



[2015] JMSC Civ.62

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2008 HCV 04545

BETWEEN **YOENSY BARNES** **CLAIMANT**

AND **MAIKEL BIZET** **DEFENDANT**

Mr. Barrington Frankson and Ms. Zaieta Skyers instructed by Frankson and Richmond for the Claimant

Mr. Ronald Paris instructed by Paris and Company for the Defendant

Heard: July 30 & 31, November 18 & 20, 2014 and April 09, 2015

***Negligence – Motor vehicle collision – Claim for personal injuries -
Counterclaim for cost of repairs to motor vehicle.***

V. HARRIS J

[1] This is a claim in negligence which arises from a road traffic accident that took place on Friday June 30, 2006 at approximately 7:00 p.m. along the Runaway Bay main road in the vicinity of Salem in the parish of St. Ann. The parties involved in this unfortunate incident are Dr. Yoensy Barnes, a medical doctor and Mr. Maikel Bizet, an architect.

The Issues

[2] These are the issues to be determined:

(i) On what section(s) of the roadway were the vehicles travelling just before the collision took place?

- (ii) What was the traffic like just before and at the time of the accident?
- (iii) Was the collision between the two motor vehicles caused by the negligence of Mr. Bizet or Dr. Barnes?
- (iv) Are Mr. Bizet and/or Dr. Barnes contributory negligent?
- (v) What is the quantum of damages to be awarded if either party succeeds?

The Claimant's position

[3] The claimant, Dr. Barnes, is alleging that he was driving his Honda Civic motor car in an easterly direction, along the left asphalted lane of the Runaway Bay main road heading towards Ocho Rios, when the defendant, Mr. Bizet, who was driving a Hyundai Tucson Sports Utility Vehicle (SUV) on an unpaved section of that roadway to his left, suddenly and without any warning turned right across the roadway into his path.

[4] Dr. Barnes said that at the time of the accident there was construction work being done on that section of the road. He observed no traffic coming in the opposite direction and there were no vehicles travelling behind or directly in front of him.

[5] He said that just before the collision he had observed Mr. Bizet's SUV and another vehicle (a Honda CRV) travelling very close to each other and at a very slow rate of speed. Mr. Bizet's SUV was ahead of the Honda CRV.

[6] These two vehicles were to the left of the lane he was driving in and on an unasphalted section of the roadway. He said that he passed the first vehicle and was in the process of passing Mr. Bizet's SUV when it suddenly and without any indication turned right across the roadway and into the path of his motor car.

[7] The left front section of Dr. Barnes motor car collided with the right front wheel of Mr. Bizet's SUV. Dr. Barnes' motor car then ran off the main road and finally crashed into the perimeter wall of the apartment complex in which Mr. Bizet resided. This apartment complex was located to the right of the main road as one proceeds in the direction of Ocho Rios from Montego Bay.

[8] The left front fender, left front panel and left headlight of Dr. Barnes' motor car were damaged. He observed damages to the right front wheel and right front fender of Mr. Bizet's SUV.

[9] Dr. Barnes has asserted that the collision was caused solely by the negligent manner in which Mr. Bizet operated his SUV. He denies that he was contributory negligent.

[10] As a result of this collision Dr. Barnes is saying that he has sustained serious personal injuries and suffered loss and damages. He is claiming the sum of \$9,000,000.00 in general damages, \$3,000,000.00 for handicap on the labour market, costs and interest. If Dr. Barnes succeeds, the parties have agreed special damages in the amount of \$288,100.00.

The Defendant's Case

[11] The defendant Mr. Bizet, on the other hand, is alleging that Dr. Barnes is solely responsible for the accident which occurred or at the very least that he contributed to it. He is saying that he was travelling in the same lane as Dr. Barnes was just before the accident and not on the unpaved section of the roadway.

[12] A technician, who was going to install a car alarm in his vehicle, was travelling behind him in a Honda CRV. They were headed to his home which was located in an apartment complex on the right hand side of the Runaway Bay main road, in the vicinity of Salem, as one proceeded from Montego Bay towards Ocho Rios.

[13] He stated that prior to the collision, there was traffic behind him and there were also motor vehicles that were travelling in the opposite direction. He said that there was remedial road construction that was taking place on that section of the roadway and so the vehicles were moving slowly along the road. He also said that there were heavy duty vehicles on the unpaved section of the roadway.

[14] Mr. Bizet said that when he reached in the vicinity of the apartment complex in which he lived, he stopped his vehicle. His right hand indicator was turned on to alert the other motorists on the road that he was making a right turn. Before turning right he

said that he had to wait until about five to six (5-6) vehicles that were travelling in the opposite direction (the right lane) had passed his vehicle.

[15] After the right lane was clear, he checked his rear view mirrors and then turned right. It was at this time that he felt an impact to the right front wheel of his SUV. Mr. Bizet stated he never saw Dr. Barnes' motor car before he felt the impact. He alleged that the collision was caused because Dr. Barnes was overtaking when it was not safe to do so.

[16] Mr. Bizet has filed a counterclaim and is seeking special damages in the amount of \$160,833.31 for the cost of the repairs to his SUV, assessor's fee, loss of use and wrecking fees. He is also claiming costs and interest. The figure of \$85,833.31 has been agreed between the parties as the amount to be awarded as special damages, should Mr. Bizet succeed on his counterclaim.

The Law

[17] Section 51 of the Road Traffic Act sets out the rules of the road. The applicable sections of that legislation which applies to this case are sections 51(1) (d), (f) and (g) and 51(2).

[18] Section 51(1) (d) provides that a motor vehicle shall not be driven so as to cross or commence to cross or be turned in a road if by doing so it obstructs any traffic.

[19] Section 51(1) (f) states in part that a motor vehicle that is proceeding from a place which is a road into a place which is not a road shall not be driven so as to obstruct any traffic on the road.

[20] Section 51(1) (g) stipulates that a motor vehicle shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead.

[21] Finally section 51(2) imposes a duty on all drivers of motor vehicles to take such action as may be necessary to avoid an accident.

Analysis and Disposal - Liability

[22] The credibility of the parties is crucial to the resolution of the issues that concern the question of liability in this matter. I also bear in mind that in order for Dr. Barnes to succeed he must satisfy the Court on a balance of the probabilities that the accident was caused exclusively by Mr. Bizet's negligence.

[23] Both Dr. Barnes and Mr. Bizet have given different accounts of how the accident occurred. There is no independent evidence on the subject of liability and the court therefore has to determine the outcome of this matter by considering the parties' demeanour in the witness box and applying common sense and experience to the evidence presented by them.

Issue 1: On what section(s) of the roadway were the vehicles travelling just before the collision took place?

[24] Dr. Barnes has given evidence that Mr. Bizet was travelling on the left unpaved section of the road prior to the collision. Mr. Bizet has denied this. He stated that he was travelling in the left asphalted lane, that is, the same lane as Dr. Barnes was travelling in, just before the accident.

[25] In Dr. Barnes' witness statement which was filed on October 24, 2011 it was stated there for the first time that Mr. Bizet's SUV and another vehicle (the Honda CRV) were travelling on an unpaved section of the roadway. It is noted that this was never averred by him in his Particulars of Claim that was filed on September 25, 2008, which was much closer in time to the date of the accident. I considered this to be important and have taken it into account when I assessed his credibility.

[26] The unchallenged evidence of Mr. Bizet is that he had purchased his motor vehicle about seven to eight (7-8) days before the accident and that he was 'like a baby with a new toy'. He was travelling from the Gran Bahia Principe Hotel where he worked to his apartment that was situated in Salem, Runaway Bay at the relevant time.

[27] There is no evidence that motorists were being directed to use the unpaved section of the roadway just prior to the time of the collision. There is no evidence that

motorists were prevented by anything or anyone from using the left paved lane. Dr. Barnes' evidence was that he was travelling in this very lane.

[28] The question which naturally arises is this: Since motorists could drive on the left asphalted lane of the road, why would Mr. Bizet be driving his new motor vehicle, on an unpaved section of the roadway to the left of the asphalted road, in such close proximity to his home which was located on the right hand side of the road?

[29] Additionally, if, as Dr. Barnes said, Mr. Bizet's SUV was to his left on the unpaved section of the road, when it suddenly and without warning turned right and came into his path just as he was about to pass the vehicle, was it not more likely the case that the collision would have taken place on a section of that paved left lane rather than in the right lane? It is to be noted that it is agreed that the collision took place in the right lane.

[30] I will answer these two questions in this way. On this aspect of the evidence I am prepared to accept the evidence of Mr. Bizet that he was not driving on the unpaved section of the roadway and I find that he was driving in the asphalted left lane.

[31] I do so because I believe him when he said that he had purchased his motor vehicle about a week before the accident and he was like a 'baby with a new toy'. He was on his way home. He knew exactly where his home was, that is, on the right hand side of the road. There is no evidence that he was prevented by anyone or anything from driving in the left paved lane. In light of these factors, I do not accept that he would have driving on the left unpaved section of the road just before the accident.

[32] Further, the agreed fact that both cars collided with each other in the right lane is more consistent with the evidence given by Mr. Bizet.

Issue 2: What was the traffic like just before/at the time of the accident?

[33] Dr. Barnes' evidence was that no vehicles were travelling behind him, directly ahead of him or in the opposite direction just prior to and at the time of the accident. Mr. Bizet's vehicle and the Honda CRV were to his left on the unpaved section of the road travelling very closely together and very slowly. Mr. Bizet on the other hand stated that

as he was driving on the left paved lane, there were vehicles that were travelling behind him, as well as, in the opposite direction.

[34] I am again prepared to accept Mr. Bizet's evidence on this aspect of the evidence. I do so because I take into account that the road on which this accident occurred was and still is the main North Coast highway that leads from Kingston to Montego Bay.

[35] There was road construction going on at the time. This no doubt would have had some impact on the motorists and other users of the road at the time. Mr. Bizet said, and I accept, that the motorists were driving slowly on the roadway as a result of the remedial road works.

[36] Moreover, this was a Friday evening at about 7:00 p.m. Applying my experience to this aspect of the evidence, given the day, time and location of the accident, as well as, the road works that were taking place at the time, I am unable to accept Dr. Barnes' evidence concerning the traffic that was on that section of the road at the material time.

Issue 3: Was the collision between the two motor vehicles caused by the negligence of Mr. Bizet or Dr. Barnes?

[37] Having assessed the parties as they gave evidence, I was impressed with the demeanour of Mr. Bizet. He appeared to me to be quite forthright and candid. I felt he was not shaken by the very able cross-examination of learned counsel Mr. Frankson.

[38] I am therefore prepared to act on the evidence he has given and find as a fact that the accident was caused solely by the negligence of Dr. Barnes who was overtaking when Mr. Bizet would have been in the right lane making his way into the driveway of his apartment complex. At the time that Dr. Barnes was overtaking, the road ahead of him was not clear and unobstructed and it was not safe for him to do so.

[39] I wish to address two matters before leaving this issue. These concern two areas of Mr. Bizet's evidence. It was admitted by him that he never pleaded in his Defence that he had put on his right indicator before he made the right turn and that there were

heavy duty vehicles that were parked on the unpaved section of the road. He also agreed that he considered these two matters to be important.

[40] He maintained however, that these two things were true although they were absent from his earlier pleadings, which would have been done in closer proximity to the date of the accident. I took these two matters into account when I assessed his credibility. I found the parking of the heavy duty vehicles on the unpaved section of the road to be of little significance.

[41] I felt however, that the absence from his earlier pleadings that he had put on his right indicator before turning right was important. In spite of this, having assessed his demeanour, I believed him when he said that he did this and have therefore found as a fact that he had done so.

Issue 4: Are Mr. Bizet and/or Dr. Barnes contributory negligent?

[42] In light of my finding that Dr. Barnes is solely responsible for the accident, I have found that Mr. Bizet was not contributory negligent.

Submissions made on behalf of Dr. Barnes

[43] Before addressing the issue of damages, I wish to address three submissions that were advanced on behalf of Dr. Barnes.

[44] Firstly, I was urged to consider that the damages to Mr. Bizet's SUV were more in keeping with Dr. Barnes' account of how the accident happened. However, I did not find that this was helpful to me at all. The damages to Mr. Bizet's vehicle that I saw in the pictures that are exhibits in this case could well have been caused based on his account of the collision.

[45] Secondly, it was submitted that if the court accepts Mr. Bizet's evidence that when he looked in his rear view mirror he did not see Dr. Barnes' motor car, then this evidence is inexplicable. The thrust of this submission is that since Mr. Bizet said that he looked in his rear view mirror before he started to make the right turn, it follows that

he would have seen Dr. Barnes' vehicle which would have been in the process of overtaking.

[46] Without venturing into the realm of speculation, it is clear to me that Mr. Bizet's ability to see Dr. Barnes' vehicle would be dependent on how the vehicles were positioned in relation to each other at the time when Mr. Bizet looked in his rear view mirrors.

[47] It is well known and accepted that as one is driving a motor vehicle there are areas of the road that cannot be seen by looking forward or through the rear view and side mirrors. These areas are commonly referred to as 'blind spots'.

[48] Finally, it was put forward that I should reject Mr. Bizet's evidence that he had to wait until the five to six (5-6) vehicles that were travelling in the opposite direction had passed him before he began the right turn. If this were so, it was advanced, then those vehicles would have been in the same lane as Dr. Barnes was when he was overtaking.

[49] Unfortunately, I am unable to agree with learned counsel Mr. Frankson on this point. Having accepted this aspect of Mr. Bizet's evidence, I draw the reasonable and inescapable inference that Dr. Barnes would have started overtaking after those vehicles that were travelling in the right lane had passed his motor car as well.

Issue 5: What is the quantum of damages to be awarded if either party succeeds?

[50] Mr. Bizet has succeeded on the claim and counterclaim. The parties had agreed that if this were the outcome of the matter that the court was to award him special damages in the sum of \$85,833.31 on his counterclaim. Furthermore, the Court will make an order as to interest on the agreed figure based on Mr. Bizet's pleadings.

Conclusion and Orders

[51] Judgment is given for the defendant on the claim and counterclaim.

[52] On the counterclaim the defendant is awarded special damages as agreed in the sum of \$85,833.31 with interest at 3% per annum from June 30, 2006 to April 09, 2015.

[53] Costs on the claim and counterclaim to the defendant, to be taxed, if not agreed.