[2018] JMSC Civ.2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV05868

BETWEEN	**LUKE SMITH**	**CLAIMANT**
AND	**PAHK LIMITED**	**1ST DEFENDANT**
AND	**DELANO SMITH**	**2ND DEFENDANT**

Mr. Lemar Neale instructed by Bignall Law for the Claimant

Mr. Kwame Gordon instructed by Samuda & Johnson for the first Defendant

Second Defendant unrepresented

Heard: November 13, 2017 and January 10, 2018

Negligence - motor vehicle collision – personal injury – credibility - liability

Wint-Blair, J

[1] This claim arose out of a motor vehicle collision which occurred on or about February 19, 2009. The claimant claims that on the material date, he was driving a Toyota Town Ace motor truck registered 8695 DV. The first defendant, who was driving a 1996 Mitsubishi L200 motor truck registered 7754CC, collided into his vehicle.

[2] The first defendant has filed an amended defence and counterclaim denying liability and alleging contributory negligence on the part of the claimant.

[3] The second defendant who was named in the suit was not served and this claim did not proceed against him. He was the driver of the first defendant's vehicle and was called by the first defendant as a witness.

The case at bar turns on the issue of credibility. The parties agree on the vehicles driven, the location, date, time, weather, condition, shape of the road and driver's involved. They disagree on how the collision took place. Agency is also not in issue. Against this background, an examination of the evidence is required and it is the evidence and my impression of the witnesses which will lead to a determination of the issues of credibility and liability. I accept and have said previously that in assessing the credibility of a witness, demeanour is but one of

the many factors to be considered. There is also the substance of the evidence which is generally approached by a tribunal of fact with reason, logic and common sense. The proper approach is to consider the evidence of the witness against the backdrop of the evidence lead in the trial. This assists in making the connections from one witness to another and back to the facts. Demeanour is certainly not by any means the sole determining factor.

[4] The claimant's pleadings state that the collision damaged the right side of his motorcar in the claim and the *"front rear"* in his particulars of claim. Counsel for the claimant has filed written submissions which speak to damage to the rear of the claimant's vehicle. This is the first issue, as pleadings are not evidence, a look at the claimant's evidence revealed in paragraph six of his witness statement which was permitted to stand as evidence in chief, that:

> *"the right side of the pick up van collided into the front right side of the vehicle I was driving damaging my front bumper and front, right fender."*

The claimant as is well known bears the burden of proving his case on a balance of probabilities.

[5] In cross-examination there was the following exchange between Mr. Gordon and the claimant:

"Q: The front of that vehicle collided with the front of yours

A: The front fender of it collided with my front fender and my front wheel when I swerved from it."

[6] The evidence then, is that there was a collision with the front right side of the claimant's vehicle. How did this collision occur? This was a case in which there must be a resolution of two irreconcilably opposed versions of how the collision between both vehicles took place. Each driver gave evidence that he was driving on his correct side of a road with a slight left curve as one travels to Old Harbour, on a sunny day; and that it was the driver of the other vehicle who came over onto his incorrect side and there collided with him. There was no room for compromise or accommodation between the two versions. Nor indeed was there any possibility that one of the drivers was mistaken in his recollection of the accident: it is simply that one of them spoke the truth and one did not.

[7] The claimant's evidence was that he was driving in the vicinity of Zadie Garden at Gutters, St. Catherine when he saw a Mitsubishi pick-up truck travelling "*at a very fast speed*" in the opposite direction. This Mitsubishi pick-up truck overtook a vehicle in front of it and came around a curve at speed in his lane. The claimant said this was sudden and he swerved left to avoid a head-on collision. The right side of the first defendant's pick-up truck collided with the front right side of the claimant's vehicle. This caused damage to the front bumper, right front fender, right front tyre and rim on the claimant's vehicle.

[8] In cross-examination the claimant said that when his vehicle came around the slight curve the first defendant's vehicle was thirty (30) feet from his door with its front headed towards the front of his vehicle. The front fender of that vehicle collided with the front fender and front wheel of his vehicle when he swerved left to avoid the collision as had he not done so there would have been a head on collision.

[9] The claimant denied telling Mr. Smith after the collision that he had fallen asleep at the wheel. He admitted that after the accident he came out of his vehicle but

at the distance he had stopped he couldn't see the damage to the first defendant's vehicle. He denied walking to the defendant's vehicle and making the admission suggested to him.

[10] The claimant's particulars of claim denote a collision which occurred when the first defendant's motor truck swerved to the right side. There is no indication in the particulars of claim that the second defendant overtook another vehicle and remained on the claimant's side of the road causing him to swerve to the left. This distinction was put to the witness while he was in the witness box and he maintained that the second defendant was overtaking and it is this action which lead to the collision.

[11] The second defendant's evidence was that he was travelling at about 40mph. He reduced his speed to 20mph as he had seen several vehicles ahead of his travelling slowly. While he was so engaged he saw the claimant's Toyota pick-up truck travelling in the opposite direction. As soon as this pick-up came close to his vehicle, it began to drift from its correct side of the road over into the second defendant's side of the road and into his path. In order to avoid a collision, the second defendant said:

> *"I immediately stepped on my brakes but because of how close the Town Ace pick-up was to me at the time, I was unable to prevent a collision between both vehicles. The Town Ace pick-up truck collided with the right hand front bumper and front wheel of my truck and then the right hand front door and right back panel."*

[12] In cross-examination, the second defendant said that on the day of the collision, five vehicles were driving in front of the first defendant's vehicle and there was also a parked truck on his side of the road. His vehicle was three feet from the vehicle immediately ahead when he was driving at 40mph. When his vehicle was three feet away from the vehicle in front of his he stopped. The second defendant admitted that this was not in his witness statement. He gave evidence that he did not just merely reduce speed, he came to a complete stop. The collision occurred at a point on the road where there was a slight curve.

[13] When he was asked whether he would have been able to see a vehicle coming in the opposite direction because of the curve in the road, the second defendant answered:

"I didn't see any vehicle because I wasn't driving I was stopped."

[14] He went on to say that there was a truck parked on his side of the road which caused all traffic to come to a complete stop. The truck had parked in the middle of the lane and in order to get around the truck he would have had to go into the other lane. He agreed he would have had to overtake the truck to go around it. He had not overtaken this truck before the collision and had not gone around the truck at all he didn't pass the truck because of the accident. This evidence about a parked truck he admitted was not in his witness statement.

[15] The second defendant described the claimant's vehicle as being *"very, very close"* he observed it drifting into his path. He said he did not swerve as he was stationary with his vehicle in park, there were two to three vehicles behind his and the vehicle three feet in front of his was also parked behind the truck.

[16] Of the five parked vehicles behind the truck two passed when the way was clear. The second defendant was asked what it meant 'to be parked' and he accepted both options suggested to him, the first was that his vehicle was in park not moving and the second that it could mean that in the line of traffic, he stopped with his foot on the brake. This was not clarified by either side. The witness said the claimant left his correct side of the road and came onto his side there was no prospect of a head-on collision, as the claimant's vehicle could not fit into the three feet of space which remained between the first defendant's vehicle and the nearest vehicle in front.

[17] The second defendant explained that it was the claimant who came into his path while his truck was in neutral causing him to step on the brake. The impact occurred in the driving lane then the claimant's vehicle went back to its correct lane stopping several car lengths down the road. The second defendant said his

vehicle sustained damage to the front and rear wheel, front fender, door and back panel for the vehicle, *"one whole side scrape off."*

[18] Both claimant and second defendant gave evidence that after the collision each driver left his vehicle and went to the other's vehicle. The claimant's evidence was that the second defendant ran over to him and said that the vehicle belonged to his company and that he did not have the original documents, and he gave the claimant the name and address of his employer.

[19] The second defendant gave evidence of the claimant walking back to where he had stopped enquiring after his well-being and saying *"sorry rude boy you know say a drop me drop asleep. A de second time this happen to me."* They exchanged particulars. The claimant denied making this statement.

[20] Both sides agree that the next day the claimant went to the address of the first defendant and he saw the second defendant. There he met with Donald Angus, Site Superintendent of the first defendant company.

[21] Donald Angus gave evidence that on February 20, 2009 he arrived at the first defendant's address for work and saw the claimant speaking with the second defendant. The claimant said that had seen the second defendant but did not speak with him. The claimant admitted to Mr. Angus that he was at fault in the collision, as he had dozed off at the wheel. He had come to make arrangements for the repair of the motor truck which belonged to the first defendant.

[22] Mr. Angus said he offered to repair the motor truck at cost in the first defendant's shop as the claimant had admitted liability. A further meeting was arranged for 1:00pm at which time the details of cost and payment would be agreed. The evidence was that the claimant agreed to return and return he did save that at 1:00pm he had reversed his position and was by then denying liability.

[23] The claimant denied leaving his vehicle and going to talk to the second defendant. He admitted going to the first defendant company the next day. There was no challenge to the evidence that it was the second defendant who

came to him and gave him the name and address of his employer and told him that he did not have documents for the vehicle. It was put to the second defendant that the vehicle documents were held at the first defendant's offices, to which the second defendant responded there were photocopies in the vehicle. This answer was accepted it would appear for counsel went no further. In light of that, there was no need for the claimant to attend the office of the first defendant for documents. The content of the photocopied documents was available to the claimant after the collision. Understandably, the second defendant was not the owner of the vehicle and the claimant may have wanted to talk with the owner, but that was not his evidence. His evidence was that he wanted documents for the second defendant's vehicle and those he obtained on his visit.

[24] It was in cross-examination that the claimant testified that he spoke to a supervisor but he neglected to give any evidence of the content of that conversation or name of the supervisor, for in fact, his witness statement is completely bereft of a visit to the office of the first defendant at any time.

[25] I find that on a balance of probabilities the claimant gave evidence which was inconsistent with the damage sustained to both vehicles. It was his evidence that the first defendant's vehicle came around the curve at speed in his lane it was also his evidence that the first defendant's vehicle came around the curve and was thirty feet from his door. While there was no physical evidence, there was evidence that this was a single lane road with a dividing line. Both parties drove motor trucks. It is difficult to accept that the second defendant was close to the claimant's vehicle if the claimant first saw it at "thirty feet away from his door". The choice of language used by the claimant is noteworthy, he used the words "thirty feet away from his door." The inference to be drawn from that is that he was referring to the driver's door which meant that he estimated thirty feet from the side of his vehicle and not its front. In my view, what the claimant is really saying is that the first time he saw the first defendant's vehicle it was not in front of his vehicle as in the position to cause a head-on collision but to the side of his vehicle in its correct driving lane.

[26] The second defendant testified about a parked truck on his side of the road which the claimant gave no evidence of seeing. The claimant agreed that he observed a line of traffic on the second defendant's side of the road and evaded answering the question about any observations he would have made regarding that line of traffic.

[27] I find that the first defendant's vehicle sustained a glancing blow when the front of the claimant's vehicle collided into it. This accounts for the damage from front to rear on the first defendant's vehicle. The damage sustained by both vehicles is more consistent with the second defendant's account of the collision which is of a drifting of the claimant over into his lane.

[28] The inconsistent positions taken by the claimant in his pleadings and evidence as to the damage to the first defendant's vehicle are proof of the claimant's decision to be less than forthright with the court. Therefore, I accept the evidence of the second defendant as to how the collision occurred, I also accept that the claimant accepted liability on the scene of the collision and the next day, when he spoke with Mr. Angus.

[29] This case turns on which evidence the court accepts and having accepted the evidence of the second defendant the claimant is found liable in negligence. It was not necessary to deal with evidence of any prior collision given the conclusion reached in this case. The first defendant has also claimed damages for repairs to the vehicle, assessor's fee and wrecker fee none of which have been challenged. As a consequence the following orders are made:

[30] Orders

1. Judgment for the first defendant on the claim and counterclaim.
2. The first defendant is awarded damages in the sum of $175,400.00.
3. Costs to the first defendant be taxed if not agreed.