

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2017/0356

BETWEEN:

**[1] KASIM LIBURD
[2] CARLISLE WILKIN**

Claimants

and

KEVIN JEFFERS

Defendant

Appearances:-

Ms. Tamara Malcolm for the Claimants.

Ms. Jordanne-Marie Ebanks for the Defendant.

2021: March, 17
September, 15

JUDGMENT

- [1] **WARD, J.:** On 30th July, 2016 an accident occurred on the Island Main Road, Dieppe Bay between an Omnibus, Registration No. HA225, driven by the 2nd claimant but which was owned by the 1st claimant, and a pickup truck driven by the defendant. The claimant alleges that the accident was caused by the negligence of the defendant in that he negligently managed his vehicle by travelling at a fast speed around a corner and thereby losing control of his vehicle, which collided into the claimant's vehicle causing damage. On the other hand, the defendant contends that the claimant was responsible for the accident because, he suddenly, and without warning, executed a right turn into the path of the defendant who had clearly signalled his intention to, and was in the process of, overtaking the claimant's vehicle.

[2] On 21st November, 2017, the claimants filed a Claim Form and a Statement of Claim in which they particularised the defendant's negligence as:

- a. Driving too fast;
- b. Failing to keep any or any proper lookout or to have any sufficient regard for users of the road;
- c. Failing to exercise or maintain any sufficient or adequate control of the said motor vehicle;
- d. Failing to steer or control the said motor vehicle or to apply his brakes adequately or at all so as to avoid colliding with the second claimant;
- e. Failing to take care while attempting to overtake HA225;
- f. Overtaking motor vehicle HA225 when it was unsafe to do so.

[3] By reason of the foregoing matters, the claimant alleges he has suffered loss and special damage which, as particularised, amount to \$83,232.27.

[4] For his part, the defendant contends that the accident was caused solely due to the negligence of the 2nd claimant in swerving right, into the path of the defendant's vehicle without indicating or providing any warnings to the defendant; making a right turn on the Island Main Road when it was unsafe to do so; failing to keep any or any proper look - out or to have any or any sufficient regard for other traffic, particularly oncoming traffic on the said road; swerving right on the Island Main Road and colliding into the defendant's vehicle; failing to keep a proper lookout or to observe or heed the presence or approach of the defendant's vehicle; failing to have or to keep any or any proper control of the said vehicle; failing to stop or to keep on his side of the road or act in any other way so as to manage or control the said motor car so as to avoid the said collision.

[5] I turn now to review the evidence that was actually before the court.

The Claimants' Evidence

[6] It should be stated at this point that only the 1st claimant gave evidence. This was on account of a ruling by another judge then having conduct of the matter denying an application for an extension of time for the 2nd claimant to file a witness statement. In the absence of evidence from him, there was no evidence adduced by the claimant of any eyewitness account of the accident. That said, I will examine the evidence of the 1st claimant who arrived on the scene of the accident after the

fact. In doing so, I disregard all matters of hearsay contained in his witness statement that purport to speak to the point of collision or how the accident occurred.

- [7] Mr. Liburd testified that he was the owner of a green Toyota Hiace Motor Bus, registration no. HA225 which he used as a passenger bus for which Carlisle Wilkin was the driver. On Sunday, July 30th, 2016, at about 9:00am, he received a phone call from the 2nd claimant who reported that there had been an accident involving his bus in Dieppe Bay. He called the police then made his way to the scene of the accident to see what was happening.
- [8] On arrival, he saw one police officer on the scene speaking to the drivers of both vehicles involved in the accident. He heard the defendant say that he had a flight to catch that morning and was hurrying to the airport to meet his wife.
- [9] He had known the defendant very well for several years. He approached the defendant and asked him what happened. The defendant then apologised to him for the accident saying that he was hurrying to meet his wife at the airport as he had a flight to catch that morning.
- [10] The 1st claimant walked around the wreckage trying to figure out how the accident had occurred and looked at the damage. He observed that his bus was parked under a tree some distance from the roadway. The right-hand side of his motor bus was very badly damaged, from the middle and closer to the driver's door. The door could not be opened at all. He noted that the front of the pick-up was also damaged. He says the defendant apologised to him and agreed to fix the bus.
- [11] He subsequently received a quotation from his Insurance Company which showed that it was over Eighty Thousand Dollars (\$80,000.00) in damage and was uneconomical for repair. He also lost his no claim bonus.

The defendant's evidence

- [12] The defendant's account is that he and his wife had left home in separate vehicles at approximately 8:15. They were both scheduled to depart on an 11a.m. flight but he first had to make a stop at the mechanic.
- [13] While driving along the Island Main Road in the vicinity of Dieppe Bay, he observed the claimants bus travelling ahead of him some thirty feet away. The bus began to slow down. He checked to see if the road was clear of oncoming traffic. Having verified that it was, he cautiously proceeded to

overtake the passenger bus when he was about 10 feet away. He put on his right indicator and blew his horn three or four times as he overtook the bus. Suddenly, and without any warning or indication the second claimant unexpectedly swerved right, when he had almost finished overtaking him, thereby causing the right side of the passenger bus to collide into his vehicle, sending both vehicles off the roadway. He denied that he had apologized to the 1st claimant at the scene and that he had agreed to fix the bus.

[14] The defendant's vehicle sustained significant damage to the left front radiator and support, fender and windshield.

[15] Both the 2nd claimant and the defendant gave their respective explanations as to how the accident occurred. This is documented in the Police Accident Report to which neither side took objection. The claimant's account states:

"I was driving along the Island Main Road from Dieppe Bay to Parson. I indicated right then turn right after which I heard tires on the right side and I heard a bang and I started to a tree (sic) I look into the mirror before a turn but I did not see the pick-up."

[16] The defendant's account states:

"I was driving from Dieppe to Parson in P.756. I was driving behind HA225 when the bus slowed down and I tried to overtake then the driver of the bus turn right and I collided to the right side of the bus."

[17] Measurements were taken by Sergeant Morton who documented the point of impact in the following terms: "Point of impact from mountain side of the road - 10' 8". He recorded the road width as 20 feet. He also made the following notation: "Tire impressions of back right wheel 35'." This is unhelpful as there is no indication as to which vehicle made the impressions.

Discussion and analysis

[18] Having analyzed the evidence, I note that the claimant has failed to adduce any direct evidence of how the accident occurred. I am asked to draw certain inferences which the claimants say would lead to the conclusion the accident was caused by the defendant's negligent driving.

[19] The claimants rely on the defendant's admission that he was in a hurry as he had a flight to catch, seemingly as an inference that he was speeding. Even if it is accepted that the defendant said so,

which he has not denied, this does not by itself amount to an admission of speeding or negligence. Reliance is also placed on the defendant's answer under cross-examination that he estimated that he was traveling at about 30 m.p.h. when he took a corner some distance before the collision. From this, the claimant urges the drawing of an inference that the defendant was speeding, lost control of his vehicle as he took the corner and collided into the claimant's bus. Learned counsel for the claimants in her written closing submissions states:

"The Claimant's evidence is that it was the Defendant who operated the said motor vehicle at such a speed around the corner, prior to the accident, that he was unable to slow, swerve, stop or brake to avoid the collision. Therefore, it is the Defendant who so negligently operated his motor truck in attempting to overtake the Claimant's motor vehicle and at such a speed, that he lost control of the said motor vehicle causing it to collide into the right side of the 1st Claimant's motor vehicle driven by the 2nd Claimant."

- [20] This is a bold submission that completely ignores the fact that there was no such evidence from the claimants before the court regarding the defendant speeding around the corner then losing control of his vehicle on account of that. On the contrary, the defendant testified as follows:

"I first saw the motor bus after I came around the corner. At this point, it was about thirty feet from my truck. When I started to overtake, the motor bus was a maximum of 10 feet away. The vehicle that the 2nd claimant was driving started to slow down. I had no idea that this indicated that he was intending to do something. I didn't wait to see why he was slowing down before I attempted to overtake. I don't exactly agree that cautious drivers slow down before they make a turn. The turn was unexpected and sudden."

- [21] Set against the defendant's uncontradicted evidence that after clearing the corner he saw the claimants bus some 30 feet ahead of him, proceeding along a clear stretch of road, any inference that the defendant lost control of his vehicle because he sped around a corner is unsustainable as inferences must be drawn from proved facts. No evidence was led to contradict the defendant's evidence that the road was clear of oncoming traffic and that he put on his indicator and blew his horn three or four times as he overtook the bus.

- [22] Moreover, there is some support for the defendant's assertion that the accident occurred because the 2nd claimant turned into his path suddenly and without warning having been alerted to the defendant's overtaking maneuver. The police report records the 2nd claimant as admitting that he executed a right turn on the Island Main Road whereupon he heard screeching tires on the right side of the bus before impact.

[23] In context, therefore, Ms. Malcolm's submission that on the defendant's own evidence, at the point of overtaking, he was "negligently operating his motor bus contrary to sections 22 (8), 48 and 49 of the Vehicle and Road Traffic Act Cap 15.06 of St. Kitts and Nevis in proceeding to overtake the motor bus PRIOR to sounding his horn or indicating his intention to do so" fails to accurately reflect the defendant's evidence as set out above.

[24] The same may be said of Ms. Malcolm's further submission that having noted that the 2nd claimant had began to slow down, the defendant failed in his duty of care to observe if the 2nd Claimant was attempting to make any maneuver before he attempted to overtake the bus and that a reasonable driver in the circumstances would have blown his horn and put on his indicator prior to attempting to overtake, to make the 2nd claimant aware of his intention to overtake and not after having commenced overtaking the motor vehicle.

[25] Ms. Malcolm makes much of the defendant's evidence that the collision occurred when he had almost completed overtaking the bus. She submitted that if the defendant's vehicle had almost completed overtaking the claimant's bus when the 2nd claimant swerved into his truck, then it stands to reason that the back of the defendant's motor vehicle, or at the least the middle of the motor vehicle, would be closer to the front of the claimant's motor vehicle and that any sudden turn by the 2nd claimant at this juncture would cause damage to the left side and possible rear of the defendant's vehicle. This submission turns on an interpretation of what the defendant meant when he said he had "almost completed" overtaking the bus. However, he was not asked to elaborate by stating precisely how much of his vehicle had gone past the claimant's. The exchange during cross-examination bears this out:

Q: "So you almost finished overtaking the claimant, would you agree with me that the back and rear would almost be in line with the motor vehicle?"

A: No"

[26] Ms. Malcolm's interpretation of what the defendant meant when he said he had almost completed overtaking, seems to be that at least half of the defendant's vehicle was ahead of the claimant's at the time of the collision. While this is a reasonable interpretation, it is not the only one. The defendant's evidence has to be placed in full context. This includes the fact that he first saw the bus thirty feet ahead of him; he narrowed the gap to ten feet before signaling his intention to

overtake by putting on his indicator and sounding his horn three or four times as he overtook the bus. While in the process of overtaking the collision occurred. In that context, the defendant could reasonably regard himself as having almost completed the maneuver. That is how I interpret his evidence.

- [27] Contrary to Ms. Malcolm's submission, I find no incongruity between his evidence on this point and the areas of damage sustained by both vehicles. From the exhibited photos, the bus was impacted along its right side, particularly from the middle area to the driver's door. The front of the defendant's vehicle is in a head-on collision with the side of the bus. Both vehicles are situated under a tree on a grassy verge off the roadway. Ms. Malcolm submitted that this was where the collision occurred and relies on the description of the point of impact contained in the Police Accident Report as supporting such an inference. It is the defendant's evidence that this is not where the collision occurred but merely where the vehicles came to rest after the collision which had occurred on the roadway. There is evidence to support this. In his duly signed explanation to the police, the 2nd claimant said:

"I was driving along the Island Main Road from Dieppe Bay to Parson. I indicated right then turn right after which I heard tires on the right side and I heard a bang and I started to a tree (sic) I look into the mirror before a turn but I did not see the pick-up."

- [28] This explanation clearly places the collision on the roadway while both vehicles were in motion and after the 2nd claimant had executed a right turn. That is the conclusion to which I have come, whatever the ultimate resting place and position of the vehicles. I may add that the damage sustained by both vehicles is consistent with the defendant's assertion that the 2nd claimant made a sudden right turn into his path when he had almost completed overtaking the bus. The areas of damage observed to both vehicles would not be inconsistent with such a scenario.
- [29] The onus is on the claimant to establish on a balance of probabilities that the defendant breached the duty of care owed to the claimant and thereby caused damage to the claimant. For the reasons discussed above, the claimants failed to discharge this burden.
- [30] On the contrary, the evidence adduced by the defendant persuades me that the accident was attributable to the 2nd claimant's negligence as particularised and the 2nd claimant was under a duty to exercise due care on the road, which involved determining and anticipating the actions and

movements of other road users; maneuvering his vehicle in order to prevent and avoid accidents; keeping a proper lookout; and exercising particular care and attention. See **Cheryl Edwards Administrator of the Estate of Janique Lewis v Ethel Mills**¹ (para 17)

[31] I further hold that the 1st claimant is vicariously liable for the accident caused by the 2nd claimant. On the subject of vicarious liability, Lord Donovan in the Privy Council decision of **Rambarran v Gurrucharran**² succinctly summarized the principles in the following way:

i. "The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."

[32] There is no dispute in this case that the 2nd claimant was hired by the 1st claimant to drive the bus. The 2nd claimant was at the time using the bus for the owner's business under delegation of duty as driver. Thus the 1st claimant is therefore vicariously liable for the accident caused by the 2nd claimant.

Assessment of damages

[33] Having established the claimants' liability, the next question is what quantum of damages should be awarded. The defendant seeks special damages in the sum of \$22,000.00, representing the replacement cost of the vehicle. This is calculated by reference to the pre-accident value, less the value of the wreckage. The defendant obtained and exhibited an estimate from Zumies Auto Services who assessed its pre-accident value at \$28,000.00 with a salvage value of \$6,000.00. I am satisfied that the defendant has specifically pleaded and proved this head of damage.

[34] As it relates to the claim for loss of use, the sum total of the evidence in support is in the following terms: "After the accident I was without a vehicle for approximately four months. This was extremely inconvenient because I was using the vehicle to go to my farm and without it I was unable to go to the farm as it was quite a far distance away."

¹ ANUHCv1998/0168

² [1970] 1 All E.R. 749

[35] This evidence provides no basis for the award of damages. No evidence is given as to any loss suffered by the defendant on account of not being able to go to his farm. There is no evidence that the farm was operated as a commercial venture.

[36] In view of the foregoing, I make the following orders:

1. The claimants' claim against the defendant is dismissed;
2. Judgment is entered for the defendant on his counterclaim;
3. The claimants shall pay the defendant special damages in the sum of \$22,000, inclusive of interest on special damages at the rate of 6% from the date of the accident until the date of judgment;
4. Prescribed costs in accordance with CPR 65.5.

Trevor M. Ward QC
High Court Judge

By the Court

Registrar