

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

Claim No. ANUHCV2008/0119

Between:

HARMONY HALL LIMITED

Claimant

-and-

CHARLESWORTH GOMES

Defendant

Appearance:

**Mrs. Shahida Ali – Schneider of
Henry & Burnette for the
Mr. George Lake of Lake & Kentish
for the**

Claimant

Defendant

.....
2009: June 15

2009: June 22
.....

JUDGMENT

1. **Harris J:** This is a running down action. The Claimant claims in Negligence against the Defendant and the Defendant counterclaims against the Claimant in Negligence, all as a result of a motor vehicle collision that took place on the Pares Main Road in Antigua in March of 2007, between the motorcycle ridden by the Defendant and minibus owned by the Claimant and driven by the Claimants on – duty employee, Omar Morsby.
2. There is no dispute that the Claimant suffered damage and loss to their vehicle and that the Defendant/Counterclaimant suffered personal injury and damage and loss to his motorcycle.
3. Further, there is no dispute as to where the accident took place, the time of the accident, the type of vehicles involved in the accident, the proper parties to the action and the direction the respective vehicles were driving in at the time of the accident.

4. Both claims are founded in Negligence. Here again, no dispute has arisen as to the applicable legal principles.
5. Having heard the evidence in this matter, the central contention in this matter now turns on whether the respective parties were at the material times driving on their proper side of the road immediately prior to and at the time of the collision.

THE PARTIES CONTENTIONS

6. The Claimant contends; that the Defendant, whilst riding a motorcycle, improperly pulled out from behind a moving red pick-up travelling in the same direction he was and manouvred his bike into the lane and path of the oncoming vehicle of the Claimant. Notwithstanding the Claimants evasive action of pulling to his extreme left, the Defendant and his motorcycle collided with left front portion of the Claimant's minibus. The claimant's minibus was at the material time transporting its workers from work and the driver was an employee of the claimant company.
7. The Defendant contends; that he, having overtaken the said red pick-up and returned to his own lane, the Claimant's vehicle unlawfully veered across into his lane. At this time, the Defendant says that he attempted to avoid the Claimant by trying to go around the left side of the bus (the buses' left side) and the left front of the bus collided with him throwing him to the ground, unconscious.
8. The evidence for the Claimant as to the circumstances of the accident was given by the driver of the minibus, Omar Morsby and by Sonia Joseph, both employees of the Claimant Company.
9. The evidence for the Defendant/Counterclaimant as to the circumstances of the accident was given by the Defendant himself and a Police Officer and eye witness, Dorian Goodwin, a passenger in the red pick – up truck.
10. The Defendant/Counterclaimant has set out his loss and damage to include eight (8) months of his wages at \$4000.00/month and a sum of \$59,094.00 for the cost of replacement parts for his motorcycle.

11. The Defendant said in evidence that his motor bike was the 1st of its model to have been manufactured by the manufacturer, Kawasaki and that the bike was 10 years old at the time of the accident. He had paid US\$4000.00 for it at the time of purchase.
12. The Defendant disclosed and exhibited a job letter from his employer indicating his weekly income at \$720.00/mnth. Further, the Defendant acknowledged in cross examination that during his illness he received from his employer – not from social security – the sum of \$800.00/month.
13. The claimant alleged that they expended the sum of \$20,722.00 on replacement parts for the damaged vehicle along with cost of labour to repair same, all as a result of the collision. Further, the claimant contends that the vehicle took 22 days to repair and that during that period they were forced to hire a vehicle for the purpose of transporting their workers, at US\$70.00 a day to a value of EC\$4,184.02. Counsel for the Defendant suggested to the claimant company representative and witness, Mrs. Jana Kucerova that the vehicle only required two (2) days work at the most. Mrs. Kucerova indicated that she could only say that it did in fact take the repairman 22 days to buy the parts and repair the vehicle. No evidence was put before the court by the defendant or otherwise, to contradict the case for the claimant that the repair required 22days. Further still, no evidence was placed before the court to support the defendant's contention put to the claimant at trial, that the repair job to the claimant's vehicle required only two (2) days as opposed to 22 days.

COURT'S FINDINGS

14. At the onset, let me say that I accept the Defendants story of his attempting to avoid the Claimant's minibus by trying to go around it on the front passenger side of the said bus. This, in my view, accounts for the impact on the bus being on its far left front side and not on the nearer driver's side of the bus.
15. The issue is whether the Defendant needed to take this evasive action as a result of he improperly riding his motor bike on the wrong side of the road and into the

oncoming minibus¹ or, whether as a result of the Claimants minibus driving on the wrong side of the road and into the oncoming motor bike².

16. The Defendant in his witness statement/evidence in chief at para 2, recounts the events leading up to the collision. In there, he says that having overtaken a red pick-up and then returning to his lane, he observed the claimant's minibus drive onto his lane as appearing to avoid driving through a wave/sink in the road on the claimant's lane and continuing towards him (the defendant also said that the claimant's bus appeared to slow down as if going to stop to pick up passengers on the defendant's lane). The defendant swerved out into the middle of the road to go around the right side of the bus to avoid the bus colliding with his motor cycle. The bus at that time also swerved out to the Defendants right side towards the claimant's proper lane. The defendant said that he went over to the right edge of the road, on the far side of the claimant's lane, and could go no further because of a guard rail on the side of a bridge at that point in the road.
17. This recount appears plain and simple enough until the cross examination of the defendant where he insisted that he never went to the extreme right edge of the claimants lane. He testified that in fact he went to the right side of his lane and at that time realized that he could not go to right edge of the claimant's lane because of the guard rail alongside the bridge at that point in the roadway, whereupon he aborted that attempt. At this point the bus ran into his bike.
18. If the Claimant's bus was in fact on the Defendant's side of the road as alleged, the collision could have taken place toward the middle of the road as suggested by the evidence of the Defendant. But clearly, his answers in cross examination are at marked variance with that of his witness statement/evidence in chief.
19. However, the evidence of the Police Officer, Dorian Goodwin, who was traveling as a passenger in the red pick – up which was traveling in the same direction as the Defendant, accords with the oral testimony only, of the Defendant in this one particular – the point of impact. Dorian Goodwin testified that he observed the Claimant's pick – up about three (3) light poles away traveling in the opposite

¹ See the claimant's 'particulars of negligence'.

² See the Defendant/Counter Claimant 'particulars of negligence'.

direction to his red pick up; in the lane of his oncoming red pick – up and the Defendants moving motor bike, when the Claimant's minibus knocked the Defendant of the road. Dorian Goodwin's evidence varied from that of the Defendant in that he claimed that the Defendant braked and slid into the bus. The defendant gave no evidence of braking and sliding into the claimant's minibus. The existence and /or cause of the skidding remains unexplained.³

20. The Defendant's evidence in chief is consistent with his pleadings but inconsistent with that of his cross examination and that of his witness, Dorian Goodwin, on the point of impact of the collision.
21. So how does a court decide the question of who caused the accident? The claimant submits that the court decides this question as a properly directed and reasonable jury would and submits that support for this proposition is to be found in the dicta of no less a jurist than Lord Reid, in Stapley v Gypsum Mines Ltd [1953] 2 All ER 478 at 485G-486A where he put it thus:
22. *"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly and reasonably jury would decide it..... The question must be determined by applying common sense to the facts of each particular cases. One may find that, as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those two faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident....."*
23. The Defendant is bound by his pleadings. I have to consider that the evidence of his witness Mr. Goodwin, introduces a new dimension to the defendant's case as

³ An unexplained skid can be evidence of negligence; As to the inference of negligence from a skid see, Richley v Faull(Richley, Third Party) , para26, post.; see 28 Halsbury's Laws(3rd edit) 71 para 70; see 36 Digest (Repl) 91, 487-492.

pleaded in relation to the evidence set out in para 5 of the Defendants counter claim and para 2 of his witness statement/evidence in chief. The pleadings place the collision on the extreme left of the claimant's lane. This is supported by the evidence for the claimant. The oral testimony of the defendant in court and that of his witness Dorian Goodwin, place the collision point of impact in the defendant's lane, towards the middle of the roadway.

24. Although there is common ground between the Defendant's pleadings, his witness statement, and the testimony of his witness, Mr. Goodwin, on one hand and also common ground between those facts and evidence respectively and the pleadings, witness statements and testimony of the Defendant's witnesses on the other hand; **my confidence in the veracity of the case for the Defendant has been shaken by (i)** the sharp inconsistencies in the case for the defendant and the inconsistency between the case as pleaded and supported by his evidence in chief on the critical issue of the *point of impact* and the case introduced in cross examination and supported by the oral testimony of his witness.⁴ The evidence given in court by the defendant and by his witness cannot alter the defendant's pleaded case.⁵ In any event, quite apart from the 'pleadings' issue, this inherent inconsistency in the defendant's evidence goes to the core of the dispute in this matter and as result, in a case such as this where the weight of the evidence between the parties is so finely distributed and balanced, significantly diminishes the credibility of the defendant and veracity of his case on this issue and on his case generally.⁶
25. **(ii)** Further, the discrepancy between the documentary evidence of the Defendant's income of \$720/wk (\$2880/mnth) and that which he sets out in his claim as \$4000/mnth (\$1000/wk) does not auger well for the veracity of the Defendant's case⁷. The defendant's claim also fails to set out the existence, far less the deduction from his loss of income claim, the \$800.00 a month he admitted in cross examination as receiving from his employer during the period of his incapacity. Further still, the Defendant is claiming \$59,094.00 for the purchase of replacement parts for his

⁴ This witness, Mr. Goodwin, did not provide a witness statement in this matter but had instead a broad witness summary was filed in the matter.

⁵ See Barrow J.A. in Eastern Caribbean Flour Mills Ltd v Ormiston Ken Boyea/Hudson Williams, Civil Appeal 12 Of 2006.(St Vincent)

⁶ This balancing recognizes the claimant's civil burden of proof; See also para 19 above for another, albeit lesser inconsistency.

⁷ I have considered the defendant's explanation for this discrepancy and in the balance, am not convinced.

damaged motor bike; a bike which he admitted he had purchased brand new 10 years earlier for US\$4000.00 (EC\$10,800.00).⁸ As matter of information and completeness, I accept that the defendant sustained the personal injuries he alleges.

26. In determining the quantum of damages and evidence in its support or opposition, the court is guided in that determination by looking at the evidence through a prism of fairness and reasonableness. In Liverson Sandy v Antigua Public Utilities Authority?, Mitchell J. set out the guiding principles thus: *"The standard applicable to proof of special damages is the balance of probability. Where the Claimant by oral testimony in Court establishes the value of a claim for special damages and the value placed on the claim is not challenged, then unless the value claimed appears unreasonable, the only course of action properly open to the assertion is to accept the Claimant's claim in full"*.

27. The evidence of the Claimant's two (2) witnesses on both liability and quantum of damages, was unshaken, was plausible and was inherently consistent. In all the circumstances and in the balance and having regard to the claimant's burden of proof, I accept the evidence of the Claimant over that of the Defendant.

28. I am satisfied that the collision – the point of impact - took place well on the claimant's lane. I am not satisfied, that whatever took place – even if the claimant was to have earlier crossed into the defendant's lane as he alleged – that the defendant's ultimate intrusion far onto the claimants lane at the point of impact and that the cause of and the actual collision, was caused by the negligence of the claimant. I do find the defendant to have been negligent as alleged.

29. For the reasons provided above, **it is hereby ordered** as follows:

ORDER

- (i) Judgment for the Claimant on the claim in the sum of EC\$24,956.02 in special damages.
- (ii) The Counterclaim is dismissed.

⁸ I have given due consideration to the Defendants explanation in relation to both these matters.

⁹ Antigua and Barbuda High Court Suit No. 156 of 1998.

- (iii) Costs for the Claimant on claim ANUHCV 2008/0119 on the CPR 2000 Prescribed Cost scale calculated on the judgment sum awarded in para. 29" (i)" above.
- (iv) Interest pursuant to the Judgment Act only.¹⁰

AUTHORITIES CITED IN ARGUMENT ¹¹

- (i) Romford Ice & Cold Storage Company Ltd. v Lister (1955) 3 ALL ER 460 at 468;
- (ii) Halsbury's Law, 4th edit. Vol. 33 para 653;
- (iii) Ruth Spencer v Bernard Bonny ANU HCV 2005/0039 at 58;
- (iv) Charlesworth & Percy on Negligence, 8th edit., pp 46 para 2 – 51;
- (v) Stapley v Gypsum Mines Ltd [1953] 2 ALL ER 478;
- (vi) Richley v Faull (Richley, Third Party) [1965] 3 ALL ER 109;
- (vii) Liverson Sandy v Antigua Public Utilities Antigua and Barbuda High Court Suit No. 156/1998.



David C. Harris
High Court Judge
Antigua and Barbuda

¹⁰ There is no evidence before the court as to whether the Claimant received monies from the insurer for instance, or whether they were kept out of these monies for this or any shorter period. I am unable to exercise my discretion in these circumstances, to make a discretionary interest award under the Eastern Caribbean Supreme Court Act for a loss that I am not satisfied was sustained or, even, more likely than not to have been sustained..

¹¹ See claimant's written skeleton arguments filed June 4th 2009; see parties pre-trial memorandum.