



[2014] JMSC Civ. 58

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 03282

BETWEEN	RAYMOND SWABY	CLAIMANT
AND	ALICIA KING	DEFENDANT

Miss D. Archer instructed by Kinghorn & Kinghorn for the Claimant

Mr. Leon Palmer instructed by Williams McKoy & Palmer for the Defendant

Claimant and Defendant present

Negligence -Motor vehicle accident- credibility of witnesses

Heard: January 22 & 23, February 26 and March 19, and April 8, 2014

IN OPEN COURT

Lindo, J. (Acting)

[1] This is a claim in negligence arising out of a motor vehicle accident which occurred on the morning of August 9, 2010. It involved the claimant who was riding motor cycle registered 8966 G and the defendant who was driving motor car registered 2758 EZ.

[2] The claimant's case is that he was riding his motor cycle in the right hand lane along Orange Street in the parish of Kingston, when the defendant's vehicle collided in his motor cycle and he sustained serious personal injury and has suffered loss and damage.

[3] The defendant has denied the claimant's averment of negligence and is contending that the accident was caused by the negligence of the claimant.

[4] The statements of case indicate that there was an accident involving the parties on the morning in question but there is dispute as to who is to be blamed as the parties have put forward two different versions as to how the accident occurred.

[5] The Claimant's evidence is that he was riding his motorcycle on the right hand side going up Orange Street when he was hit from behind. He states that he fell in the road more to the right, and some persons who were looking on assisted him into the defendant's vehicle and she took him to the Kingston Public Hospital. He further indicated that at the hospital he was examined, a cast was put on his foot and he "got a stick to use until I was able to get some proper crutches..." He said on the evening after the accident he went to the City Centre Police station and discovered that his motor cycle was at the station. He had no knowledge how it got there.

[6] He further stated that he went back to the hospital "and they put the cast on my foot" and that he went back on several occasions and the cast was eventually removed on October 26, 2010. He said he was feeling a great amount of pain and he went to see a private doctor Dr. Ravi Sangappa in Spanish Town, he was examined and treated and he went back on several occasions because he continued to experience serious pains in his back.

[7] Mr. Swaby also gave evidence that he was unable to work for "some three and a half months after the accident" and that he paid certain sums of money as a result of the accident and received receipts for such payments as well as medical reports from the Kingston Public Hospital and Dr. Sangappa. These documents were tendered in evidence as exhibits 1 to 4, inclusive.

[8] Under cross-examination by Mr. Palmer, he admitted he had no certificate of competency to ride a bike but has been riding with a learner's licence for about twenty years. He stated that the motor bike sustained damage but he did not get it repaired as it was stolen from where he lived in 2011. He said he could not recall the month or date it was stolen.

[9] In reply to the suggestion by Counsel that the car driven by the defendant was in the same lane as he was in he replied, "sure", When asked if they were driving side by

side, he failed to give an answer but insisted that he was three feet seven inches or more from the right sidewalk. He also added that he decided to turn and had put on his right indicator. He stated that he could never travel in the left lane going up Orange Street.

[10] On being further questioned, the claimant stated that it was not the left front bumper/fender of the car that he collided in but that it was “supposed to be the left front bumper which hit me”. He repeated that he was three feet seven inches from the sidewalk and that he fell in the road. In answer to the question as to where in the road he fell, he stated that he “can’t say how far from the sidewalk I fall”. He however stated that the bike ended up near on the right hand side. Additionally, the claimant stated that he was going to stop. He also stated that he “can’t answer if (he is) in the left lane and wanted to turn right (he) would put on the right indicator”

[11] In further response to counsel for the defendant, the claimant denied that the defendant said if he didn’t swing in front of her the accident would not have happened, stated that he was travelling at about 10 mph and also again denied that he was travelling in the left lane. The claimant concluded that he was hit from behind when he had put on the right indicator to turn right, but when asked by counsel for the defendant where along the road he was going to turn right, he was unable to give a clear answer.

[12] On the continuation of the matter on February 26, 2014, the defendant was sworn and her amended witness statement filed on the 24th day of January, 2014, was accepted as her evidence in chief, permission having previously been granted by the court to allow the amendment, to include a certificate of truth. The defendant’s evidence is that she was in the right traffic lane and other vehicles were in the left lane all travelling in the same direction. She states that the claimant was riding in the left lane “almost abreast” of her car and suddenly and without warning he “cut across into my lane” and that he collided into the left front bumper of her car. She indicated that she took him to the Kingston Public Hospital and later that day went to the City Centre Police Station and reported the accident.

[13] On cross examination, the defendant stated that she was on her way to work, to get there by 8 am. She described the point of impact as “between the two wheels of the bike- pedal area”, and stated that “the left corner of the bumper collided with his right lower side of the bike”. She indicated that the only vehicle on her left side was the defendant’s motor bike and that he was abreast, a little bit ahead, no more than a metre. This she demonstrated to the court.

[14] On being further questioned, she stated that there were vehicles parked on both sides of the road so she was not completely in one lane, but was in about two thirds of the lane, “more in the right lane than the left lane”. She indicated that she was driving at about 40 kph and agreed that she was not travelling within the pace of a car length behind the vehicle travelling in front of her.

[15] She denied suggestions that the front of her vehicle would be in line with the back of the claimant’s bike but agreed that a portion of her vehicle was in the lane in which the claimant was riding and stated that the bike ended up falling in front of her vehicle, but more to the left. She insisted that she was speaking the truth when she stated the positions of the vehicles and was adamant that it was the left corner of the bumper of her car which came in contact with the right lower side of the bike.

[16] The defendant contended that the claimant swerved from his lane onto her lane and collided with her left front bumper. She denied being the cause of the accident or that she failed to exercise due care and caution and indicated that due to the amount of cars, she stopped a distance of about half a metre after the collision.

[17] No witnesses were called on behalf of either party.

[18] It is well settled that in a claim for negligence, in order for the claimant to succeed, he must provide evidence to satisfy the court on a balance of probabilities that the defendant owed him a duty of care at the material time; that there was a breach of that duty and it resulted in damage to the claimant.

[19] It is the law that a driver of a motor vehicle on a public road owes a duty of care to other road users to so manage and/or control his vehicle to prevent, hurt, harm or

damage to each other. If he breaches this duty of care and an accident occurs he is responsible in law to the person who has been wronged.

[20] In the context of this case, both claimant and defendant are blaming each other for the accident and have given an account of how they claim the accident happened. The critical question is therefore who is to be believed.

[21] Counsel for the claimant submitted that the defendant was “more than likely” in a rush to get to work as she was late. She suggested that based on the evidence of the claimant he was well in the right lane and that on the case for the defendant, if the claimant was abreast of her car, with no evidence that he either sped up or that she slowed down, it is highly improbable that the claimant could have collided with the left tip of her front bumper. She expressed the view that a sudden swerve would have resulted more in a side impact and that the point of impact as described by the defendant is more consistent with the version as described by the claimant.

[22] She further submitted that the claimant has satisfied the court on a balance of probabilities that the defendant was solely to blame for the collision as his account is more consistent with all the evidence and the defendant has not offered any explanation as to why the claimant “would have just swerved across her path having been abreast of her just a few seconds before”. She therefore urged the court to find for the claimant on liability.

[23] On behalf of the defendant, Mr. Palmer submitted that given the extent of the damage to the motor cycle, one would expect that the claimant would include damages for repair to it. He noted that the court would have been assisted in arriving at a determination if the claimant had provided an assessor’s report which would support his claim that he was hit from behind, pointing out that it is common knowledge that a rear impact is defensible only in rare circumstances and it is one of the particulars of negligence readily pleaded when an action is initiated.

[24] Counsel pointed out to the court that during the cross examination of the defendant, it was suggested that the claimant was in the left traffic lane and that the defendant failed to observe the claimant’s indicator that he was about to turn right to

which the defendant agreed that the claimant was in fact in the left lane but she did not see any indicator.

[25] Both parties agree that the accident occurred at about 7:45 am and they were both travelling in the same direction along Orange Street in Kingston. The claimant was on his way home while the defendant was on her way to work.

[26] Having considered the facts of this case and the submissions of both counsel, I recognize that the issue of liability rests on the credibility of the witnesses and the plausibility of the accounts given by them. In arriving at my decision I have placed reliance on my assessment of the witnesses. I have examined their demeanour while giving evidence and during cross-examination.

[27] From the facts of the case, and the unfolding of the evidence before me, I find, on a balance of probabilities that the claimant is the author of his own misfortune. I find as a fact that there were vehicles parked on either side of Orange Street and that the defendant was in fact straddling both lanes, therefore the claimant's statement that he was three feet seven inches from the sidewalk could not be correct. Additionally, I do not believe the claimant when he states that he was riding at ten miles per hour.

[28] The claimant was not very convincing. He could not state where he intended to stop or turn having put on his right indicator. He gave evidence that the defendant was hurrying him along after the accident saying she was late for work. I note however that her evidence is that she should reach work at 8am.

[29] I was impressed by the clarity of the defendant, notwithstanding that in her witness statement she stated that other vehicles were in the left lane travelling in the same direction but on cross examination she said vehicles were parked on either side of the road so she was more in the right lane than the left.

[30] The inconsistencies on the part of the claimant between what he said in his witness statement which stood as his evidence in chief and what was said in amplification of his witness statement and under cross-examination in my view affect his credibility. I note also that although the claimant states that his motor bike was

damaged, no claim was made in relation to such damage and on the pleadings it was not stated that the defendant hit him from behind, but it was sought to be brought out in the evidence.

[31] The court did not have the benefit of an assessor's report on either the motor bike or the motor car which could provide more conclusive evidence on the point of impact or where on each vehicle damage was sustained. However, on examination of the medical report, it is noted that the injury received by the claimant was to his right foot. This to my mind is an indication that the impact is more likely to have occurred to the right side of the motor cycle and as such is more consistent with the defendant's version of how the accident occurred. I find it highly improbable that the claimant could have been in the right lane, and be hit from behind by the left front bumper of the defendant's car.

[32] It is the claimant who has a duty to prove his case on a balance of probabilities. Mr. Swaby's evidence has been discredited. He gave answers in cross-examination which demonstrated that his version of how the accident happened or his recollection of the accident could not be accepted or relied upon.

[33] There was no independent eyewitness. I accept the demonstrated positions of the vehicles prior to the accident as depicted by the defendant. I also accept the evidence as to the point of impact as stated by her as being more plausible as in my view that would be more probable to result in the type of injuries sustained by the claimant. I also accept that after the impact the claimant fell in front of the motor vehicle, more to the left as stated by the defendant.

[34] I therefore prefer and accept the evidence of the defendant as being more reliable than that of the claimant as the defendant manifestly has a clearer recollection of the material facts and I find that the accident was caused, wholly, by the negligence of the claimant.

[35] There will therefore be judgment for the defendant with costs to be agreed or taxed.

