

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2016

CLAIM NO. SKBHCV2014/0213

BETWEEN:

ANNE MARIE CLARKE

Claimant

and

REESE LIBURD

Defendant

Appearances:-

Ms. Marsha Henderson of Counsel for Claimant

Mr. Arudranauth Gossai with Ms. Liska Hutchinson of Counsel for Defendant

2016: July 29

JUDGMENT

[1] **CARTER J.:** In a famous children's poem first recorded in 1765, the lyrics ran:

*"Hey diddle diddle,
The Cat and the Fiddle,
The Cow jump'd over the Moon,
The little dog laugh'd to see such Craft,
And the Dish ran away with the Spoon."*¹

This was a curious case in which the cow sought to jump over the defendant's minibus and lost its life as a result. The damage caused by that ill-fated jump underpins the claimant's cause of action.

¹ "Cat and the Fiddle" printed in London in *Mother Goose's Melody* around 1765

[2] On the evening of the 15th of April 2009, the claimant was a passenger in motor omnibus HA76, when the vehicle driven by the defendant, motor vehicle P4174, collided with a cow throwing the said cow unto motor omnibus HA76.

[3] The claimant in her Statement of Claim set out that: *"the defendant was negligent in that he drove and/or managed and/or controlled the said motor vehicle P4174:-*

- a) Dangerously and without due care and attention;*
- b) At an excessive and/or improper rate of speed in the then obtaining circumstances;*
- c) Without keeping any or any proper and/or efficient lookout and/or control in the management of the said motor vehicle P4174;*
- d) Without having any and/or any proper and/or any sufficient regard for other vehicles and/or other persons who were or might be using the said road.*
- e) Without having any and/or any proper and/or sufficient regard for the passengers in the motor omnibus.*
- f) Failed to apply brakes, slow down, stop and in any way to maneuver the said motor vehicle registration number P4174 so as to avoid colliding with the said cattle and further collision of the cattle with the motor omnibus in which the claimant was a passenger."*²

[4] The claimant further claimed that as a reason of the defendant's negligence she suffered severe personal injuries, financial loss and damage. She particularized her injuries as follows:

- a) The claimant who was born on the 6th October, 1972 is forty two (42) years of age suffered Acute Neck Sprain, disc herniation at L4/5 with mass effect on the the cal sac and cauda equina (spinal cord)*
- b) Injury to the left little finger, resulting in residual pain and insensibility*
- c) Acute Anterior Chest Wall Contusion*
- d) Acute Low Back Sprain"*

[5] The claimant also stated that she suffered special damage as a result of the defendant's negligence and particularized these as follows:

"

<i>Date of Receipt</i>	<i>Nature of Receipt</i>	<i>Amt. paid in EC\$</i>
<i>22nd April, 2009</i>	<i>Prescription Fee (J.N.F. Hospital)</i>	<i>\$10.00</i>
<i>23rd April, 2009</i>	<i>Six days on the Surgical Ward, Lab work, Ultra Sound, Medication</i>	<i>\$917.00</i>

² Paragraph 5 of Statement of Claim filed 29th October 2014

24 th April, 2009	X-Ray Report (Dr. Mark A. Hodge)	\$50.00
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- [6] At trial, after the claimant's evidence had been led, the claimant conceded that there had been no evidence offered to support some of the particulars of injuries pleaded. Specifically, the particulars at Paragraph 5 (a) (d) and (e) of the Statement of Claim. Counsel for the claimant formally indicated that she would not proceed with those limbs of the particulars of Negligence. The trial proceeded on the other particulars of negligence as pleaded.
- [7] In his defence the defendant admitted that he had a collision with *"a cattle which had attempted to run and/or jump across the road and into the path of [his] oncoming vehicle without there being any warning ... of its presence or its intention so to do."*³ He denied that he drove his motor vehicle negligently on the evening in question and disputed each of the particulars of negligence stated by the claimant. He denied that he had, through any negligence on his part, caused the alleged injuries, loss and damage stated by the claimant and put the claimant to strict proof of the same.
- [8] The issues were therefore clearly defined:
- a) Did the defendant's negligence cause the accident?
 - b) If the defendant was negligent, what is the extent of his liability for the injuries loss and damage suffered by the claimant as a result such negligence?

What Is Required to Prove Negligence?

- [9] The writers **Clerk and Lindsell on Torts** has concisely set out the requirements which a claimant must prove to establish a defendant's negligence as:
- 1) The existence in law of a duty of care situation;
 - 2) Careless behaviour 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 of which he complains; (Once (a) to (d) are satisfied, the defendant is liable in negligence and only then the next two factors arise);

³ Defence filed on the 17th December 2014 at paragraph 3

- 5) The extent of the responsibility for the damage to be apportioned to the defendant where others are also held responsible;
- 6) The monetary estimate of that extent of damage.⁴

As with any other civil trial the claimant must satisfy the court by evidence of negligence on a balance of probabilities.

The Case for the Claimant on The Issue of Negligence

- [10] The claimant called a number of witnesses in support of her case. The claimant's evidence in itself was not very helpful to this Court in determining the circumstances of the incident. Her evidence in chief was to the extent that:

*"On the said date, I was a passenger in motor omnibus registration number HA-76 traveling along the island main road in the direction towards Basseterre from Saddlers. Whilst in the vicinity of Dawson area, the defendant so negligently drove and/or managed and/or controlled the said motor vehicle registration that it collided with a cattle, and then throwing the cattle on the said motor omnibus in which I was travelling. I was at the time seated on the front passenger seat of the motor omnibus."*⁵

- [11] She could offer nothing further. In cross-examination, with regard to the accident itself, she stated: *"I don't remember how the accident happened."* With regard to the specific allegations in her witness statement she stated to Counsel for the defendant that she *"can't say that the Defendant drove the bus negligently. I can't say that the defendant drove dangerously or without due care and attention. I can't say anything about the driving of the defendant at the time of the accident."*

The Evidence of Leon McSheen

- [12] Leon McSheen stated to the court that he was an omnibus driver on the relevant date. He stated that he knew both the claimant and the defendant. He confirmed that the claimant was a passenger in his vehicle on the night of the incident. His evidence is crucial to the determination of the main

⁴ 18th ed. at page 219

⁵ Witness Statement of Anne Marie Clarke filed March 1st 2016

issue of the defendant's negligence in this case and the relevant parts of this evidence were as follows:

"There was an accident involving Reese Liburd hitting a cattle that ran down and jumped in front of his vehicle and it ended up on the windshield and roof of my passenger bus. I passed the cattle there when I was going to Saddlers. They was in an area ... on a hillside. There were a lot of them. When I was coming back from Saddlers the cattle them was still there so I was approaching carefully because I know I pass them there. There was a corner. I didn't clear that corner. I was approaching where the cattle were and I see one of the cattle start jumping up and kicking up, then it and run down the hill and jumped out in front of the oncoming vehicle. The cattle landed on the bus. I saw light coming so I start to go slow. I start to try and pull of the road. I saw the light of the oncoming vehicle. We were both approaching the corner. I could not say how was far away the vehicle was ... The cattle did not get in the road. The cattle jumped off the hillside. They were on the mountainside. It jumped into the road. The cattle didn't get across the road. It jumped and the jeep was right there and that was the impact. It was a big cattle... When I saw the oncoming light and cattle, I was trying to come to a complete stop. I did not blow my horn or anything."

[13] In Cross-Examination McSheen stated that:

"I conclude that the driver was not able to see the cattle because of these trees in the corner...I noticed cattle run off the hill and hit the other vehicle and then landed on my bus."

The Evidence of Victor Nicholas

[14] The police officer, Victor Nicholas, who investigated the incident was also called on behalf of the claimant. Officer's Nicholas's evidence was of attending at the scene and taking statements from the defendant, McSheen, and later the claimant. He also took measurements as pointed out by the defendant on the evening of the incident. The officer related that he was familiar with this area and that he had *"received a number of reports of accidents in that same area where livestock is part of the accident or caused the accident."* He concluded in his Examination in Chief that: *"Based on my investigations, there was no indication of what speed either of the vehicles was travelling at the time of the accident."*

[15] In Cross-Examination he stated that there were no streetlights in the area where the accident occurred. Also that the cow which was struck was some 30-35 feet away from the corner, the point of the accident when he arrived on the scene. He stated that he did not see any tyre impressions on the road when he returned the next day in daylight. He also stated that although there had been

many reports of incidents involving livestock that: “*I am not aware of any sign to say livestock beware put up by the Police.*”

[16] That was the evidence led by the claimant on the issue of the claimant's negligence.

No Case Submission

[17] In this case the defendant was put to his election at the end of the evidence for the claimant. He declined to give evidence or to call any witnesses on his own behalf and instead made a submission of no case to answer at that stage.⁶ Counsel for the defendant submitted to the court that the court should find that the claimant has failed to show even a *prima facie* case of negligence. He submitted that when the court views the evidence of the claimant and the witnesses called by her in support of her claim, that the court should find that there is no evidence to establish on a balance of probabilities that the defendant breached the duty of care which counsel agreed that the defendant owed to other users of the road. He submitted that this was not a case in which *res ipsa loquiter* had been pleaded nor a case where there was any evidence of careless driving on the part of the defendant. He invited the court to find that the claimant had failed to establish any of the particulars of negligence as set out in her Statement of Claim and to find for the defendant on that basis.

[18] In answer to the defendant's submission of no case, Counsel for the claimant submitted that there was a case to answer. On the issue of the negligence of the defendant, Counsel for the claimant submitted that the evidence of McSheen and Nicholas was to suggest that the defendant may have been driving at an improper rate of speed in the circumstances. She pointed to the evidence of how far the cow landed from the point of impact and asked the court to infer from McSheen's evidence that if the defendant was driving at a reasonable speed he might have been able to avoid the collision. She also asked the court to take the extent of the damage to McSheen's vehicle as another factor from which the court could infer that the defendant was not driving at a proper speed in the circumstances.

⁶ Blackstone's Civil Practice 2014 at 61.46 - It is the practice that in a civil case that the defendant seeking to make a submission of no case had to elect to call no evidence before making the submission. See also *Alexander v Rayson* [1936] 1 KB 169; *Young v Rank* [1950] 2 KB 510.

[19] Counsel for the claimant referred the court to two (2) cases in support of her contention that the court could look to the extent of the damage caused to the vehicle in which the claimant was travelling, as evidence that the defendant was speeding on the night in question. In **Richards v Francois**, the first of the two (2) cases upon which the claimant relied, Mohammed J, dealing with a submission that there was no evidence that the defendant was speeding stated that:

“ [16] The Defendant's Counsel submitted that there was no evidence that the Defendant was speeding. However, I do not agree with this position. In my judgment the impact of the collision on the Defendant's vehicle, which were the damages to the bonnet and windscreen as depicted by the post-accident photographs, the nature and extent of the injuries sustained by the Claimant, which were to his left leg, left arm and shoulders. and the point of stoppage by the Defendant after the impact, which was approximately 40 feet past the point of the collision, are not consistent with the Defendant driving at a speed of 30-35 mph but more consistent with a vehicle travelling at a greater speed. Even if I accept any of the Defendant's version that the Claimant had alighted the bus directly into his path, if he was driving at a speed of 30-35 mph he ought to have had a reasonable chance of avoiding the collision since his vehicle was 5 feet wide and he had free space of 10 feet in the roadway to manage his vehicle to avoid the collision. I therefore find that the Defendant was driving far in excess of 30-35 mph and speeding.”⁷

[20] This Court is mindful that each case must be determined on its own facts and that this may be especially true in matters in the nature of the instant claim.

[21] The court cannot ignore that it was the impact of the cow on the vehicle in which the claimant was travelling that caused the injury to the claimant. Therefore while the extent of the damage to the vehicle in which the claimant was travelling can be useful in determining the speed of a defendant's vehicle, the court is mindful that the damage noted in this case was not the direct effect of the defendant's vehicle colliding with another or here, the vehicle in which the claimant was travelling.

[22] The damage noted to that vehicle therefore as well as the injuries caused to the claimant are not such strong indicators as in **Richards v Francois** of the defendant's speed. In the instant case it is the actions of the animal, the speed at which the cow was travelling before it made contact with the defendant's vehicle that would have influenced the extent of the damage and the resultant injury. It

⁷ GDAHCV 2010/0156 delivered on November 7th 2013

is the case that the cow was a much smaller object in relation to the defendant's minibus so that this impact and the distance that the cow was thrown are also not such strong factors in the claimant's favour in the court's estimation. Further the evidence of McSheen was that he pulled his vehicle off the road. MsSheen placed his vehicle directly into what ultimately and unfortunately was the path into which the cow was thrown upon impact. For these reasons the facts of the instant case make that judgment not pertinent.

- [23] The court was also referred to the case of **Lindsey v Allen**⁸. In this case at paragraph 40 the Learned Judge upon full consideration of the evidence in the case found and concluded that:

"[40] I find as a fact that the claimant was speeding. I based that fact on the conclusion that one of the drivers had to be speeding having regard to the extensive damage sustained by both vehicles. The claimant admitted this fact but said that it was the defendant who was speeding. The defendant having emerged from behind a parked vehicle, as I accept to be the case and turning right could not have been travelling fast."

- [24] I have already dealt with this issue of the relation between the extent of damage caused and the speed at which the defendant's vehicle was travelling. I do not find **Lindsey v Allen** and the Learned Judge's assessment based on the facts in that case, which are not at all similar to the facts of the instant case, are of much assistance to this Court.

- [25] In the instant case, on the issue of speed, the court looks to the fact that there is no evidence on the claimant's case of any skid marks on the road leading to the point of impact or after the cow had been struck to suggest that the defendant was speeding before the impact and unable to stop his vehicle due to speed after he had hit the cow.

- [26] In the case at bar, the evidence of Leon McSheen has not been controverted. His evidence, which the court accepts as that of a credible witness, strengthens the court's view that there is no evidence of the defendant speeding on the evening of the 15th April 2009 and leads the court to the conclusion that any driver could have met with the accident that took place on that evening. McSheen anticipated that a driver coming around the bend without the knowledge of the actions of the cows was bound to come in contact with them. The court notes that McSheen's actions in stopping his

⁸ MNIHCV2009/0021 delivered on July 26th 2011

own vehicle when he saw the manner in which the cows were behaving, were not as a result of any recognition or conclusion by him that the vehicle coming around the bend, the defendant's vehicle, was travelling at a high rate of speed. Instead it would appear to this Court that they were as a result of his estimation that any vehicle driven by any driver would have made contact with the cows.

[27] His evidence was: *"I could see the lights from the vehicle. I started to pull off the road because I know that the oncoming vehicle was not able to see the cattle and I see the cattle try coming off the hill. I say this vehicle going to get hit and let me get out but I was bad lucky...I concluded that the driver was not able to see the cattle because of these trees on the corner....I noticed the cattle run off the hill and hit the other vehicle and then landed on my bus."* This was, to this Court, a strong indicator in the defendant's favour.

[28] The fact that the defendant has declined to give evidence and sought to have the court consider the no case submission does not change the standard of proof that is required of the claimant. The onus remains on the claimant to satisfy the court on a balance of probabilities. In **Miller v Cawley**⁹, Lord Justice Mance in considering the issue of standard to be applied where a defendant is put to election at the close of the claimant's case, referred to his decision in **Boyce**¹⁰ wherein he had clearly stated that:

"First, where as defendant is put to his election, that is the end of the matter as regards evidence. The judge will not hear any further evidence which might give cause to reconsider findings made on the basis of the claimant's case alone. The case either fails or succeeds, even on appeal."

[29] He went on to state in **Cawley** that:

"Where a defendant was put to his or her election and elected to call no evidence, the issue was not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. Rather, it was the straightforward issue, arising in any trial after all the evidence had been called, namely whether or not the claimant had established his or her case by the evidence called on a balance of probabilities."

[30] Having considered all of the evidence presented, the court upholds the submission of no case made by the defendant. The claimant has produced no evidence that the defendant was driving at an

⁹ Miller (t/a Waterloo Plant) v Cawley [2002] All ER (D) 454 (July)

¹⁰ Boyce v Wyatt Engineering [2001] All ER (D) 16 (May)

excessive and/or improper rate of speed in the then obtaining circumstances as pleaded in her Statement of Claim. Following on from this finding that there was no evidence of speed, the court has also considered the other aspects of the evidence led by the claimant as to the defendant *“driving without keeping any or any proper and/or efficient lookout and/or control in the management of motor vehicle P4174 or that the defendant failed to apply brakes, slow down, stop and in any way to maneuver motor vehicle registration number P4174 so as to avoid colliding with the said cattle and further collision of the cattle with the motor omnibus in which the claimant was a passenger”*.¹¹ The claimant has produced no direct evidence to support either of these two latter particulars to point of negligence. Indeed the evidence of the claimant’s own witness, Leon McSheen, contradicts these allegations.

[31] The finding of this Court is that the claimant has failed to prove on a balance of probabilities that the defendant was negligent when he collided with the cow on the evening of the 15th April, 2009. Having made this finding there is no need for this Court to go on to consider issue two (2) as outlined at paragraph 8 herein.

[32] In this case, sadly, the cow was not nearly as nimble or as crafty as the nursery rhyme suggests.

Order of the Court

[33] Case for the defendant. Costs to the defendant to be prescribed costs to be assessed if not agreed.

Marlene I Carter
Resident Judge

¹¹ Particulars of negligence, Paragraph 3 of Judgment