



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 02344

BETWEEN	CHRISTOPHER STONE	CLAIMANT
AND	ROBERT POWELL	1ST DEFENDANT
AND	LAWRENCE MCKENZIE	2ND DEFENDANT
AND	WINDELL SHAW	3RD DEFENDANT
AND	LAWRENCE MCKENZIE	3RD ANCILLARY CLAIMANT
AND	WINDELL SHAW	2ND ANCILLARY CLAIMANT
AND	ROBERT Powell	ANCILLARY DEFENDANT

Negligence – motor vehicle collision – Claimant a passenger unable to say what caused collision – whether burden of proof satisfied.

Heard: 9th April, 2013, 31st July, 2013

Sean Kinghorn instructed by Kinghorn & Kinghorn for Claimant.

Stacia Pinnock for 2nd Defendant/3rd Ancillary Claimant and 3rd Defendant/2nd Ancillary Claimant.

CORAM: JUSTICE DAVID BATTS

[1] At the commencement of this matter there was no answer from the 1st Defendant after he was called. The Claimants counsel advised that the 1st Defendant had

not been served with the Claim but had been served with the Ancillary Claim. Claimants counsel stated that the claimant would not be proceeding against the 1st Defendant.

[2] Both Counsel agreed that the following be admitted as exhibits -

Exhibit 1(i) - Medical Report from Black River Hospital dated 27th June, 2006

Exhibit 1 (ii) – 5 Receipts from the Black River Hospital

Exhibit 1 (iii) Police Report

Exhibit 1 (iv)- Receipt dated the 1st June 2006 from the Black River Constabulary Force evidencing payment of \$1,000 for police record.

Exhibit 2 (v) Assessors Report from Larmex Loss Adjusters Ltd. dated March 2nd 2006.

Exhibit 2 (vi) Assessors Invoice dated March 3, 2006

Exhibit 2 (vii) Invoice from Rowe's Trucking Service dated January 25th 2006 and,

Exhibit 2 (viii) Invoice from Bim Bim 24 hours wrecking Service dated January 4 2006

[3] The Claimant Christopher Stone gave sworn evidence. He is self employed and peels cane to sell. His witness statement was admitted as his evidence in chief. The statement he said had been read over to him but he was able to recognize his signature.

[4] In that statement he stated he was involved in a motor vehicle accident on the 4th January 2006. The accident occurred at 6:30 – 7:00 p.m. It was dark. He was a passenger in a motor vehicle driven by Robert Powell along the Holland – Bamboo main road. He was seated behind the driver and there were 2 other passengers in the vehicle. One of the passengers, a gentleman to his left, told the driver he wished to get off. The vehicle, according to Mr. Powell was then on the left hand side of the road. The driver slowed down and eventually stopped.

[5] The witness statement continued,

“Soon after Robert Powell stopped the vehicle, I heard and felt a massive impact to the front section of the vehicle. I was knocked unconscious. I regained consciousness at Black River Hospital and learnt that it was another motor vehicle that collided into the front of Robert’s vehicle.”

[6] When cross examined the witness stated it was the first time travelling in Robert Powell’s vehicle. He said he did not know the name of the other male passenger but the female passenger was known to him. He was asked whether the taxi went to the right of the road when a stop was requested and he denied it. He was unable to say whether the gentleman had got out of the car before the collision occurred as what he has said was all he could recall. Suggestions were put to the witness as to his position in the vehicle and the number of passengers. The pleading which ascribed negligence to Mr. Powell was put to the witness who said he could not recall saying that. The cross examination climaxed with the following exchange:

“Q: So you don’t know how accident happen

A. (Pause) I don’t know the gentleman say he need a stop and then I remember going through hospital gate.”

[7] There was no re examination and the court then asked,

“J: Why are you saying the vehicle pull to left if the last thing you remember is the man asking for a stop.

A: He has to pull to left I figure that is what must have happened.”

His attorney then asked,

“Q: When the gentleman asked for a stop what side of road was vehicle travelling on

A: The left side.”

[8] The Claimant closed his case. Counsel for the 2nd and 3rd defendants submitted that there should be judgment on the Ancillary claim against the 1st

Defendant/Ancillary Defendant. I ruled relying on Order 18.11 (2) that the case would proceed on the basis that the 1st Defendant/Ancillary Defendant not having filed a defence to the Ancillary claim is deemed to have admitted it. Proof of service of the ancillary claim was by Affidavit of service filed on 14 March 2013.

[9] The 2nd Defendant Mr. Lawrence McKenzie then gave evidence. His witness statement dated 8 March 2013 stood as his evidence in chief. In that statement he describes himself as a 52 year old driver. On the 4th January 2006 he was heading easterly along the Holland Bamboo Main road in St. Elizabeth. He was in the left lane travelling at 65 km per hour and it was apparently 6:50 p.m. and dark. He was travelling alone.

[10] He stated that an approaching a section of the road he felt a massive impact to the entire front of his bus and heard a 'boom'.

“(5) My bus spun with the front turning to the right and rear to the left with more of the rear on the left shoulder where it then stopped. I was still in my left lane.

(6) After coming to a stop, I remained in my bus for a short while before getting out.

(7) While seated in the bus, I observed that the driver of a white Corolla motor car registered 1859 EP had found itself on my side of the road facing me and had come to a stop approximately 3 feet away.

(8) That I don't know how the driver of the Toyota found itself in my lane facing me with its entire front on my side of the road while the rear was on its side of the road turned at an angle.”

[11] When cross examined the 2nd Defendant said he was driving a Hiace minibus. His vehicle fit comfortably in his lane. The witness was unable to indicate the width of the road as the accident happened a long time ago. He was coming from the direction of Westmoreland. Vehicles were able to pass in the opposite direction with no difficulty. The road was straight with no blind corner. His headlights were on. He could see about 30 feet ahead with his headlights. The lights were on dim not bright beam.

[12] The witness said the first time he became aware of the other vehicle was when it collided in his vehicle. The following exchange occurred:

“Q: Was car in the middle of the road

A: No front was on my side of the road. The back was on his left side.

Q: It was at an angle.

A: Yes facing me.”

[13] The witness admitted that the damage was to the front of his vehicle. he did not closely examine the damage to the Corolla but its front was damaged. In answer to the court the following exchange occurred:

“J: you had visibility of 30 feet but did not see the car please explain.

A: On that part of the road there is a slope and mine was on higher part and car on lower part so my light shine a little over his vehicle.”

In answer to questions arising the witness demonstrated that the other side of the road was lower than his side.

[14] The next witness was the 3rd Defendant Windell Shaw. His witness statement dated 8th March 2013 was allowed to stand as his evidence in chief. His evidence concerned the damage to his vehicle. There was no cross examination.

[15] Counsel for the 2nd and 3rd Defendants submitted that the issue of liability as between the Ancillary Claimant and Defendants should be dealt with separately. I indicated that I would consider the matter.

[16] Closing submissions were then made. Claimant's counsel relied upon *Res Ipsa Loquitur* and submitted that a burden was on the Defendant to explain how the collision occurred. He submitted there were 3 possibilities a) the accident occurred on the left as one heading towards Westmoreland. If so the 2nd Defendant is liable. b) the accident occurred in the middle of the road if so responsibility is shared or c) accident occurred on the right as one heads towards Westmoreland and if so the 1st Defendant would be entirely to blame. Defendants counsel submitted that the Claimant's evidence diverged from his pleadings in terms of how blame was apportioned. She submitted that the police report Exhibit 1 (iii) corroborated her client's case. The legal burden she submitted remained on the Claimant. She said the Defendant's account of the accident was consistent with assessor's description of damage. She submitted that if contribution were considered it could only be for failure to keep a lookout and therefore 15%. In rebuttal Mr. Kinghorn submitted that the failure of the 2nd and 3rd Defendants to allege the movement to the other side by the 1st Defendants vehicle was fatal. Further that this was not suggested to the Claimant.

[17] The submission about pleadings arose because the defence of the 2nd and 3rd Defendants alleged the following as particulars of the 1st Defendant's negligence which caused the accident:

- a). Stopping or parking his vehicle registered 1859 EP on the incorrect side of the road in the path of one-way traffic.
- b). Failing to turn on his headlights or hazard lights

However the 2nd and 3rd Defendants defence also alleged that the 1st Defendant:

- a) Recklessly entered the path of the 3rd Defendants motor vehicles which was being driven by the 2nd Defendant.

b) Encroached on the 2nd Defendants side of the road.

[18] In analyzing the evidence I bear in mind that the 2nd Defendant states that he did not see the other vehicle before he felt the impact. He describes the vehicle as being in the middle of the road with the front on his side after the collision. The question is what explains his not seeing the vehicle prior to the collision. Were his lights off, was there a slope as he describes or was he asleep or inattentive?

[19] I also bear in mind that the Claimant is not of great assistance. He recalls a call for a stop but cannot say on what side of the road the taxi stopped. As he admitted in oral evidence, the next thing he recalls is being at the hospital.

[20] The police report (which is in evidence by consent) states that the driver of the motor car (1st Defendant) drove onto the incorrect side of the road and stopped, causing the collision. This report must have been based on information told to the police officer, as no observations at the scene are noted in the report. The court was not afforded the benefit of the police officer's observations at the scene of the accident, if any.

[21] The court has also had regard to the loss adjuster's report. Larmax Loss Adjusters examined the 2nd and 3rd Defendants motor vehicle and photographs. This showed a damaged right front. The impact is described by the assessor as to the front. There is no assessors report or objective evidence of the damage to the 1st Defendants vehicle.

[22] On this evidence it is fair to say the Claimant has failed to satisfy this Court on a balance of probabilities, that the 2nd Defendant was the cause of the accident. The 1st Defendant is not an effective party. He was not served and the Claimant elected to proceed in his absence and to abandon proceedings against him. It is not therefore open to the court to consider his liability. I find the 2nd Defendant to be a convincing witness. I observed his demeanour and admired

his candour. I do accept that he did not see the other vehicle until it manoeuvred to his side of the road. I accept that it was dark and with the slope of the road as he describes it his failure to see the other vehicle before it crossed to his side of the road was not due to inattention on his part. His evidence is not so divergent from his pleading as to cause concern because he also pleaded that the 1st Defendant had encroached on his side of the road which is consistent with the evidence he gave.

[23] In the result therefore I give judgment for the 2nd and 3rd Defendants against the Claimant on the Claim.

[24] As regards the Ancillary Claim I find as claimed in the ancillary claim that the 1st Defendant is liable to the 3rd Defendant for damages as follows:

a.	Total loss of motor vehicle	\$230,000.00
b.	Assessors Fee	4,007.60
c.	Wrecker fee	1,000.00
d.	(Loss of use denied as no evidence in support was led)	
	Total:	<u>\$235,007.60</u>

[25] There will therefore be Judgment against the 1st Defendant in favour of the 3rd Defendant on the Ancillary claim. Damages are awarded in the amount of \$235,007.60 being Special Damages. Interest will run on the Special Damages at 3% from the 4th January 2006 to the date of this Judgment. Costs of the Ancillary are awarded against the 1st Defendant in favour of the 3rd defendant.

[26] The Claim by the Claimant against the 2nd and 3rd Defendants is dismissed. Costs of the claim will go to the 2nd and 3rd Defendants against the Claimant to be taxed if not agreed.