

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

[Unreported]

Suit No: CV 1994 of 2007

BETWEEN

TIMOTHY WALKER - PLAINTIFF

AND

GASPAREE INVESTMENTS LIMITED - 1st DEFENDANT

DONNA DECLE - 2nd DEFENDANT

*Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.*

*Judge of the High Court*

2009: October 8, December 9

2012: February 22

Mr. Ivan Alert in association with Mr. Leslie Haynes Q.C. for the Plaintiff and Mrs. Marguerite Woodstock-Riley, Q.C. in association with Mrs. Fidelis St-Hill for the Defendant

**DECISION**

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- [1] **Introduction:** This is an action in negligence arising out of a collision which occurred on November 11, 2006 between a BMW motor car P-2712 owned and driven by Mr. Timothy Walker ("the Plaintiff") and an Izuzu Pick-up van XK-445 owned by Gasparee Investments Limited ("the 1<sup>st</sup> Defendant") and driven by Miss. Donna Decle ("the 2<sup>nd</sup> Defendant") as servant an/or agent of the 1<sup>st</sup> Defendant.
  - [2] At the time of the collision both vehicles were traveling in opposite directions along Highway 7 in the area known as Hastings Main Road.
  - [3] As a result of the collision, the Plaintiff's BMW car sustained damage to its right front and right fender, while the Izuzu pick-up sustained superficial graze marks along its lower right side.
  - [4] Liability is in issue, and the central issue which has been referred for the Court's determination is whether on the balance of probabilities the collision was caused, as the Plaintiff alleges, by the 2<sup>nd</sup> Defendant's negligence or alternatively, was caused wholly or alternatively was contributed to by the Plaintiff's own negligence as described by the 2<sup>nd</sup> Defendant.
  - [5] **The Facts in Dispute:** Both drivers gave evidence at the trial and each driver maintained that the other was solely to blame for the accident and that the collision occurred as a result of the other's negligence. Additionally, each driver gave diametrically different accounts of how the accident occurred.
  - [6] **The Plaintiff's version of events:** The only witness for the Plaintiff was the Plaintiff himself. He is a self-employed distributor of air and water purifiers and recalled that on November 11<sup>th</sup>, 2006 he had been travelling from Ocean City, St. Philip to Hart's Gap, Christ Church to make a delivery.
  - [7] As he was driving along the Hastings Main Road section of Highway 7 in the direction of Bridgetown, he turned on his right indicator signaling his intention to turn right onto Hart's Gap, a minor road on his right.
  - [8] He observed a vehicle less than 100 yards away from him coming in his direction in the other lane and brought his vehicle to a stop in the centre of his half of the road. According to the Plaintiff, as he was sitting in his

stationary vehicle facing towards the Garrison waiting to make the right turn onto Hart's Gap, the oncoming vehicle suddenly swerved in his direction. It appeared to him that the driver of the vehicle was on a cell phone.

- [9] The Plaintiff stated that just as it appeared that there would be a head-on collision, the driver of the oncoming vehicle swerved back to the left causing the front bully-bar of the pick-up to collide with the right front side of his car.
- [10] According to the Plaintiff, the point of impact occurred on his side of the road and the impact knocked his car backwards from the spot where he had been stopped prior to the accident, and also moved the front of his car towards the right, pushing it over the centre of the road into the other half of the road at an angle.
- [11] The Plaintiff testified that the Izuzu pick-up came to a stop 48 feet from where his car had come to a rest following the impact. Additionally according to his testimony, the Izuzu pick-up ended up at right-angles to Hastings Main Road with its tail or rear on the sidewalk and its front towards the centre of the road facing the sea.
- [12] According to the Plaintiff, the collision occurred around 8:30 am at a time when the road conditions were clear and there were no other vehicles, cyclists or individuals on the road. Visibility was also clear and he could see ahead of him up to a distance of 400 yards.
- [13] The impact, he said, caused his airbag to deploy and the next thing he knew was that a woman was at the glass of his window asking whether he was alright. According to him, he was dazed from the impact.
- [14] Under cross-examination, the Plaintiff admitted that he later learned that the woman was the 2<sup>nd</sup> Defendant who, he said, was very generous and had gotten him a drink.
- [15] *The 2nd Defendant's version of events:* The 2<sup>nd</sup> Defendant testified that on November 11<sup>th</sup>, 2006 at around 8:30 am she had been driving the 1<sup>st</sup> Defendant's Izuzu pick-up in the direction of Oistins along Hastings Main Road.
- [16] As she approached Hart's Gap, a vehicle suddenly and without warning turned to the right across her path onto Hart's Gap. She veered to the left and the Plaintiff's car hit her vehicle on the right side. The impact of the collision caused her vehicle to spin out of control. Her vehicle mounted the pavement, spun right around and ended up facing towards the Garrison with one of her rear wheels still on the curb.
- [17] The 2<sup>nd</sup> Defendant testified that the point of impact was in the left lane facing Oistins and that her vehicle remained at all times on the left side of the road. She also stated that following the impact the Plaintiff's vehicle had ended up at a 40 degree angle facing towards Hart's Gap on her side of the road. Following the accident she said, traffic continued to pass behind the Plaintiff's BMW on the left going into Bridgetown.
- [18] According to the 2<sup>nd</sup> Defendant, she got out of her vehicle immediately after the accident. The Plaintiff was still in his car. She stated that he had told her that his airbag had gone off in his face and that he was feeling stunned. According to her, he later told her that he had a lot of deliveries to make and had been in a rush. He sat at the side of the road and she said she had run to a little shop on the left and had gotten him an apple drink.
- [19] *Evidence of Defence witness, Malcolm Hunte:* Although he was not an eye-witness to the accident, Mr. Malcolm Hunte, a resident of the area who had heard the impact and had come onto the scene immediately following the accident gave evidence for the Defence.
- [20] On arriving on the scene, Mr. Hunte observed that the driver of the BMW, the Plaintiff was still in the car. He spoke briefly to him, assisted in getting him out of the car and sat him down, after which he started to direct traffic.
- [21] According to Mr. Hunte, the BMW was stopped in the middle of the road turning into Hart's Gap. According to Mr. Hunte, the Plaintiff's vehicle was more on the left side of the road in the lane going to Oistins and at a 40 degree angle, while the 2<sup>nd</sup> Defendant's Izuzu pick-up was about 20 to 40 feet away from the BMW facing Bridgetown.
- [22] Traffic continued to approach from both directions and in order to pass had to slow down and pass to the seaward side of the Plaintiff's car. In particular, traffic coming from Oistins, had to pass behind and to the left of the Plaintiff's vehicle on the way to Bridgetown.
- [23] *The Legal Submissions:* Counsel for the Plaintiff, Mr. Ivan Alert submitted that the evidence, when taken as a whole, supports the Plaintiff's version of the collision. The thrust of Mr. Alert's argument was that the 2<sup>nd</sup> Defendant collided with the Plaintiff's stationary vehicle which was on its left and proper side. He contended that such collision was *prima facie* evidence of the 2<sup>nd</sup> Defendant's negligence and cited **Randall v Tarrant [1955] 1 All ER 600** in support.
- [24] Further, counsel cited the following cases to illustrate that reasonable care (which includes the avoidance of excessive speed and keeping a good lookout) must be exercised by drivers on a highway: **Bourhill v Young [1943] AC 92**, **Springett v Ball (1865) 4 F & F 472**, **Bracegirdle v Oxley [1947] 1 All ER 126**. Thus, he argued that the 2<sup>nd</sup> Defendant failed to exercise such reasonable care as she was inattentive and driving in excess of the speed limit.
- [25] Counsel for the Defendants, Mrs. Woodstock-Riley, Q.C. submitted that the Plaintiff had failed to prove his case and that a review of the evidence supported a finding that on a balance of probabilities the 2<sup>nd</sup> Defendant's version of the facts was more probable than the version given by the Plaintiff.
- [26] In its review of the evidence, she urged the Court to consider in particular, the damage to the vehicle, the position of the vehicles and the credibility of the witnesses.

- [27] She submitted that the Plaintiff's credibility was undermined when he failed to produce at trial photographs of the damage to his vehicle which had been disclosed in the Plaintiff's List of Documents filed in the proceedings on May 16<sup>th</sup>, 2008.
- [28] Counsel for the Defendants, while agreeing that the Plaintiff's vehicle sustained damage to its right front bumper and right fender, submitted that damage to the right of the Plaintiff's vehicle was not consistent with a near head-on collision and an alleged swerve to the left by the 2<sup>nd</sup> Defendant. According to Mrs. Woodstock-Riley, on the Plaintiff's version, the damage to his vehicle would more likely have been sustained to the centre front of his vehicle. She also found it significant that the Izuzu pick-up had sustained no marks to its front.
- [29] **Discussion:** At the outset and in keeping with its powers under Division 1 of Part V of the **Evidence Act, Cap. 121** of the Laws of Barbados, the Court has taken judicial notice of the duties incidental to the exercise of due care on the highway as set out in the **Barbados Highway Code** published by the Ministry of Transport and Works pursuant to **section 119** of the **Road Traffic Act, Cap. 295**.
- [30] While the Court is keenly aware that breaches of the Code do not create a presumption of negligence, the Court is satisfied that the rules and guidance in the Code provide a useful framework for analyzing the respective duties and obligations of both parties involved in this accident.
- [31] As a starting point, the Court is satisfied firstly, that both vehicles were travelling in opposite directions along a two-lane highway, secondly, that the Plaintiff intended to turn right onto Hart's Gap and thirdly, that in order to do so the Plaintiff would have to turn across the path of the Defendant's oncoming vehicle.
- [32] In such circumstances, the basic rule of the road is that both vehicles should keep well to the left side of the highway, unless about to overtake or turn right. *[Rule 7.2 Barbados Highway Code.]*
- [33] The fact that a collision occurred in these circumstances suggests that one or other of the drivers failed to keep to their left and proper side of Hastings Main Road. The question as to which driver was at fault is the main issue of fact to be determined in this case.
- [34] The Plaintiff's case is that he had brought his vehicle to a stop in the centre of his half of Hastings Main Road, facing towards the Garrison and that he was on the left and proper side of Hastings Main Road waiting to make the right turn onto Hart's Gap. According to his testimony, as he was sitting in his stationary car in the centre of his lane of Hastings Main Road, the oncoming vehicle driven by the 2<sup>nd</sup> Defendant suddenly swerved in his direction, crossed the centre-line of the road before swerving back to the left. In so doing, he says, the 2<sup>nd</sup> Defendant collided with the right front side of his stationary car. According to the Plaintiff, the 2<sup>nd</sup> Defendant was wholly to blame for the accident.
- [35] For her part the 2<sup>nd</sup> Defendant says that the Plaintiff was wholly responsible for the accident. According to her testimony, she was at all times in on her left and proper lane of the Hastings Main Road proceeding in the direction of Oistins when the Plaintiff's oncoming vehicle suddenly and without warning turned to the right across her path onto Hart's Gap. As a result of the Plaintiff's actions, she veered to the left and the Plaintiff's car collided with her vehicle on the right side.
- [36] While the facts surrounding the exact position of both vehicles immediately prior to the collision are obviously in dispute, it is clear from the evidence of the Plaintiff and to a lesser extent from the testimony of the 2<sup>nd</sup> Defendant, that the Plaintiff intended to make a right turn from Hastings Main Road into Hart's Gap and that in order to do so, he would have to cross the path of the Defendants' oncoming vehicle.
- [37] In this regard, the Code provides, *inter alia*, that a driver wishing to make a right turn across the path of oncoming traffic should reduce his speed before the turn, signal his intention to turn and just before proceeding, look to make sure the way is clear and that no vehicles are either oncoming or overtaking. *[See rule 7.43]*
- [38] The Code further provides that a right turn must not be made in front of oncoming traffic unless such a turn can be safely made. *[See rule 7.46.]*
- [39] The Court has considered all of the evidence together with the applicable rules of the road and the respective obligations of each driver. The fact that an accident occurred at all, suggests that one or other of the vehicles crossed the centre-line into the path of the other, causing the collision.
- [40] In the present case, it is clear that Timothy Walker and Donna Declé could not both be telling the truth and that the version which one or other of them gave about the point of impact was mistaken or completely untrue. Under cross-examination, both witnesses maintained their respective versions (given during examination-in-chief) as to how the accident occurred and ultimately, the Court was unable to determine which of them was obviously lying.
- [41] As Defence witness, Malcolm Hunte arrived at the scene of the accident minutes afterwards and did not see the point of impact, there was also no independent eye witness testimony capable of corroborating Donna Declé's evidence as to how the collision took place.
- [42] Having examined the Plaintiff's version of the facts, the Court finds that inasmuch as the Plaintiff intended to make a right turn into Hart's gap, it is more likely than not that he would have brought his vehicle closer to the centre line of the highway in preparation for the right turn rather than to have brought his vehicle to a stop in the centre of his half of the highway as he testified.
- [43] Having examined the Plaintiff's version of the facts together with what little evidence there was as to the damage sustained by both vehicles, the Court is satisfied that the damage to both vehicles was not consistent with a near

head-on collision in his half of the highway in the manner he described. The damage to both vehicles is, in the Court's view, more consistent with a collision which occurred in the centre of the highway in circumstances where one or other vehicle may have crossed the centre-line at the point of impact and I so hold.

- [44] The Defendant's vehicle was an Izuzu pick-up with bully bars on the front. The Plaintiff says that the damage to the right front side of his vehicle was caused by the bully bars on the front of the Defendant's vehicle although there was no evidence that the bars had been damaged in the collision and the only damage to the Defendant's vehicle were some superficial scratches along the right side of the Defendant's vehicle, consistent with what the Court would describe as a glancing blow or scraping impact along the right side of the Defendant's vehicle. The impact was sufficiently severe to have caused the airbags in the Plaintiff's vehicle to deploy, stunning him in the process.
- [45] The 2<sup>nd</sup> Defendant testified that the Plaintiff turned suddenly right across the path of her oncoming vehicle causing her to veer to the left in consequence of which the Plaintiff's vehicle collided into the right side of the 1<sup>st</sup> Defendant's Izuzu pick-up truck.
- [46] On the 2<sup>nd</sup> Defendant's version of the facts, it would be expected that the Plaintiff's turning vehicle would more than likely have sustained damage to its left front and left fender, or even across its entire front.
- [47] It is, however, equally possible that the 2<sup>nd</sup> Defendant (as the Plaintiff alleged) could have strayed over the centre-line, for whatever reason, and then swerved sharply left to avoid colliding with the Plaintiff's stationary vehicle, grazing the right side of Plaintiff's stationary vehicle and causing damage of the type sustained by both vehicles. Furthermore, as the 2<sup>nd</sup> Defendant clearly had sufficient room to her left to swerve to the left, as she says, to avoid the collision, it was also possible that the 2<sup>nd</sup> Defendant was not fully to the left of the highway when the collision occurred and could even have crossed the centre-line of the road as the Plaintiff alleged.
- [48] The final position of both vehicles after the impact was also not helpful in a determination of which driver was to blame. The Plaintiff's vehicle ended-up in the centre of the road facing Hart's Gap, but more in the lane going to Oistins. This is consistent with the Plaintiff's evidence that the point of impact occurred on his side of the road, knocking his car backwards from the spot where he had been stopped prior to the accident, and also moving the front of his car to the right, pushing it over the centre-line into the other half of the road at an angle.
- [49] The 2<sup>nd</sup> Defendant's vehicle, however, travelled approximately 20 to 40 feet from the point of impact and had swung completely around and come to a stop facing Bridgetown. Although there was no evidence that she was driving at an inordinate speed, the fact that her vehicle traveled so far from the point of impact, even on her version of the facts, suggests some degree of speed.
- [50] It is well established in the law of negligence, that if two motor vehicles collide in the centre of the road, the inference is, in the absence of evidence enabling the blame to be fixed upon one driver or the other, that both drivers were equally to blame. [*See Halsbury's Laws, Volume 78: Negligence page 65 @ para 55. and Baker v Market Harborough Co-operative Society Ltd [1953] 1 WLR 1472*]
- [51] In the absence of any convincing evidence which suggested that one driver was more to blame than the other, the Court is not moved to accept either version of the facts. In the circumstances, the Court finds that the proper inference to draw in this case is that both drivers were equally responsible for the accident.
- [52] In the result , the Court finds that the Defendants are 50% liable to the Plaintiff on the Statement of Claim and the Plaintiff is 50% liable to the Defendants on the Counterclaim.
- [53] The Defendants will pay one half of the Plaintiff's costs, while the Plaintiff will pay one half of the Defendants' costs. Both sets of costs are to be assessed if not agreed.

**Maureen Crane-Scott**

**Judge of the High Court**