



[2019] JMSC Civ 228

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 01041

BETWEEN	LENNOX COX	CLAIMANT
AND	NATIONAL SOLID WASTE MANAGEMENT	1ST DEFENDANT
AND	HERRON LLOYD	2ND DEFENDANT

IN OPEN COURT

Mr. Leslie Campbell instructed by Campbell, McDermott for The Claimant.

Ms. Deandra Butler instructed by Samuda and Johnson for The Defendants.

Ms Gayle Mitchell Legal office for the 1st Defendant.

HEARD: 24th September and 13th December, 2019

Motor vehicle Accident - Personal Injury - Negligence - Breach of Duty of Care.

THOMAS, J.

Introduction

[1] This case concerns a motor vehicle accident in which the Claimant alleges in her Claim and her Amended Particulars of Claim that on the 5th of January 2006 she was a passenger in a motor vehicle licenced 9123 DF, travelling along the Daniel Town Main Road in the parish of Trelawny; the 2nd Defendant who was travelling in the opposite direction, was the authorized driver of a motor truck owned by the

1st Defendant and servant or agent of the 1st Defendant. She further claims that the 2nd Defendant negligently drove the motor truck and caused it to collide with the motor car in which she was travelling causing her to suffer injury loss and damage.

[2] The Defendants have countered the allegation of the Claimant in their Defence with the following averment:

“While Mr. Stewart (not Mr. Herron Lloyd) and authorized driver of the 2nd Defendant was negotiating a left hand corner the motor vehicle registered 9123 DF driven by Mr. Ashod Melbourne, at the material time was proceeding in the opposite direction. A man was pushing a hand cart on Mr Melbourne’s side of the road in the said corner. Mr. Melbourne failed to reduce his speed while approaching the said corner and when he eventually applied the brakes the motor vehicle skidded and spun around with the right fender proceeding onto the incorrect side of the road thereby colliding with the right front side of the 1st Defendant’s truck.”

[3] An Ancillary Claim was filed by the 1st Defendant against the driver of the vehicle in which the Claimant was travelling, that is Mr. Ashod Melbourne. However Counsel for the 1st Defendant and the Ancillary Claimant in the Ancillary Claim indicates that a Judgment in Default was obtained against Mr. Melbourne. Therefore, the trial proceeds on the Claim only.

The Issues

[4] This Claim is based in negligence.

Consequently, the issues which lie to be determined are:

(i) Whether the Defendants owed a duty of care to the Claimant

- (ii) Whether the Defendants have breached their duty of care to the Claimant.
- (iii) Whether arising from a breach of a duty of care by the Defendants to the Claimant injuries have been suffered by the Claimant.

Whether The Defendant Owed a Duty of Care to The Claimant

[5] It is an established principle of law that all road users owe a duty of care to other road users. (See *Esso Standard Oil SA Ltd & Another v. Ivan Tulloch* (1991) 28 JLR page 5570). The 1st Defendant has not challenged the evidence of the Claimant that she was a passenger in a motor vehicle that was being driven on the road and which was involved in the collision. Additionally, the 1st Defendant has not denied that they are the owners of the motor truck that was involved in the collision and that at the time Mr. Stewart, the driver of the motor truck was their authorised driver as such, acting as their agent. Consequently, it has been established on the evidence that at the time of the collision the Claimant was a road user and that the 1st Defendant through their agent and driver of their motor truck owed a duty of care to the Claimant

Whether the Defendants Breached Their Duty of Care to the Claimant

The Evidence and Analysis

[6] The case of the Claimant as gleaned from her evidence in chief is that:

On the 5th of January 2006 she was travelling as a passenger in the motor vehicle licence 9123 DF on the Danielle Town Main Road in Trelawny. On reaching a section of that road she noticed the 1st Defendant's garbage truck driven by Mr. Stewart coming from the direction of Falmouth. The truck was coming around a corner and came on her driver's side of the road where it hit the car sending it to the edge of the road near the precipice. She states that she read the defence in relation to the allegations that the collision was caused by her driver Mr. Melbourne going around a hand cart and going on the other side of the road and collided in

the truck. Her evidence in response to this allegation is that It was after the collision with the 1st Defendant's truck, when Mr Melbourne managed to get the car back on the road that she noticed a hand cart in front of the vehicle and Mr. Melbourne went around the hand cart to avoid hitting it.

[7] I take the view that the only construction on this bit of evidence is that the first time the Claimant was seeing the hand cart was after the collision.

[8] The Claimant on cross examination agrees that there is a precipice to the left and an embankment to the right where the accident occurred. She states that about two (2) feet of the truck came over on Mr. Melbourne's side of the road. Mr. Melbourne did not swerve as they were already in the corner and he could not go over any more because of the precipice.

[9] However, when confronted with her witness statement The Claimant agrees that she said in the statement that it was the collision that pushed the car to the edge of the road. She thereafter maintains that the statement that "it was the collision that pushed the car to the edge of the road" is the truth. She declared that when she first saw the hand cart it was three (3) feet from her vehicle on the side that the truck was on and that it was not always on her side of the road. She further states that when she first saw the hand cart on the opposite side of the road, the collision had not yet occurred; that about seconds to a minute passed between the time she first saw the hand cart and the accident.

[10] Further, according to the Claimant's evidence on cross examination the hand cart was in the corner of the opposite side of road near the embankment when she first saw it. Evidently, this portion of her evidence stand in stark contrast to the earlier statement in her evidence in chief that she first noticed the hand cart after the collision on her side of the road. She further states on cross examination that after the accident happened the hand cart was on Mr. Melbourne's side of the road; that the hand cart came across the road after the accident. However she agrees that it was the first time she was saying this.

- [11]** Counsel for the Claimant submits that the fact that the impact to the car in which the Claimant was travelling was to the right, is consistent with her version of the accident. Counsel for the 1st Defendant submits that critical details of the Claimant's evidence reveal several inconsistencies which go to "the root of her credibility". She pointed to the Claimant's evidence with regards to the fact that she stated that the truck only came over two (2) feet on her side of the road, yet she states that her driver could not swerve as he had no space to go further left on her side. Additionally, she highlighted the fact that the Claimant mentioned for the first time in cross examination that she saw the handcart on the opposite side of the road prior to the accident. She submits that the presence and location of the handcart are "critical to these events" and that there are inconsistencies on the Claimant's case regarding the presence and movement of the handcart around the time of the accident. She asks the court to find that these inconsistencies are attempts on the part of the Claimant to deceive the court and that the accident could not have occurred the way she describes it. She further submits that the evidence of the witness for the 1st Defendant is more consistent and credible and that the court should accept his version.
- [12]** On my assessment of the evidence of the Claimant bearing in mind that that she bears the burden of proof on a balance of probability, I find that the sum total of her evidence lacks credibility, is confusing and has unresolved inconsistencies. On her account the hand cart man was originally on Mr. Stewart's side of the road. In that event he would have been relatively safe as the truck would have come over to her left leaving space between the truck and the embankment. Additionally, on her version her car would have been pushed close to the precipice. Therefore, in crossing to her side of the road the hand cart driver would have been putting himself into greater danger. I do not perceive any reasonable person doing this.
- [13]** Later on cross examination the Claimant agrees that when she saw the hand cart it was in Mr. Melbourne's path. I find this very instructive as she admits that her driver went around the hand cart man while he was positioned on her side of the road. She does not agree that when Mr. Melbourne was passing the hand cart the

truck was on its correct side. She insists that the truck was over on them when Mr. Melbourne was passing the hand cart. Nevertheless, she agrees that neither the truck nor the car collided with the hand cart. Therefore the narrative as told by the Claimant remains enigmatic at the close of her case.

[14] There is no explanation as to how, the truck being on the Claimant's left side of the road, the hand cart being in the path of the Claimant's driver Mr Melbourne, he was able to navigate his way safely around the hand cart. That is how he would have been able to do so without colliding with neither the hand cart nor the truck. Additionally, there is no explanation as to why Mr. Melbourne attempted to go around the cart when the truck was over on them. In any event later in the cross examination she eventually agreed that the cart was in the corner on her side of the road when the collision occurred.

[15] Counsel for the Claimant submits that the version presented by the Defendants defies credulity. He contends that if the motor car in which the Claimant was travelling spun around one would expect that it is the left side of the car that would have been impacted. However, I do not share counsel's view of the evidence. It is my view that the Defendants have provided this court with a more plausible account of the circumstances leading up to the collision. The evidence of Mr. Stewart is that:

While proceeding up the grade along the Daniel Town Main Road, approaching a left hand corner he saw a hand cart man on the right side of the road in the corner. When he first saw the hand cart man he was in the middle of the corner. There was no vehicle travelling ahead of him in the direction in which he was proceeding. He entered the corner and when he reached in the vicinity of the corner he saw the motor car registered 9123DF in which the Claimant was travelling, proceeding towards him on the said road. The said motor vehicle was less than half a chain from the hand cart and was mostly on his, Mr Stewart's correct side of the road. The motor vehicle appeared to be heading directly for him so he stepped on his

brakes and tried to go a little further way in to the corner in an attempt to avoid the collision.

[16] Mr. Stewart further states that he was unable to move much further to his left because there was an embankment on that side of the road which he was already close to. He noticed that the driver of 9123 DF applied his brakes and swerved to the left to return to his correct side of the road.

[17] It is important to note that it is the rear section and not the entire motor vehicle that he says that swung around in his direction and the back right hand fender of the motor car collided with the right front side of the truck. I do not find this account of the collision to be inconsistent with right of the motor car being impacted. The Claimant admits that after the impact the car was facing the gully. Therefore on swerving to the left it is not improbable that the front of the car ended towards the gully, it being in a horizontal position with its right side towards the traffic coming in opposite direction.

[18] Mr Stewart further testifies that:

“The collision took place on his side of the road. The truck came to a complete stop shortly after the accident. The motor car proceeded further along the road and then stopped. The police subsequently came on the scene and carried out an investigation.”

[19] Mr, Stewart’s evidence remained consistent on cross examination. He was not discredited. He asserts that “he saw the hand cart man from way out.” He maintained that the cart was on the right hand side of the road. When he first saw the car it was about a half chain on his side of the road. “It was moving coming down to him straight into him.” He applied his brakes and swerved a little to the embankment. It was not much swerving. Before he swerved he was about twelve inches from the embankment. When he finished swerving the truck was on the embankment. The wheels were touching the embankment. He did not collide head on with the back of the car, the car swung around to him and swung in front of him.

He saw that “the driver swung away and hold his brake and turn the car front to the gully.” By the time he came out the truck he saw the car going round the corner.

- [20] Mr Stewart explained that “the car bounced off the truck with the front turn to the precipice and that he was breaking up hoping that the truck would have stopped.” He admitted that he was charged by the police, who on both accounts came on the scene after the collision. There is no evidence that he was convicted of any offence. His evidence is that he went to court twice and was told if he did not get a summons he did not need to return to court. He states that the police charged him that he swerved to the right and hit the motor vehicle in which the Claimant was travelling. However, he continues to deny that version.
- [21] Additionally, his unchallenged evidence is that the car did not remain at the point of impact after the collision. The Claimant’s evidence supports his version that Mr. Melbourne had removed from the point of impact. There is no evidence before this court as to the basis on which the police would have ascribed criminal responsibility of the accident to Mr. Stewart. Additionally, the fact that he was charged does not automatically make him liable. A competent court must make such a pronouncement. Additionally, the fact of a criminal conviction, is not evidence in civil proceeding. (See *Hollington v. F. Hewthorn and Company, Limited, and Another* [1943] K.B. 587; and *Juilus Roy v Andre Jolly* [2012] JMCA Civ 53).
- [22] In these proceeding the court is responsible to weigh the evidence and arrive at its own finding on the facts. Having assessed the evidence in totality and bearing in mind that the Claimant has the burden of proof to prove her case on a balance of probability I find that the Claimant has failed to discharge this burden. I take note of the fact that the Claimant failed to mention the hand cart in her Particulars of Claim. Additionally, her mention of the hand cart in her witness statement was to counter the averment in the Defence that the accident was as a result of her driver

going around the hand cart and his failure to manoeuvre the car so as to avoid an accident.

[23] I find that the presence and position of the handcart are factors of considerable weight, relating to the details of the accident which significantly affect the facts in issue, going to the root of the case. The fact is, the original picture that the Claimant has painted is that the Mr. Stewart just drove the truck over on her side of the road for no apparent reason. There was no indication that there was any obstruction on the Mr. Stewart's side of the road or that he was overtaking any vehicle. Whereas it is accepted that there are times that motorists and individuals do behave irrationally without any obvious reason, my role at this stage is to balance the evidence of both sides.

[24] In light of the fact that the Claimant bears the burden of proof, I have to determine whether in light of the evidence, to include her demeanour whether her account sounds more probable than that of the Defendant. If my finding to this question is in the affirmative, then she would have discharged her burden. However where I find it difficult even to comprehend her version, and when balanced against that of the Defendant, his version appears to be more coherent and probable, then Claimant would have failed to discharge her burden and would not have proven her case.

[25] I find that Mr. Stewart appears to me to be more forthright in his evidence, answers and demeanour than the Claimant. The details in relation to his version are more consistent. Additionally, I find that it is more probable that the accident occurred in the manner described by Mr. Stewart. Consequently, I find the following facts;

- (i) Mr. Melbourne, the driver of the motor vehicle in which the Claimant was a passenger attempted to go around a hand cart that was travelling on his side of the road.

- (ii) While he was doing so the truck owned by the 1st Defendant and being driven by Mr. Stewart was on the correct side of the road.
- (iii) In going round the hand cart Mr. Melbourne drove his car on the opposite side of the road. He attempted to swerve back to his corrected side of the road. In doing so the right rear of the car spun around collided with the front of the 1st Defendant's truck.

[26] Essentially I find that the accident was caused by the negligence of Mr. Melbourne. Additionally, I accept the account of Mr. Stewart as to the measures he took to avoid the accident. I accept his evidence that he swerved to the left and in so doing the wheels of the truck ended up on the embankment. This is, in light of the fact that it is accepted by the Claimant that there was an embankment to his left. In light of these findings I hold that Mr Stewart did all that he could to avoid the accident.

[27] Consequently, I find that the cause of the accident was wholly the fault of Mr. Melbourne failing to have due regard for the presence of the Defendant's motor truck on the correct side of the road, failing to drive in a manner that was safe for him to go around the obstruction on his side of the road, and get back on his side without causing an accident. Evidently, I find that no liability can be ascribed to the Defendants. Therefore the Judgment is entered for the Defendants.

ORDERS

Judgment for the Defendant

Cost to the Defendant to be agreed or taxed.