BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

No. 1834 of 2012

BETWEEN

DESMOND NICHOLLS	**CLAIMANT**
AND	
ACE ENGINEERING INC.	**FIRST DEFENDANT**
RICHELLE NURSE	**SECOND DEFENDANT**

Before The Hon. Madam Justice Jacqueline A. R. Cornelius, Judge of the High Court

2014: June 10

Ms. Charleen Walkes for the Claimant
Ms. Nicole Roachford for the Defendants

DECISION

Introduction

[1] The Applicant/Claimant applies for an order that summary judgment be awarded pursuant to Part 15 of the Supreme Court (Civil Procedure) Rules (CPR) 2008 or alternatively that the Defendants' defence be struck out pursuant to Part 26.3(3) of the CPR on the grounds that the Respondents/Defendants have no real prospect of successfully defending the claim or issue and the Defence discloses no reasonable grounds for defending the claim.

[2] The crux of the matter lies in the disputed proposition that where a motorist deliberately turns across another's path in response to the flashing lights of the other, thereby causing a collision, no defence is possible and no claim of contributory negligence can be made.

BACKGROUND

[3] This claim arose out of a motor vehicle collision which occurred on 20 January 2009 along Searles Main Road, Christ Church. On 26 October 2012 the Claimant filed a Claim Form with a Statement of Claim and a Notice of Proceedings under the Road Traffic Act Cap 295. He subsequently filed an Amended Claim Form and Statement of Claim on 22 March 2013.

[4] The facts reveal a common occurrence on local roads. The Claimant, Mr Nicholls, pleaded that he was driving motor vehicle XH 490 along Searles Main Road in a westerly direction when motor vehicle XA 4737 (owned by the First Defendant), being driven by the Second Defendant, Miss Nurse in the opposite direction, suddenly turned across the Claimant's path and collided with his vehicle. He claims damages as a result of the negligent driving of the Second Defendant.

[5] The Defendants filed their Defence on 24 January 2013. In it, they allege that the Second Defendant had come to a stationary position with the intention of turning right when the Claimant flashed his lights evidencing his giving precedence to the Second Defendant to turn right into Searles Factory Yard. At paragraph 5, the Defendants deny that the collision was caused by the negligence of the Second Defendant or by breach of statutory duty and state that it was caused solely by the Claimant's negligence and/or breach of his statutory duty.

[6] On 19 March 2013 the Claimant applied for summary judgment and filed an affidavit in support on 17 June 2013. He deposed to the following:

> "6. I have read the Defence of the First and Second Defendants which states, that I would have flashed my light giving the Second Defendant precedence to proceed across my path and into Searles Factory Yard. I say however that it was never my intention to give the second Defendant precedence to proceed across my path, **as the headlights were actually switched on in error and quickly switched off.**

> 7. I further say that in any event, a flashing headlight does not indicate that it is safe for a driver to proceed across the path of an oncoming vehicle…
>
> 8. I further say that the Second Defendant in proceeding whilst my vehicle was still in motion failed to exercise the requisite care and attention which was the sole cause of this collision" (emphasis mine)

[7] In her Affidavit of 28 June 2013 the Second Defendant states that the Claimant must bear some liability for the accident. She deposed as follows:

> "4. That the Claimant flashed his lights signaling his intention to allow me to cross, that is, he turned on his lights and turned them off after a few seconds.
>
> 5. That the Claimant stated that it was an error, however, he made no attempt to correct that error and instead, he collided with the vehicle driven by me.
>
> 6. That based on the belief that the Claimant did indeed give, that he was allowing me to make my turn, I immediately did so when the Claimant collided into my vehicle.
>
> 7.That given the circumstances, the Claimant must bear some liability for the accident.
>
> 8. That to deny me the opportunity to argue liability, would be unjust in the circumstances."

ISSUES

[8] The issues to be determined in this application are clear. Firstly, whether the Court should give summary judgment against the Defendants on the Claimant's claim; and secondly, whether the Defendants' Defence should be struck out pursuant to Part 26.3(3) of the CPR. The issues as mentioned

above give rise to the further questions: what does a "flashing light" given by a motorist to another mean? Is it an invitation to move ahead in precedence to the flasher? If an accident occurs subsequently, who is to blame?

[9] The argument of the "flasher", the Claimant, Mr. Nicholls, is that a flashing headlight (whether flashed in error or not) means nothing more than an indication to the other motorist that "come if you want but the risk is at you.'

[10] The argument for the Defendants is that the Claimant by flashing his lights, contributed to the collision, and that the matter is further compounded by the fact that though he asserts that the lights were flashed in error, he made no attempt to correct the error by any further signal to the Second Defendant. Having made that signal in error he then had a duty to other road users who were misled by his actions.

LAW

[11] Part 15 of the CPR sets out the procedure by which the court may decide a claim or a particular issue in a claim without trial. Rule 15.2 provides the grounds for summary judgment. It states:

> "The court may give summary judgment against a party on the whole of the claim or on a particular issue if
>
> (a) it considers that
>
> (i) the claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) the defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other reason why the case or issue should be disposed of at trial."

[12] Rule 15.6 relates to the Court's powers on an application for summary judgment. It provides that:

> "15.6 (1) The court may give summary judgment on any issue of fact or rule whether or not such judgment will bring the proceedings to an end.
>
> (2) Where the proceedings are not brought to an end, the court must also treat the hearing as a case management conference."

[13] Rule 26.3(3) deals with striking out a statement of case. It provides:

> "(3) The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court
>
> (a) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> (b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending the claim; or
>
> (c) ..."

[14] In ***Swain v. Hillman*** **[2001] 1 All ER 91** Lord Woolf MR explained at p. 92:

> "Under r. 24.2 [rule 15.2 Barbados CPR], the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which has no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' ... direct[s] the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

At page 94 Lord Woolf MR continued:

> "It is important that a judge in appropriate cases should make use of the powers contained in Pt. 24. In doing so he or she gives effect to the overriding objectives ... It saves expense: it achieves expedition; it avoids the court's resources being used up on cases where this serves no useful purpose, and I would add, generally, that is in the interests of justice. If a claimant has a case which is

> bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible . . . Useful though the power is, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial ... The proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial; that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

[15] In ***Alfa Telecom Turkey Ltd v Cukurova Finace International Ltd et al*** **Civil Appeal No. 1 of 2009 (decision of 16 September 2009)** the Court held that the decision on a summary judgment application does not involve the judge in conducting a mini trial. Further, if the pleaded case of the parties indicates that there is a factual issue to be tried, which if proved in favour of the respondent to the application might result in a decision in the latter's favour, then the preemptive power of the Court should not be used.

[16] The Court in ***Alfa Telecom Turkey (supra)*** went on to refer to the case of ***Bank of Bermuda Ltd v Pentium (BVI) Ltd et al*** **Civil Appeal No. 14 of 2003 (BVI, judgment delivered 20 September 2003)** in which Saunders CJ (Ag.) (as he then was) stated that:

> "[18] A judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim."

[17] The authors Gilbert Kodilinye and Vanessa Kodilinye in the text **Commonwealth Caribbean Procedure, 3rd ed.** at page 64 wrote as follows:

> "… **summary judgment will not normally be appropriate for negligence and personal injuries claims where the facts are more likely to be disputed** … the policy of the CPR is to knock out weak cases at an early stage of the proceedings, whether the weakness is on the defendant's or the claimant's side. It was felt by the framers of the CPR that it was not in the interests of litigants to pursue cases or to put up defences that were doomed to fail, and the result of which would be unnecessary costs burdens." (emphasis mine)

[18] In ***Bennett v Pearson*** **C.L. B.446 of 1994 (Jamaica Supreme Court, unreported decision of 25 November 2004)** Sykes J stated:

> "I am not saying that success is guaranteed but neither can I say that failure is assured. My task at this stage is simply to determine whether the claimants' case is such that it has *no real prospect of succeeding*. I am not permitted to conduct a mini-trial of the issues . . . Some of the points of law cannot be dealt with unless there is a full exploration at the trial of all the relevant facts and circumstances. The summary judgment procedure is not a substitute for a trial. It is designed to cast out the most hopeless of cases. There are cases that, even on the most benevolent view of the allegations, the party relying on them simply cannot succeed."

THE DEFENCE & ISSUE OF CONTRIBUTORY NEGLIGENCE:

[19] Do the Defendants have a real prospect of successfully defending the claim?

[20] The Second Defendant asserts that the Claimant must bear some liability in circumstances where he signaled his attention to allow her to turn right across his path into Searles Factory Yard and that it would therefore be unjust if she is not afforded an opportunity to argue liability. Moreover, she argued that the Claimant had a duty of care in circumstances where he gave

a misleading signal. She submits, if the Claimant flashed his lights to her in error (as he contends), the Claimant made no attempt to rectify his error.

[21] The Defendants' pleadings dispute liability (the extent thereof) on the Claimant's claim and raise the defence of contributory negligence. In their Defence, the Defendants' state as follows:

> "4 … The Second Defendant who had come to a stationary position with the intention of turning right, when the Claimant flashed his lights evidencing his giving precedence to the Second Defendant. The second Defendant upon noting that the Claimant gave way attempted to make a right turn into Searles Factory Yard when the collision occurred.
>
> 5. The Defendants deny that the collision was caused by the negligence if the Second Defendant or by breach of the Statutory duty but state that it was caused solely by the negligence of the Claimant and/or the Claimant's breach of statutory."

[22] On the meaning of contributory negligence, the learned authors wrote in the treatise **Charlesworth & Percy on Negligence 12th ed.**, at **paragraph 4-03**:

> "It [contributory negligence] applies solely to the conduct of the claimant. It means that there has been some act or omission on the claimant's part which has materially contributed to the damage caused and is of such a nature that it may properly be described as negligence. For these purposes "negligence" is used in the sense of careless conduct rather than in its sense of breach of duty… It connotes failure by the claimant to use reasonable care for the safety of either himself or his property, so that to some extent, he becomes blameworthy as the "author of his own wrong".

Further, the authors refer to the case of ***Nance v British Columbia Electric Ry*** **[1951] AC 601** at **page 611** where Lord Simon pointed out:

> "**When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to**

> **establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full**." (emphasis mine)

[23] Moreover, **section 3** of the **Contributory Negligence Act Cap 195** provides that:

> "**where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons**, a claim in respect of that damage shall not be defeated by reason of the fault of the persons suffering the damage, but **the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage**."(emphasis mine)

[24] There is no evidence before the Court that contradicts the assertion that Claimant flashed his headlights at the Second Defendant. The Second Defendant refutes and rejects the Claimant's argument that "a flashing headlight' does not indicate that it is safe for a driver to proceed across the path of an oncoming vehicle. She relied on the case of ***Clarke v Winchurch* [1969] 1 All ER 275**. There, the defendant drove his car from the kerb, facing oncoming traffic when a bus stopped to allow him to cross. The bus driver flashed his headlights at the defendant who came out extremely slowly in front of the bus. The plaintiff was riding a moped, overtaking the stationary traffic and bus, when he collided with the defendant's vehicle. The court considered the plaintiff wholly to blame for the accident. It went on to conclude, "with regard to the bus driver his flashing headlights meant merely 'Come on so far as I am concerned'."

[25] It is settled law that road users owe a duty of care to fellow users and will be liable in negligence if breach of that duty causes damage. In ***Bourhill v***

Young **[1943] AC 92** at **104** it was held that a driver of a vehicle on the road is under a duty to take proper care not to cause damage to other road users. Lord Macmillan stated that reasonable care means an "avoidance of excessive speed, keeping a good look out, observing traffic rules and signals and so on."

[26] It is evident upon reading the Defence and Second Defendant's Affidavit that the Defendants have disputed the obligation to compensate the Claimant on his full claim; i.e. the extent of liability is in issue. In this regard they have raised contributory negligence in circumstances where the Claimant has admitted that he signaled/flashed car lights (whether in error or otherwise) at the Second Defendant.

[27] It seems to me that this is not a weak defence so doomed to fail that should be struck out at this stage. The weight of the authority in favour of the Claimant is not so strong to my mind that it places the defence of the Defendant out of the realms of success. The sheer prevalence of this practice on our roads and the motoring culture in this jurisdiction indicates that the limits of the duty of care in these circumstances may not be as well defined as counsel for the Claimant argues, and may well be tipped in favour of the Defendant at this stage. In fact, from this perspective, this practice is so common that the issue should go to trial.

[28] In the premises, the Court is of the view that the Defendants have a real prospect of defending the claim.

CONCLUSION

[29] Having considered the relevant law and facts, bearing in mind the overriding objective under Part 1of the CPR, the Court is satisfied that the Defendants have established that they have a real prospect of successfully defending the Claimant's claim or issue. These issues cannot be resolved at this stage.

[30] The Claimant's application for summary judgment is refused.

[31] For the reasons mentioned above, the Court having examined the Defence finds that it discloses reasonable grounds for defending the claim. The Claimant's application for striking out under Part 26.3(3) is dismissed.

[32] Costs awarded to the Defendants to be agreed or assessed.

Jacqueline A.R. Cornelius
Judge of the High Court