foreseeably increased the risk of collision and serious injury if a vehicle did emerge. In doing so, the Defendant clearly operated his vehicle in a negligent way.

[11] The Court is however satisfied that with speed at which he approached the intersection and having recently overtaken the vehicle owned by Mr. Boise Lloyd, the Defendant failed to keep a proper look out for other users of the road, in that he failed to see the Claimant in sufficient time to avoid colliding with his vehicle. The Court is satisfied that at the time of the collision the Claimant's vehicle was sufficiently positioned on the left side of Harrigan Estate Public Road in such a way that demanded that the Defendant slow down or stop his vehicle in order to avoid the collision.

[12] The Court is reinforced in this conclusion by the criminal conviction recorded in the Magistrate Court. By virtue of section 91(2) of the Evidence Act of the Virgin Islands, a defendant's criminal conviction is admissible in evidence for the purpose of proving that he committed that offence. However, section 91(2) permits a convicted person who is a defendant in subsequent proceedings to call evidence to show that he was wrongly convicted. J v Oyston[1].

[1] (1999) 1 WLR 694

[13] A prior criminal conviction, provided that it is relevant to the issues to be decided in the civil matter is therefore admissible in subsequent civil proceedings and constitutes at least *prima facie* proof of the convicted person's culpability.

[14] In McCauley v Hope (Carryl, a third party)[2], the English Court of Appeal held that provided he has some good cause for so doing, and can discharge the burden of proof to a civil standard, a defendant in a road traffic case may seek to dispute his criminal conviction. The effect of admitting evidence of a conviction in civil proceedings is therefore to shift the legal burden of proof from the party who would otherwise have to prove the offence to make good his claim to the party who had been convicted who must prove on the balance of probabilities that he was innocent and who unless he discharges that burden must be treated for all relevant purposes as having committed the offence of which he was convicted; but in determining whether the party convicted has discharged that burden of proof, it is not the function of the judge to consider what view he himself might have taken of the criminal trial had he sat on it as judge. JW Stupple v Royal Insurance Co. Ltd[3].

[15] In this regard, the Defendant has done little in aid of discharging his considerable burden to produce evidence that the conviction was incorrect. It follows therefore that the Defendant's conviction is persuasive evidence of the criminal finding and of the facts supporting such finding. Given the nature of a criminal trial with its higher standard of proof, the Court is satisfied that presumption of the facts surrounding his prior criminal conviction has not been rebutted.

[16] Having said this, it is also clear that a criminal conviction does not necessarily mean that a person is 100% liable in negligence. It is clear that the decision to charge one and not the other person with the offence of careless driving is usually at the discretion of the police and the mere fact that one of the two drivers is charged does not necessarily mean that the other driver is not liable at all. The issue of contributory negligence is always open to the party despite the conviction. In the instant case therefore, it is open to the Defendant to pursue a defence of contributory negligence. The Court therefore invited the Parties to address this issue only, in supplemental written submissions.

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[2] [1999] 1 WLR 1977
[3] [1971] 1 ALL ER 417

[17] The Court has considered these submissions. In that regard, the Court is guided by section 2(2) of the Law Reform Miscellaneous Provisions) Ordinance Cap 41 of the Laws of the Virgin Islands and by the appellate judgment in Melvina Frett Henry v Tortola Concrete[4].

[18] The Court is satisfied that the party who asserts contributory negligence against a claimant has the burden of specifically pleading it and proving it on a balance of probabilities. Such defendant must prove (1) the fault and (2) the causative effect of the fault.

[19] The Court is also guided by the judgment in Tompkin v Royal Mall Group PLC[5] which prescribed the correct way for a judge to considered the issue of contributory negligence:

(1) First, the Court must assess the parties causative contributions to the accident and injury. In considering, this step it is open to the court to consider the extent of the Defendant's departure from reasonable standard of care. The Court is also cognizant that the standard of care in contributory negligence is judged by what is reasonable in all the circumstances – this is an objective test which requires the court to consider what should be expected of a person who is taking reasonable care of his/her safety.

(2) Then in light of this assessment, the Court must decide what would be a just and equitable apportionment.

[20] Counsel for the Claimant has submitted that the Claimant had a greater duty of care in exiting from a minor road unto a major road and even more so for turning across the flow of traffic. She submitted that the Claimant acted to his detriment and contrary to the safety of his passenger when he exited the minor road in the way that he did. Counsel further submitted that the damage to the Claimant's vehicle is indicative that he was in process of turning onto the Harrigan Estate Public Road (the major road) when his vehicle was struck by the Defendant's vehicle. Although the Defendant rejects the Claimant's evidence that he could see when the Defendant overtook Mr. Lloyd's car, Counsel asserts that if this evidence is accepted it clearly shows that the Claimant acted to his detriment when he continued to proceed out of the intersection when the vehicle was lawfully overtaking on the major road onto which he was about to merge. Counsel submitted that if the Claimant could see the Defendant overtaking from 120 feet away and was able to determine that he was speeding then he should not have continued to proceed.

[4] HCVAP 24 of 2008
[5] 2005 EWHC 1902

[21] In Counsel for the Defendant's words, the more plausible scenario is:

> "the Claimant did not see the Defendant until he was already in his maneuver in the intersection and tried to speed across onto the correct lane but failed to do so."

[22] Rather than address the evidence of the witnesses, Counsel for the Claimant submitted that the Claimant's case of contributory negligence was not properly pleaded to allow the Claimant to know the specific case he was required to meet. He further submitted that no contributory negligence was proven at the trial.

Conclusion/Disposal

[23] The standard of care in contributory negligence cases is judged by what is reasonable in the circumstances Harrison v Ministry of Defence[6]. This concept requires an objective analysis, in other words, the Claimant must take such care as is reasonable to avoid these accidents which fall within the general class of accidents, as opposed to simply that particular accident.

[24] In Woodlam v Turner[7], the Defendant's employee drove a coach from a side road and turned right onto the main road. He drove through a gap in stationary vehicles that were on the main road. The Claimant was driving a motorbike along the main road and overtaking the slow moving vehicles. A collision occurred. The trial judge Parker J., found that drivers should be aware that emerging blindly from a side road even at low speed posed a significant risk to motorcyclists on the main road; that the traffic to the Defendant's right side resulted in him being unable to see oncoming vehicles; that the Defendant could have waited until his view to his right was better. However, the learned judge also found that the Claimant ought to have been aware that there was stationary traffic on the main road and he was approaching a junction. His speed of 20 mph when overtaking the vehicles was, for the traffic conditions, excessive. The Court therefore assessed contributory negligence at 30%.

[6] (1993) CLY 3929
[7] [2012] EWCA 375

[25] On appeal, the appellate court determined that having regard to trial judge's findings of fact, he was wrong to apportion liability in the way that he did. The Court determined that there was no reason to differentiate between the Parties in terms of apportionment of responsibility and ascribed a 50% apportionment for each party.

[26] In **Hamilton v O'Kane and Perry**[8], the Court of Appeal considered an accident involving a motorcyclist carrying a pillion passenger who was over the blood alcohol limit and collided with a vehicle emerging from a minor road. The Court of Appeal held that the rider of a motorcycle and the driver of a car were equally to blame for an accident that occurred when the car driver emerged from a minor road into collision with the motorcyclist who had been travelling on a major road, causing serious injuries to his pillion passenger. The speed of the motorcyclist had not been of causative importance, nor had the fact that his driving was impaired by the influence of alcohol. The trial judge had failed to give appropriate weight to his own finding that the car driver had emerged onto the major road without looking, which effectively meant that he had failed to keep a proper lookout.

[27] Applying the ratio in these cases to the case at bar, the Court finds that the Claimant owed a duty of care to other users of the road to ensure that it was safe to begin and then continue his turning maneuver onto the major road. The Claimant had a duty to assess that it was safe to cross before he did so. In the Court's judgment, the Claimant would have had to have waited until he had a clear view of the road to his right before attempting to make his turn. The Claimant contends that he complied with this duty.

[28] It was common ground that there is a bend on the Harrigan Estate Public Road just before the intersection with the Diamond Estate Public Road. The Claimant testified that the distance between the curve and the intersection is less than 50 feet. He accepted that this meant that he had a duty to keep a proper lookout and he asserted that he did do so. When he was examined under oath, the Claimant stated that he did not see the Defendant's vehicle until he was out in the road to go to Mayer's Estate; he was completely out of the intersection, on the left hand side of the road when he first saw the Defendant. He testified that before proceeding, he looked up and down and there was nothing. In his witness statement, his evidence remained consistent. The Claimant

[8] [2009] EWCA Civ. 931

stated that "*when I saw Dr. Phillips coming toward me I was already traversing the intersection from the Diamond Estate Public Road toward the eastbound section of the Harrigan Estate Public Road.*"

[29] Mr. Stewart's evidence is also relevant. He was the Claimant's passenger on the day in question and he testified that he they arrived at the intersection, they stopped and looked up and saw nothing. They drove across the intersection and had straightened up on the major road and it was only then that they saw the Defendant's vehicle coming down. He reiterated that the Claimant was fully on his side of the major road (the left hand side) when the collision occurred.

[30] Again, Officer Lindo when he was examined under oath testified that collision did not taken place in the intersection but rather in slightly higher up on the major road. His measurements on the scene revealed that the distance from the junction of the Diamond Estate Public Road (the minor road) and the point of impact was 107 feet. In circumstances where the width of the road at the point of impact (as pointed out by both drivers) measured 22 feet and the Claimant's vehicle was met on the left portion of the road facing in a southerly direction, this Court is forced to conclude that the Claimant had in fact completed his maneuver onto the major road when the collision occurred. The Court has also noted the Defendant's own evidence that the accident happened in the vicinity of the intersection but not in the intersection itself.

[31] In these circumstances, the Court has some difficulty in discerning how he could be said to have breached his duty.

[32] In contrast, it is clear that the Defendant was approaching the intersection of a major and minor road when he would have seen Mr. Lloyd's stationary vehicle on the major road. It is also clear that a reasonable claimant must also be prepared for the fact that others may not exercise reasonable care and skill in their conduct. Lord Du Parq in Grant v Sun Shipping Company[9] put it this way:

> "A prudent man will guard against the possible negligence of others when experience shows negligence to be common.

[9] [1948] AC 539, 567

[33] In his written evidence, the Defendant stated that he was travelling along the major road at about 25 mph when he saw the Defendant's vehicle emerging from the minor road turning right to go uphill towards him, he stated that the Claimant was effectively and completely blocking his side of the road. He decreased the speed of his vehicle and moved right towards the middle of the road in an attempt to avoid the Claimant's vehicle. He expected that having seen him, the Claimant would stop and not proceed any further because at that point there would have been enough space to go around him. However, the Claimant failed to slow down and stop but continued to proceed and although the Defendant maneuvered towards the middle of the road, their vehicles collided.

[34] The Defendant's evidence under oath was also revealing and determinative. It was only in his oral testimony that the Defendant revealed that Mr. Lloyd had stopped his vehicle, allowing him to overtake. He testified that he was able to complete the overtaking maneuver and return completely on his side of the road by the time he came to the intersection. In fact, he stated that he travelled the length of a football pitch – 100 yards before he came upon the curve approaching the Diamond Estate Public Road (the minor road). According to the Defendant, the distance between the curve in the road and the intersection is 25 yards. He stated that as soon as he turned around the curve he saw Mr. Malone proceeding out of the intersection. At the time, he was driving at 20 – 25 mph on the left side of Harrigan Estate Public Road having already overtaken Mr. Lloyd's vehicle.

[35] When he was asked about the position of the Claimant's vehicle on the major road, the Defendant's evidence is that he saw no vehicle coming directly at him. After further questioning however, he stated that he never said that the Claimant was not on his side (the left) of the road. When he was further questioned, the Defendant stated that the Claimant was in the process of coming out of the intersection. And yet when he was further taxed the Defendant asserted that while he was going towards the intersection, the Claimant's vehicle was not already making the turn towards the easterly direction. He later stated that when he came upon the intersection, the Claimant was right at the intersection and in that same time frame, he moved off into the road. This vacillation however conflicted with his evidence in chief. When he was asked whether the accident occurred in the intersection, he replied that it happened in the vicinity of the intersection but not in the intersection itself.

[36] His evidence therefore posed a great difficulty for the Court and when considered within the entire matrix of the evidence, the Court did not consider his evidence to be reliable. What is clear, is that Defendant was of the view that he was driving on a major road and that the Claimant had an obligation to yield, even though the Claimant had already entered onto the major road from the minor road when he came upon him. Officer Lindo's measurements belie the Defendant's description of the accident and the Court is satisfied that at the point of impact, the Claimant's vehicle was well out of the intersection, and on the left side of the road.

[37] The Defendant's case is that at the time he saw the Claimant, he was unable to stop because he was travelling at 20 – 25 mph and there was not enough room. In that same vein he testified that there would have been no need to stop at the point when he saw the Claimant but then the Claimant proceeded into the road itself.

[38] As the Claimant was approaching an intersection or junction he had a duty to approach an intersection cautiously, keeping a proper lookout for other vehicles coming from the minor onto the major road. He also had a duty not to overtake when he may come into conflict with other road users e.g. when approaching or at a road junction on either side of the road. He ought to have been aware that there was a stationary vehicle on the main road and given its location, his speed (even if the Court were to accept his evidence of 20 – 25 mph) when overtaking the vehicles was, for the traffic conditions, excessive. There were obvious alternatives available that would have eliminated or reduced the risk of collision. He could have waited behind Mr. Lloyd's vehicle until he was able to overtake safely. Instead, he did so at a speed which was not sufficiently slow so as to given him any real chance of taking effective action to avoid the collision. There was no physical evidence of braking on the part of the Defendant's vehicle and in his own evidence he decided to swerve around the Claimant's vehicle rather than brake to prevent the collision.

[39] Weighing these factors, the Court is satisfied that the Claimant's driving held no causative potency and that contributory negligence is not made out in this case. The Court's order is therefore as follows:

i. Judgment is entered for the Claimant.

ii. The Defendant shall pay damages to the Claimant as assessed by the Master on application made by the Claimant. Such application to be made within one (1) month of the date of this judgment.

iii. **The Defendant shall pay the Claimant's prescribed costs in accordance with CPR** Part 65.

Vicki Ann Ellis
High Court Judge

By the Court

Registrar