

**EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2013/0675

BETWEEN:

ERIKA SCHERPING

Claimant

and

PENROD KIRBY

Defendant

Appearances:

Mr. John Fuller for the Claimant

Ms. Gail Christian for the Defendant

JUDGEMENT

2017: October 23

- [1] **HENRY, J.:** The claimant, Erika Scherping, (Ms. Scherping) claims damages for personal injury and loss suffered as a result of the alleged negligent driving of the defendant, Mr. Kirby.
- [2] In her Statement of Claim, Ms Scherping pleads that on the 29th October 2010, she was driving her vehicle A5378 along Independence Avenue from south to north. On approaching the traffic light at the intersection with Queen Elizabeth Highway she entered the center lane in order to make a right turn at the said intersection. Mr. Kirby negligently entered the center lane from the far left when it was unsafe to do so and collided with her vehicle. The Particulars of Defendant's Negligence pleaded include:

- a) Failing to observe the claimant
- b) Failing to stop, swerve or otherwise control his vehicle so as to avoid colliding with the claimant
- c) Entering a major road from a minor road and cutting into the center lane without regard to the claimant's presence.

- [3] In his Defence, Mr. Kirby admits that on the day in question he was the driver of Motor Jeep A23834. However he denies that he negligently collided with Ms Scherping's vehicle causing her pain and injury, loss and damage. He states that at the material time he was driving his vehicle from west to east on Prince Klass Street. On reaching the junction of that street and Independence Drive, he yielded to give way to the vehicles traveling from South to North along Independence Drive. Further, that the vehicle positioned at the front of the line of traffic on Independence Drive halted and permitted him to turn right onto Independence Drive. While executing the right turn, his vehicle was struck by Ms Scherping's vehicle, Ms Scherping having overtaken the line of traffic travelling in a northerly direction. Mr. Kirby avers that the collision was caused solely by the negligence of Ms Scherping. No further particulars of negligence were pleaded by Mr. Kirby.
- [4] In her Reply, Ms Scherping denies that she overtook a line of traffic travelling in a northerly direction when it was unsafe to do so. She asserts that it was Mr. Kirby who negligently entered the lane she was travelling in when it was unsafe to do so.

The Evidence

- [5] The evidence in chief of the parties was consistent with their pleadings. Ms. Scherping denied that she was speeding at the material time. Her evidence is that she came out of Vivian Richards Street and made a left turn unto Independence Drive. Independence Drive runs north to south. At the point where she entered unto Independence Drive there are two lanes: one for north bound traffic and the other for south bound traffic. Her evidence is that as she proceeded north on Independence Drive approaching the traffic light at the junction with Queen Elizabeth Highway, Independence Drive expands into three lanes: two for north bound traffic and one for south. As she approached the traffic light, her evidence is that she was travelling in the middle lane, that is, the north bound lane for traffic making a right turn at the light. There were a few cars in the left north bound lane, but no other cars in the middle lane. Her evidence is that at about the vicinity of Prince Klass Street and Independence Drive, Mr. Kirby drove his vehicle out of Prince Klass Street pass the vehicle on her left which was going north, attempted to turn right and crashed into her damaging her vehicle and breaking her tibia.
- [6] On cross-examination, she stated that she did not know where exactly the two north bound lanes begin, but that while she was driving she recognized that there was a lane for traffic making a right turn at the traffic light. It was suggested to her that at the time she moved to go right in to the turning lane, there were only two lanes – one for traffic travelling north and one for south bound traffic. Her response was no, there were three lanes. She denied that she moved prematurely before it was safe to do so. She denied that at the time Mr. Kirby executed his turn unto Independent Drive there was only two lanes one going in either direction. It was put to her that at the time Mr. Kirby came out

of Prince Klass Street and onto Independence Drive, it was because the vehicle in front of Ms Scherping had stopped and beckoned him to come out. Her response was: “ there was no car in front to me, the car was to the side of me.” Impact, according to Ms Scherping, was to the left front of her vehicle.

- [7] On cross examination, Mr. Kirby admitted that traffic was quite heavy that morning. In regard to the location of the collision his evidence is that it took place more or less in front of the gas station and that when you come to the top of Prince Klass Street and look ahead, you are looking at the gas station. Prince Klass Street runs West to East and is a minor road. At the corner of Prince Klass Street and Independence Drive if one turns left one would be travelling north towards St. Johns. If one turned right, he would be travelling south on Independence. His evidence is that on that morning on reaching the top of Prince Klass Street he intended to make a right turn unto Independence Avenue. The driver of a car travelling north on Independence Drive stopped to let him pass. He was asked how the driver indicated to him to proceed. His answer was that the gentlemen looked out the side and waved his hand telling him to come. He stated that before he moved out he could not see Ms Scherping. He was adamant that at that portion of Independence Drive there are only two lanes of traffic – one going in each direction. According to him Ms Scherping had to be in the single lane going north. It was put to him that his vision was blocked by the car that indicated to him to come and the vehicle behind it. His response was: yes, in a sense. It was further put to him that because the gentlemen told him to come he felt it was safe to come out. His answer was “exactly”.
- [8] Meshack Kirby, the defendant’s son, also gave evidence. He was a passenger in the vehicle at the time of the collision. His evidence is that he was seated in the front passenger seat. His evidence is that he was able to see Ms Scherping’s vehicle coming. He did not tell his father to stop because according to him they were in their right lane and had got the go ahead to proceed. He was of the view that they had the right of way because a car stopped for them to come out so that one would expect the other traffic to stop also.
- [9] At the conclusion of the evidence, the court visited the locus and each party had an opportunity to point out their location at the material time. The parties pointed out different locations. Ms Scherping pointed out a location on Independence Drive opposite the gas station and at the top of Prince Klass Street. Mr. Kirby pointed out a location one block south and opposite the Ramco Building at the top of a street he asserts is also known as Prince Klass Street. That street carried no street sign.
- [10] A Police Report dated 4th December 2013, was included in Mr. Kirby’s List of Documents. However, the Officer was not called to give evidence. No measurements were included in the report. The court therefore found the contents to be of little probative value.
- [11] Each party submits that the other drove negligent and was the sole cause of the collision. The issues for the court are:
- a) On the morning in question did the defendant drive his vehicle in a negligent manner
 - b) was his negligent during the proximate cause of the accident

Liability

- [12] Before the liability of a defendant to pay damages for the tort of negligence can be established, three things have to be proved: (a) that the defendant failed to exercise due care; (b) that the defendant owed to the claimant a duty to exercise due care; and (c) that the defendant's failure was the cause of the damage done.¹
- [13] It is accepted that Prince Klass Street is a Minor Road and Independence Drive is the Major Road. A vehicle shall not proceed unto a major road in such a manner or at such a time as is likely to cause danger to other vehicles on the major road. The duty was on Mr. Kirby to exercise due care and attention in making the turn into Independence Drive.
- [14] The deciding factor is factual, that is, whether at the time Mr. Kirby proceeded to turn unto Independence Drive it was safe to do so. This in part depends on whether the collision occurred at the portion of Independence Avenue that has two lanes of traffic north bound.
- [15] Mr. Kirby's evidence is that having been beckoned to proceed by the driver of a vehicle on Independence Avenue he proceeded to make the turn. He is of the view that at that portion of Independence Drive there is only one lane of traffic north bound, therefore when the driver in the north bound lane stopped and indicated for him to proceed, it was safe to do so. His evidence is that the collision occurred only because Ms Scherping wrongfully overtook that driver who stopped at the same time he proceeded to make the turn. Ms Scherping's position is that she was lawfully in the second northbound lane (center lane), which is the lane used by drivers intending to turn right at the traffic light ahead. The matter therefore turns on whether there were three lanes of traffic at the portion of road where the collision took place.
- [16] Although Mr. Kirby in his evidence placed the collision opposite the gas station at the top of Prince Klass street. At the locus he sought to indicate a position further south in front of the Ramco Building. The overwhelming evidence is that the location was in front of the gas station and the court rejects the attempt by Mr. Kirby to indicate another location. The court finds that at that portion of Independence Drive there are three lanes - two north bound and one south bound. The court further finds that Ms Scherping was travelling in the center lane north bound when Mr. Kirby attempted to make the right turn unto Independence Drive. The court further finds that Mr. Kirby was negligent in that he failed to observe Ms Scherping and he failed to stop swerve or otherwise control his vehicle so as to avoid colliding with her. Having been beckoned to come by the driver in the far left lane, he failed to make sure that it was safe to also enter the middle lane and in fact entered the center lane when it was unsafe to do so. He was therefore negligent.
- [17] Further the court finds that his negligence was the proximate cause of the collision. Judgment is therefore entered in favour of the claimant on the issue of liability.

¹ Woods v Duncan [1946] AC 401

[18] The matter is to be set down for hearing on the issue of Damages. Expert reports have already been filed. Accordingly, written submissions with authorities are to be filed and served on or before 15th November 2017. Thereafter, the court office is to set the matter down for hearing on the quantum of damages.

Clare Henry
High Court Judge

By the Court

Registrar