



[2021] JMSC Civ. 47

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 00259

BETWEEN	DORETTA FRANCIS	CLAIMANT
AND	EVERTON JOHNSON	DEFENDANT

IN OPEN COURT

Miss Chantal Jarrett instructed by Zavia Mayne & Co. for the Claimant

Mr. David Clarke for the Defendant.

Heard 20th and 21st October, 2020 and 5th March, 2021

Negligence – duty of care - motor vehicle accident – Passenger injuries

Wiltshire, J

Background

[1] On the 8th September, 2013, the Claimant, Doretta Francis, was a passenger in a Toyota Corolla motor car registered 9931 FC and driven by Rupert Palmer. The Defendant, Everton Johnson was, at the same time, driving a Suzuki Swift registered 9957 FL. The said vehicles were travelling in opposite direction along the Belle Air main road when they collided.

[2] The Claimant said that that the Defendant swerved into the path of the vehicle driven by Mr. Palmer thus causing the collision. The Defendant denied this and maintained that it was Mr. Palmer who swerved into his lane and hit his vehicle.

The Claim

- [3] The Claimant filed a Claim Form and Particulars of Claim alleging that the Defendant negligently drove and/or managed and/or operated motor vehicle registered 9957 FL so that he caused and/or permitted the said motor vehicle to collide with motor vehicle registered 9931 FC. Further that as a result of the said collision the Claimant sustained personal injuries and suffered loss and damage. The Claimant also indicated the intention to rely on the doctrine of Res Ipsa Loquiter.
- [4] In his Defence, the Defendant denied being negligent and causing the accident. He stated that while travelling along the road, there was some sand on the left side of the road, his driving side. There was no vehicle coming in the opposite direction and after almost completing going around the sand a Toyota Corolla heading in the opposite direction swerved over into his lane and collided into his car.

The Claimant's Case

- [5] The Claimants evidence is that on the 8th September, 2013, she was travelling as a passenger in motor vehicle registered 9931 FC. She was seated behind the driver, Rupert Palmer, and when she looked ahead she saw a car on her driver's side of the road. She heard "erks" and a bump.
- [6] Under cross examination the Claimant maintained that she did see how the accident happened and denied that Rupert Palmer swerved into the Defendant's lane and crashed into the Defendant's motor vehicle. She testified that she saw the vehicles after the accident and Mr. Palmer's vehicle was still on his correct driving side of the road. She also said that there was a little sand on the road and described it to be "like gravel". She denied that there was anything else on the Defendant's side of the road.
- [7] Both parties had agreed and were permitted by the court to have two photographs entered into evidence as exhibits 3(a) and 3(b). These were photographs of the

roadway and the vehicles in their post collision position. The court asked the Claimant to examine exhibit 3(b) and point out exactly where she saw the gravel on the road. She identified and marked two spots on the exhibit. The two spots indicated were on the Defendant's driving side.

- [8]** The Claimant called the driver, Rupert Palmer as a witness. The parties agreed Mr. Palmer's witness summary and the court permitted him to give viva voce evidence. In his witness summary he said that while he was travelling along the Belle Air main road he saw a grey motor vehicle travelling in the opposite direction. He said that at a certain section of the roadway he observed a pile of sand on the same side of the road as the car coming towards him. He stated further that as they both approached the pile of sand, the driver of the grey motor car veered from his side of the road, unto the side he, Mr. Palmer, was travelling on and slammed into the front section of his car. He said that the driver of the grey motor car apologised to him and said that he was trying to go around the sand that was on his side of the road.
- [9]** Mr. Palmer testified that he saw the Suzuki Swift speeding up the hill on his left side and there was nothing he could do but "tek a lick". Under cross examination Mr. Palmer was asked to clarify whether the Defendant swerved into his lane or was driving in his lane and he responded that the Defendant swerved over his lane from the sand in the road.
- [10]** Mr. Palmer was shown exhibit 3(a) and he agreed that the picture showed the cars involved in the accident and that it was taken the same day of the accident. On his examination of the picture he indicated that he saw some gravel. When asked by Counsel if he saw any sand he responded, "Me sure there was a sand heap there. Me sure." On Counsel's suggesting that there was no sand heap he answered, "It was there. I know it was there. A good size sand heap right on the road side".
- [11]** Mr. Palmer further admitted that the picture showed his vehicle at fully positioned on the Defendant's side of the road. He remained adamant however that it was the

Defendant who hit him and denied swerving from his lane to the Defendant's lane. Under re-examination he explained that the Defendant hit him and "push and swing back my car like over to fe him side."

Defendant's Case

[12] The Defendant's evidence was that he was travelling along the Belle Air main road and upon reaching a hill which was also in the vicinity of a slight bend, he saw a Toyota Corolla heading in the opposite direction. He said the Toyota Corolla came around the bend very fast, swerved into his lane and collided into the left side of the front of his vehicle causing his motor vehicle to spin more than 180 degrees.

[13] Under cross examination the Defendant denied that there was a pile of sand in the road. He stated that there was one in a yard further down the road. Paragraph 3 of the Defence filed was read to the Defendant and he was asked if he had said therein that sand was on his side of the road. The Defendant maintained that there was no sand on his side of the road and that he did not swerve from sand or try to go around sand. Under re-examination the Defendant was asked to clarify the inconsistency between his Defence and his evidence. He stated, "I don't even remember seeing any sand, or why I would have said that. Now I look at the photos there was no sand in my way."

Issues

[14] The main issue to be determined is whether the accident was caused by the negligence of the Defendant or the driver of the vehicle in which the Claimant was a passenger. Did the Defendant swerve from sand and encroach on the opposite side of the road or did Rupert Palmer leave his correct driving side and encroach on the Defendant's side of the road?

Law

[15] Section 51(2) of the Road Traffic Act states that:

“Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid a collision, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.”

All users of the road therefore owe a duty of care to other road users. This duty of care was explained in **Bourhill v Young** [1943] 1 AC 92 as a duty to take such reasonable care so as to avoid the risk of injury or damage to property. Bourhill’s case defined reasonable care as the care which an ordinary skilful driver would have exercised under all the circumstances and includes avoiding excessive speed, keeping a proper lookout and observing traffic rules and signals.

[16] To establish negligence, the Claimant must show that the Defendant owed her a duty of care, there was a breach of that duty of care and it was foreseeable that the breach would result in the loss suffered. As a passenger travelling in a motor vehicle, the Claimant was owed a duty of care by the Defendant.

Analysis

[17] The most critical piece of evidence in the determination of liability was the pictures of the accident scene and the vehicles in their post-accident positions. It is very evident to the court that the Claimant did not see how this accident occurred. Her evidence was that she was seated behind the driver and suddenly saw a vehicle in front of the vehicle in which she was travelling. She further stated that after the accident the vehicle in which she was travelling, driven by Mr. Palmer, was on its correct driving side. However, the picture of the vehicles tendered as exhibit (3b), clearly shows the Toyota Corolla, in which she was travelling, on the Defendant’s driving side of the road.

[18] Mr. Palmer, driver of the Toyota Corolla, was also not, in this court’s view, a credible and reliable witness. He stated that he saw the vehicle driven by the

Defendant approaching from the opposite direction, first, on his, Mr. Palmer's, side of the road and then he said, the Defendant swerved from a pile of sand and come onto his side of the road. He also said that as he was driving along he saw a pile of sand on the Defendant's side of the road. Exhibits 3(a) and 3(b) clearly show the vehicles, involved in the accident, at rest on the brow of the hill which the Defendant was ascending. The court also noted that there was no pile of sand on the Defendant's side of the road. The pile of sand was observed to be on the embankment. Further that pile of sand was several metres below where the accident occurred, therefore, Mr. Palmer could not have observed this pile of sand as he was driving along. Based on the location of the accident, Mr. Palmer would not have reached the section of the road parallel to the pile of sand on the embankment.

- [19]** On being shown Exhibit 3(a), Mr. Palmer indicated that he recognised the picture, the cars involved in the accident and agreed that the picture was taken the same day of the accident. Counsel asked Mr. Palmer if he saw any sand in the road in the picture. Mr. Palmer said that he saw gravel, and then stated, "Me sure there was a sand heap there. Me sure." When it was suggested to him that there was no sand heap, only gravel, he responded, "It was there. I know it was there. A good size sand heap right on the road side."
- [20]** It is of note that the Claimant when asked under cross examination, if there was sand on the road, answered, "Yes, a little sand, like gravel, look like to me where the other driver was to be." The Claimant subsequently pointed out on Exhibit 3(a) where on the road she had seen this gravel. What was pointed out were two areas with sprinklings of gravel on the Defendants' side of the road. The Claimant did not mention any heap of sand.
- [21]** Mr. Palmer also pointed out on the picture where on his left hand side of the road he was travelling. When asked to indicate the position of his car in the picture, after the collision, he pointed to his vehicle on the Defendant's side of the road and agreed that it was positioned opposite to his driving side. He however remained

adamant that it was the Defendant that had hit him and denied swerving into the Defendant's lane. When asked under re-examination to explain how his vehicle ended up on the Defendant's driving side, Mr. Palmer said, "Him hit me and push and swing back my car like over to fe him side." This explanation made no sense to the court. If Mr. Palmer was indeed fully on his correct side of the road and he did not swerve but only 'tek a lik' how did his vehicle end up fully positioned, facing his driving direction, on the Defendant's side of the road? Mr. Palmer has provided no plausible explanation. Based on the point of collision being on the brow of the hill and the post-accident position of the vehicles, I do not find Mr. Palmer to be a witness of truth.

- [22]** The mystery surrounding the sand continued when the Defendant was challenged on the fact that paragraph 3 of his Defence stated,

".....Upon reaching a section of the main road there was some sand on the left side of the road, which was the side of the road the Defendant was travelling on. Upon reaching to the sand there was no vehicle coming in the opposite direction. After the Defendant almost completing going around the sand a Toyota Corolla motorcar that was heading in the opposite direction swerved over in the Defendant's lane and collided into the front fender of the Defendants' car."

The Defendant said that he did not remember saying the above and he does not mention it in his witness statement. When pressed that he did say there was sand on the road, he responded, "There is no evidence of any sand." He remained adamant that there was no sand and denied veering from his lane into the opposite lane to go around the sand. When asked to clarify this inconsistency between his defence and his evidence, the Defendant responded, "I don't even remember seeing any sand, or why I would have said that. Now I look at the photos there was no sand in my way."

- [23]** The court accepts that there was no sand or pile of sand on the Defendant's side of the road. But what is evident from the pictures is that there are two areas of gravel sprinkled on the Defendant's side of the road as he approached the brow of the hill. The Claimant referred to it as "sand, like gravel." The Defendant seemed

confused about the reference to sand and his explanation on re-examination conveys that confusion. It is very unlikely that the Defence filed on behalf of the Defendant would not have been based on his instructions. The court does not believe the Defendant when he says he does not remember saying there was sand.

[24] I however believe the Defendant regarding how the accident occurred. Having examined the evidence, I am of the view that the Defendant was proceeding along the Belle Air main road and at a certain point on said road came upon gravel on his side of the road. I don't accept that the Defendant swerved into the path of Mr. Palmer's vehicle. I accept that there were no vehicles approaching so he moved to his right to go around the gravel. He had almost completed the manoeuvre when Mr. Palmer came around the slight bend in the road, over the brow of the hill. I accept that Mr. Palmer swerved onto the Defendant's side of the road and collided into his vehicle.

[25] The court also accepts that the collision caused the Defendant's vehicle to spin more than 180 degrees, indicating the force of the impact and the high speed at which Mr. Palmer was traveling. The pictures exhibited show Mr. Palmer's vehicle fully positioned on the brow of the hill, facing his direction of travel as if he was driving on the right hand side of the road. The Defendant's vehicle is across the middle of the road, with the front on his driving side and the rear on Mr. Palmer's driving side. The point of impact on the Defendant's side of the road and the position of the vehicles are consistent with the Defendant's version of the events.

[26] Based on my analysis of the evidence and my impression that Mr. Palmer was not telling the truth whilst the Defendant was accurately retelling the events, I find that the Claimant's claim fails. Judgment for the Defendant. Costs are awarded to the Defendant to be taxed, if not agreed.