

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2014/0849

BETWEEN:

FRANCIS HIPPOLYTE
MARINA ALEXANDER

Claimants

and

JOHN THOM
DEKO NELSON

Defendants

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Esther Greene-Ernest for the Claimants

Mr. Callistus Vern Gill for the Defendants

Claimants and Defendants present

WPC 210 Emmanuel present

2017: May 10; 18.

Vehicular collision-person responsible for the accident on a balance of probabilities-no proof of special damages

JUDGMENT

[1] **CENAC-PHULGENCE, J:** It is not disputed that on Saturday, 4th February 2012 at approximately 12:48 a.m. there was a motor vehicular collision involving two vehicles, a Suzuki Grande Vitara, registration number PC6683 owned by the

claimants, Mr. Francis Hippolyte ("Mr. Hippolyte") and Ms. Marina Alexander ("Ms. Alexander") and a minibus, registration number M584 owned by Mr. John Thom ("Mr. Thom"), the 1st defendant and driven at the time by Mr. Deko Nelson ("Mr. Nelson"), the 2nd defendant. It is also not an issue that the said collision took place in the vicinity of Volney's Gas Station along the Castries/Gros Islet Highway and that as a result of the collision both vehicles sustained damage.

The Claim

- [2] The claimants, Mr. Hippolyte and Ms. Alexander claim against the defendants, Mr. Thom and Mr. Nelson for damages suffered as a result of the motor vehicular collision which they say was caused by the negligence of Mr. Nelson as the servant or agent of Mr. Thom. The particulars of negligence pleaded were:

- "(a) Failing to keep a proper look out
- (b) Moving from a stationary position at a bus stop into the main road and the path of the claimants' vehicle without indicating
- (c) Creating an obstruction in the path of motor vehicle registration no. PC6683
- (d) Attempting to make a U Turn on a highway without any or sufficient regard for other users reasonably on the road at the time
- (e) Failing to stop, slow down, swerve or in any other way, motor vehicle registration no. M584 so as to avoid the collision."

- [3] The claimants claim special damages in the sum of \$6,292.50 being the cost of repairs to their vehicle, interest and costs.

Defence and Counterclaim

- [4] The defendants filed a defence in which they deny that the collision was caused as result of their negligence and aver that it was solely caused by the negligence of Mr. Hippolyte. The defendants have counterclaimed against the claimants for loss and damage suffered and claim special damages in the sum of \$18,199.00, interest and costs.

Issues for Determination

- [5] Mr. Hippolyte and Mr. Nelson both have their versions of how this collision occurred which I dare say are very far apart. The Court is now faced with the unenviable task of having to decide who caused the accident on a balance of probabilities.
- [6] The salient issues for the Court's determination are:
- (a) On a balance of probabilities, which of the parties is responsible for the accident?
 - (b) Whether either or both parties contributed to their respective losses
 - (c) Whether damages are recoverable as claimed

The Claimants' testimony

- [7] Mr. Francis Hippolyte's evidence in chief is contained in his witness statement filed on 15th July 2016. His evidence is that on Saturday, 4th February 2012 at about 12:48 a.m., he was driving PC6683 in the vicinity of Reduit going towards Castries. M584, a minibus, driven by the 2nd defendant, Mr. Nelson was travelling in the same direction ahead of him. Mr. Hippolyte's further evidence is that as he was approaching the area near Volney's Gas Station, he saw Mr. Nelson 'pull' into the bus stop which is located opposite the gas station. The bus stop is on the same side of the road on which he was driving, which is the left side of the road. He testified that it appeared to him that Mr. Nelson was stopping when suddenly and without any warning or indication, he cut out into his path making a U-turn in front of him. Mr. Hippolyte says that there was nothing he could do to avoid the collision but to 'pull' right to try to avoid Mr. Nelson as he emerged onto the major road directly in his path and collided with his vehicle, PC6683. Mr. Hippolyte says that Mr. Nelson is the one responsible for the accident.

[8] Mr. Hippolyte testified that at the time of the accident the road was well lit by the electricity poles and traffic was light. He had his headlamps on and was driving about 40 miles per hour. Mr. Hippolyte in his witness statement states that he never tried to overtake M584, driven by Mr. Nelson but that Mr. Nelson never gave any indication of his intended actions before he 'pulled' out into his path. He gives evidence that his vehicle suffered damage to the left front fender, left front fender garnish, left headlamp, windscreen, front bumper, bonnet and grill. Mr. Hippolyte's evidence is that because of the accident he had expenses totalling \$6,292.50 comprising:

Traffic accident report-\$200.00

Costs of repair parts-\$2,892.50

Labour charges for repair-\$2,800.00

Loss of use for 4 days @\$100.00-\$400.00

Copies of receipts for these expenses are exhibited to his witness statement.

[9] In cross-examination, Mr. Hippolyte agreed that the statement he gave the police officer on the night of the accident and what he says in his witness statement differed in that he never spoke that night about 'pulling' to the right.

[10] When questioned about why he did not brake and had to veer right instead of just staying in his lane which was the left lane, this was the exchange:

"Mr. Gill: Did you apply brakes at the time?

Mr. Hippolyte: At the time I could not apply brakes.

Mr. Gill: You said to you he was making a U turn and in making the U turn, which side of the road would he have ended on?

Mr. Hippolyte: The right side

Mr. Gill: And that is the side that you pulled towards?

Mr. Hippolyte: Yes

Mr. Gill: But if you saw him turning right why would you pull to the right instead of staying in your lane?

Mr. Hippolyte: Because I tried to avoid the accident

Mr. Gill: But you went into the same lane that he was turning instead of staying in your lane

Mr. Hippolyte: Because I was behind him coming, when he swing that was the only thing I could do.

Mr. Gill: That was not the only thing you could do. If you had stayed in your lane there would have been no accident. It's because you pulled to the right that there was an accident.

Mr. Hippolyte: That is not true at all."

- [11] Mr. Hippolyte agreed that both vehicles were facing in the direction of Castries after the accident. He said that he ended up facing the Gas Station but still pointing in the direction of Castries. When confronted by counsel Mr. Gill with the distance he told the police officer he was when he noticed M584 turning right, which was 45 feet 3 inches and that this was about three car lengths away, Mr. Hippolyte disagreed. When asked whether he was saying that the measurement the police officer had taken was wrong, he said he could not say that.
- [12] Mr. Hippolyte agreed with counsel Mr. Gill that the accident took place in the right lane but that the side he was supposed to be on if travelling towards Castries was the left lane. In cross-examination, Mr. Hippolyte testified that he was coming from Gros Islet and when asked whether he had gone to Gros Islet Friday night street party, he said no, his wife had taken him out for his birthday. He later admitted that he was at the Gros Islet street party. When counsel asked him whether he had had a few drinks, he responded rather facetiously that he had had a lot of water.
- [13] Mr. Gill asked Mr. Hippolyte whether there was a difference between someone stopping and appearing to stop to which Mr. Hippolyte responded definitely. Counsel then asked him whether the defendant stopped or appeared to stop and he responded that the defendant appeared to stop.

- [14] Mr. Hippolyte in cross-examination agreed that the point of impact was closer to the right side of the road facing south and that his vehicle was on the side closer to the Gas Station and the defendant's vehicle was on the side of him. Mr. Hippolyte hesitated but did not respond when counsel suggested to him that the defendant's version of what happened was more consistent with how the vehicles were positioned on the road.
- [15] Mr Hippolyte denied counsel's suggestion that what had really happened was that he was trying to overtake the minibus and that is why he was in the right lane and did not pay attention to the vehicle turning right ahead of him. When asked how he knew that the defendant was making a U turn, Mr. Hippolyte's response was that the defendant had just swung on him. Mr. Hippolyte continued to say that he 'pulled' right because he was trying to avoid the accident.

The Defendants' testimony

Mr. Deko Nelson

- [16] Both the 1st and 2nd defendants filed witness summaries on 15th July 2016 which were tendered and accepted as their evidence in chief.
- [17] Mr. Deko Nelson testified that he was at all material times the agent of and was driving with the consent of Mr. John Thom, the owner of M584. His evidence in chief is that on Saturday, 4th February 2012 at about 12:48 a.m., he was driving M584 southward along the Reduit Road and was approaching the Volney Gas Station where he intended to turn right onto the dirt road on the left side of the gas station. Mr. Nelson says he checked his mirrors, indicated right and began a right turn when Mr. Hippolyte driver of PC6683 attempted to overtake M584. As a result, Mr. Hippolyte ran into the right side panel of M584. As a result of the collision, Mr. Nelson testified that M584 sustained extensive damage which cost \$13,549.00 to repair. The vehicle remained non-operational for a period

exceeding 30 days and would normally generate a minimum of \$150.00 per day from its operation. No documents were produced to substantiate these amounts.

[18] Mr. Nelson's testimony is that the accident was caused solely by the negligence of Mr. Hippolyte and he is not at fault, neither did he contribute to the accident. The particulars of negligence alleged against Mr. Hippolyte are:

- (a) Drove too fast in the circumstances
- (b) Failed to keep any lookout or any proper lookout of Motor Omnibus Registration Number M584
- (c) Failed to stop, slow down, swerve or otherwise steer or control Motor Car Registration Number PC6683 so as to avoid colliding with Motor Omnibus Registration Number M584
- (d) Left his and proper side of the road at a time when it was unsafe to do so
- (e) Overtook at a time when it was unsafe to do so
- (f) Failed to ensure that the road ahead was clear before undertaking an overtaking manoeuvre

[19] In cross-examination, Mr. Nelson testified that at the date of the accident he was a bus driver and that he had had a trip to drop a young lady to her home in the dirt road at the side of the Gas Station, 'somewhere there'. Counsel, Mrs. Green-Ernest suggested to Mr. Nelson that he had 'pulled' into the bus stop and then suddenly turned across the road and he disagreed. Mr. Nelson in his evidence in chief said he had checked his mirrors and indicated right but when asked about checking his rear view mirror, he said he could not recall if he did. He however was quite forceful that he had indicated right.

[20] Mr. Nelson said he honestly could not recall whether he was aware of Mr. Hippolyte on the road before the impact. He also said it was seconds before he was actually aware of Mr. Hippolyte's presence on the road. He testified that just before the impact his vehicle was positioned in the left lane and when the collision

occurred, he was literally at the entrance to the Gas Station swinging in. He said that his vehicle did not drift after the impact and remained at the exact same spot where the impact occurred. When asked what he had done to avoid the collision, Mr. Nelson said he held brakes and stopped. He was adamant that he had noticed Mr. Hippolyte but seconds before the impact.

[21] The following is the exchange regarding counsel's suggestions as to what transpired on the morning of the collision:

"Mrs. Greene-Ernest: I am putting it to you that you drove your minibus into the bus stop and without warning you pulled out across the road trying to make that turn into the Gas Station.

Mr. Nelson: No

Mrs. Greene-Ernest: And indeed it would have been a U turn had you completed it because by your own admission the bus stop is a little further up from the Gas Station. And is it not the case that you made a split second decision to now bring the young lady home and you just cut across the road without looking

Mr. Nelson: No"

[22] Mr. Nelson in response to a suggestion by Mrs. Greene-Ernest that since he had said that the road was clear, this is why he thought he could make the turn without looking said, no. He said he knew the road and it was Friday night which was usually busy.

Mr. John Thom

[23] Mr. John Thom testified that Mr. Nelson was his agent at all material times and was driving M584 with his permission. Mr. Thom testifies of the cost of repairs to M584 which is the same as Mr. Nelson's testimony. He however claims loss of use for 30 days at \$150.00 per day in the amount of \$4,500.00. The amount which he claims is \$18,199.00. No documents were exhibited or disclosed to substantiate the amounts claimed.

Accident Report

- [24] The Traffic Accident Report is dated 1st March 2012 and indicates that Mr. Nelson was prosecuted for driving without due care and attention. However, it is not disputed that the case against Mr. Nelson was dismissed for want of prosecution.

WPC 201 Emmanuel's testimony

- [25] WPC 201 Emmanuel was the investigating officer who attended the accident scene on the night of the collision. She testified that she was at that time attached to the Traffic Department, Gros Islet Police Station. She gave evidence that she took measurements at the scene of the accident, recorded the damage to each vehicle and recorded statements from each of the drivers in her pocket book. WPC Emmanuel testified that Mr. Hippolyte said that he was driving towards Castries and there was a minibus in front of him. Emmanuel continued that Hippolyte said that the minibus went on the bus stop and he continued driving. He said the minibus just swung in front of him and he heard a loud bang.
- [26] WPC Emmanuel further testified that Mr. Nelson gave a statement in which he said that he was going to drop a young lady at Volney's Gas Station, he indicated right and then the Suzuki jeep hit the back of his right door.
- [27] WPC Emmanuel testified that after carrying out investigations, she formed an opinion as to who was at fault and laid charges.
- [28] In cross-examination, WPC Emmanuel when asked if what she had reflected in the drawing at page 16 of Bundle 3 was correct, initially said that she drew what she saw and then she said she cannot really remember how the vehicles were positioned. The Court asked the officer to demonstrate the position of the vehicles which she did. Her demonstration showed PC6683 to the right of M584 slightly ahead. When asked the position of the vehicles relative the entrance to the Gas Station, Officer Emmanuel said that they were closer to the left end of the entrance

which is where the dirt road is. Though Officer Emmanuel's drawing did not accurately depict the position of the vehicles on the road at the time of the collision, her demonstration clarified the matter and I put this down to inexperience. I have no reason not to believe her demonstration in relation to the position of the vehicles on the road. .

Analysis

- [29] It is well established that a driver of a motor vehicle owes a duty of care to all other road users. The duty is to drive with the degree of skill and care to be expected of a competent and experienced driver. The standard or test to be applied is that of the average competent and experienced driver.¹

On a balance of probabilities, which of the parties is responsible for the accident?

- [30] The traffic accident report states the distance from the point of impact to the right side of the road facing south as 17 feet 3 inches. The width of the road at point of impact is shown 22 feet 7 inches. That measurement is clearly wrongly referenced to the right side of the road in the typed accident report as in the handwritten traffic accident report; the reference is to the distance from point of impact to the left side of the road. The measurement of 17 feet 3 inches from point of impact to the left side of the road would be consistent with the evidence of Mr. Hippoylte, Mr. Nelson and indeed WPC Emmanuel who all gave testimony that the accident occurred in the right lane. That measurement shows that the point of impact was closer to the right side of the right lane, a little past the center of the right lane.

¹ Nettleship v Weston [1971] 3 AER 581.

- [31] I had great difficulty accepting the testimony of Mr. Hippolyte. He appeared very jittery, constantly fidgeted and hesitated when asked questions. Mr. Hippolyte said in evidence that he could not really read or write but it is clear that he signed the witness statement filed on 15th June 2016 and he also was able to identify the statement as his when he took the stand and his statement was tendered as his evidence in chief.
- [32] Mr. Hippolyte in his testimony said that it appeared to him that Mr. Nelson was stopping. When counsel sought clarification as to whether Mr. Nelson appeared to stop or stopped, he was clear in his response that the two things were different and said that Mr. Nelson appeared to stop. It is therefore clear that Mr. Hippolyte did not actually see Mr. Nelson stop on the bus stop as he alleges but that he assumed that this is what was happening.
- [33] Mr. Hippolyte confirmed that he was more in the right lane when the accident occurred and that his proper lane if he were travelling south would be the left lane. How is it therefore possible that the right front wheel was positioned only one foot from right side of the road? If as Mr. Hippolyte testified Mr. Nelson just swung on him without warning then there are few things which would have been different. I agree with counsel, Mr. Gill's suggestion that if Mr. Nelson had indeed made a U turn as Mr. Hippolyte says, then the accident would not have occurred so far into the right lane. The damage would have been to the back of the minibus as opposed to the right side panel.
- [34] I cannot accept Mr. Hippolyte's evidence that he 'pulled' right to avoid the collision when he saw Mr. Nelson turning right but he pointed to the point at which he saw Mr. Nelson turning right before the point of impact as being 45 feet, 3 inches. That would put him somewhere at the exit to the Gas Station. The critical question is why would Mr. Hippolyte have 'pulled' so far right when he says that he saw the vehicle turning right from 45 feet away? This also conflicts with the testimony

which he gave when he said that he was driving at the back of the minibus when it 'pulled' into the bus stop and then just swung on him. Which one is it? He saw the bus 'pulling' into the bus stop. He saw him turning right from 45 feet away. Or is it that he thought Mr. Nelson was stopping, assumed he was 'pulling' into the bus stop when he was actually turning right and decided to 'pull' right to get ahead and continue driving instead of waiting to see what Mr. Nelson was doing.

[35] I am more persuaded by the testimony of Mr. Nelson that he was turning right into the dirt road just at the entrance to Volney's Gas Station when he noticed the Suzuki jeep overtaking. His testimony was consistent. He was forthright with his responses. I believe that Mr. Nelson's version of events is more consistent with the position of the vehicles after the collision. It would explain why Mr. Hippolyte's right front wheel and right rear wheel ended up being 1 foot and 4 feet respectively from the right side of the road.

[36] I am also persuaded by the position of the vehicles as demonstrated by Mr. Nelson that he was almost at the entrance to the dirt road when the collision occurred. This is consistent with the measurements which show that the distance of the right front wheel and right rear wheel to the right side of the road in relation to the minibus as 3 feet 4 inches and 9 feet 5 inches respectively. The measurements in relation to the left front wheel and left rear wheel from the left side of the road were 15 feet 1 inch and 9 feet 4 inches respectively. These measurements are consistent with Mr. Nelson's testimony of the position of his vehicle after the collision when he demonstrated M584 at an angle over the center of the road with the front of the vehicle closer to the entrance to the dirt road.

[37] I have to agree with Mr. Gill when he said that had Mr. Nelson been making a U turn as alleged by Mr. Hippolyte then PC6683 would not have ended up to the side of M584 but rather would have ended up on the inside of the M584. The point of impact would have been different.

[38] On a balance of probabilities, and taking into consideration all the factors above, I find that the accident was caused by the negligence of Mr. Hippolyte. It is clear from the evidence that Mr. Hippolyte did not display the standard of a competent and experienced driver. If he had behaved as a competent and experienced driver, he would have waited at the back of M584, ascertain that Mr. Nelson was indeed stopping before attempting to pass on the right side of M584 to get ahead. It is also more probable that a competent and experienced driver would have 'pulled' left instead of right.

[39] I am more persuaded that it appeared to Mr. Hippolyte that M584 was stopping and since there was a bus stop just a little ahead, he assumed that the minibus was 'pulling' into the bus stop. Without waiting to ensure that this was the case, he 'pulled' right to pass and continue south and did not realize that M584 was turning right. It meant that he had no choice but to 'pull' right to try to avoid the accident because 'pulling' left would have put him directly in the path of M584.

[40] On the evidence presented, I do not find that Mr. Nelson contributed in any way to the accident and make no finding of contributory negligence against him.

[41] Having found that the accident was caused by the negligence of Mr. Hippolyte, the claimants' claim is therefore dismissed with prescribed costs to the defendants and judgment entered for the defendants on their counterclaim,

Whether damages are recoverable as claimed in the counterclaim

[42] The defendants claimed in their counterclaim the sum of \$18,199.00 comprised as follows:

cost of repairs to the vehicle -\$13,549.00

loss of use for 30 days at \$150.00 per day-\$4,500.00

cost of estimate of repairs-\$150.00

[43] There were no receipts or evidence produced in support of any of the amounts claimed. This makes things very difficult for the Court. It is trite law that special damages must not only be pleaded but must be proven. Kangaloo JA in **Mario's Pizzeria Ltd v Hardeo Ramjit**² said this:

“...special damages are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specially and proved strictly.”

[44] Lord Goddard CJ in **Bonham Carter v Hyde Park Hotel** said that parties

“must understand that if they bring actions for damages, it is for them to prove their damage; It is not enough to write down the particulars, so to speak, throw them at the head of the court saying ‘this is what I have lost; I ask you to give me these damages’. They have to prove it.”³

[45] In my opinion, the defendants could have obtained receipts for the amounts claimed and the onus was on the defendants to provide same. There is, however, no reason proffered for the defendants’ failure to provide the necessary documentary evidence in support of the amounts claimed.

² CA 146 of 2003, Trinidad and Tobago.

³ Bonham Carter v Hyde Park Hotel [1948] 64 TLR at page 178.

[46] **Order**

- (a) The claim is dismissed. Prescribed costs to the defendants in the sum of \$943.88 being 15% of \$6,292.50.
- (b) Judgment is granted on the counterclaim in favour of the defendants. However, no award of damages is made on the counterclaim as the defendants have failed to prove the damages which they claimed.

Justice Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar