The Republic of Trinidad and Tobago

In the High Court of Justice

Claim No CV 2016 - 00913

Between

KESTON CLARKE

Claimant

AND

DARREN GONZALES

First Defendant

RAKESH ROOPNARINE

Second Defendant

Before Her Honour Madam Justice Eleanor Joye Donaldson-Honeywell

Appearances:

Mr. Phillip A Wilson and Ms Keneisha Browne, Attorneys at Law for the Claimant

Mr Shiva Boodoo and Ms. Roshni Balkaran, Attorneys at Law for the Defendants

Delivered on February 15th, 2018

Judgement

A] Introduction

1. Mr. Keston Clarke ("the Claimant") claims for personal injury and property damage against Messrs. Darren Gonzales and Rakesh Roopnarine ("the Defendants") arising out of a motor vehicle accident that occurred on March 30, 2012. There is a Counterclaim by the Defendants for property damage. On a joint application by the

Claimant and Defendants which was granted by the Court the Trial addressed only liability with the assessment of damages and costs to be later determined by a Master.

2. The Claimant's case as pleaded in his Statement of Case filed on March 24, 2016, is essentially that he was proceeding along the Solomon Hochoy Highway in a southerly direction when suddenly and without warning, motor vehicle registration number PCH 4997, driven by the First Defendant, as the lawful servant and/or agent of the Second Defendant, came into contact with the rear of motor cycle registration number PBJ 9437, being driven by the Claimant. It was approximately 2.00am at the time so there was no daylight and not much activity on the highway. The impact caused the Claimant to become airborne before falling back to the ground. As a result he suffered severe personal injuries.

3. The Claimant alleges that the accident was caused by the negligence of the First Defendant in the driving of motor vehicle registration number PCH 4997, in that he, *inter alia*, failed to keep a proper look out and that he drove too fast in the circumstances. The Claimant's allegation that the Defendant failed to keep a proper look out is based on his own assessment that that must have been the case, since it was a straight, well-lit road and his motor cycle had hazard lights on but was hit from behind. The allegation regarding driving too fast is based on the Defendant's admission in evidence that he was driving at approximately 100km per hour.

4. In response, by a Defence filed on 27th September, 2016, the Defendants say firstly that as far as it related to the Second Defendant's ownership of the said motor vehicle registration number PCH 4997, same was registered at the material time, not to the Second Defendant but to one Neil Francette. As such, the Defence is that the Claim Form and Statement of Case does not disclose any cause of action against the Second Defendant and the claim as against him ought to be dismissed. The Claimant has not pleaded or brought evidence to contradict this ownership issue so at the outset the Claim against the Second Defendant is dismissed. However, as neither of the Defendants owns the said vehicle they would bear the burden of proving that they were the ones that in fact expended the sums to obtain the estimate and effect repairs to the vehicle.

5. As it relates to the Claim against both Defendants, the Defendants in their pleadings further deny that the accident was caused as a result of the negligence of the First

Defendant. Instead they contend that it was the Claimant who caused the events which unfolded that night leading to his injuries and the damage sustained to the vehicles. In particular they plead that he:

a. Unlawfully stopped along a major highway;

b. Stopped along the Sir Solomon Hochoy Highway in an area not so designated;

c. Stopped along the Sir Solomon Hochoy Highway without due reason;

d. Failed to alert other road users, including the First Defendant as to the presence of motorcycle PBJ 9437 along the said roadway;

e. Failed to use the hazard lights to warn other road users, including the Claimant of the presence of motorcycle PBJ 9437;

f. Failed to take heed for his own safety;

g. Stopped along the Sir Solomon Hochoy Highway in an unsafe and/or dangerous manner;

h. Failed to keep any or any proper lookout or to have any or any sufficient regard for other vehicles on the roadway in particular PCH 4997.

6. It was based on these particulars of the Claimant's negligence that, in addition to the Defence, a Counterclaim was filed seeking damages for the cost of repairs to motor vehicle registration number PCH 4997 as a result of the accident.

7. In response to the Counterclaim the Claimant filed a bare denial of the averments made therein. Importantly and more specifically the Claimant in his Defence to Counterclaim denies that he was ever parked on the highway. The Defence to Counterclaim merely repeats the Claimants pleaded case that he was driving along the Solomon Hochoy Highway when motor vehicle registration number PCH 4997, driven by the First Defendant came into contact with the rear of motor cycle PBJ 9437.

B] Evidence

8. At trial on the issue of liability, the Claimant relied on his evidence only while the First Defendant gave evidence on his own behalf.

The Claimant's evidence

9. The Claimant's evidence differed from the pleadings in that although he still maintained he was hit from behind while driving, in his sworn witness statement and under cross examination he introduced a new element to the events that he now says happened that night. Specifically, his evidence at Trial was that prior to being hit from behind he had parked on the right lane of the highway, behind a car he said was parked there due to difficulties encountered by the driver. This evidence regarding parking is inconsistent with what the Claimant said in his Defence to Counterclaim wherein he denied ever parking on the highway that night.

10. The events he speaks to, in testimony concerning the other parked vehicle on the road at 2.00am, recount a very detailed and unusual situation which he made no mention of in his pleadings.

11. The Claimant gave evidence of having left his job at the Carib Brewery Limited at approximately 1:45 p.m. and then proceeding en route to his home in Chaguanas. During his journey, the Claimant further testified that he came upon a motor vehicle which was stalled on the right most lane of the said highway in the vicinity of Traveller's Bar. The Claimant's sworn evidence was that he stopped to render aid, leaving his motor cycle, a dark blue road bike which was previously a purchased at a Police auction, in the right most lane of the said highway behind the stalled motor vehicle.

12. The Claimant's evidence-in-chief in this regard is inconsistent with the case as previously pleaded in his Statement of Case and Defence to Counterclaim, as he had denied parking and it was never pleaded that he stopped to render aid during the course of his journey. Under cross-examination, the Claimant admitted that he would have come to a stop on the right hand lane of the Solomon Hochoy Highway, that is the fast lane and he accepted that action was hazardous to other road users.

13. In his evidence-in-chief, the Claimant indicated that he assisted in pushing the stalled vehicle off the right lane and onto the shoulder, thereby leaving his motor cycle on the right lane of the Solomon Hochoy Highway. He again accepted that this would have caused a doubly hazardous situation to road users in the circumstances.

14. My overall impression of the Claimant as a witness was that he lacked credibility due to the inconsistencies between his pleaded case and the evidence he presented. The fact that he only belatedly introduced a story admitting parking on the highway but explaining it as necessary stop to help a driver in distress, made it difficult for me to accept his version of events.

15. In my determination, it was not possible to find in the Claimant's favour on a balance of probabilities that he was on his motorcycle with hazard lights on when he was hit and that he had on clothing with reflectors. He failed to prove that the accident was caused solely by the First Defendant without any contributory negligence on his part.

The First Defendant's Evidence

16. At paragraph 4 of the First Defendant's Witness Statement, he testified that he was proceeding at an approximate speed of 100 kilometers. Under cross examination, he admitted to driving at a speed of 100 kilometers. When it was put to him by counsel for the Claimant that he was exceeding the speed limit, the First Defendant responded that there is no speed limit for the highway and there is usually a clear road with hardly any vehicles around 2:00am in the morning. He admitted under cross-examination to taking a chance by driving at 100km per hour in the circumstances.

17. Accordingly, although the Claimant's evidence was tarnished to the extent that he could not prove the First Defendant was entirely responsible for the accident there was on the Defendant's own case an admission of fast driving. This would in my view have been part of the cause of the accident.

C] Applicable principles of Law and Findings

First Defendant's Negligence

18. As usefully underscored in the submissions of Counsel for the Claimant, there are certain well established situations wherein under the law governing Negligence it has been found that a duty of care exists. One such example is the duty of drivers.

19. The driver of a vehicle on the road owes a duty of care to other road users and pedestrians. The Honourable Mr. Justice R. Rahim in the case of **CV 01911 Angela Mitchell v Leon Brown and others** said in his judgment at paragraph 38 that

    "*The duty is to take reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the road. The standard of care which road-users must exercise is that of the reasonable road-user. The reasonable driver is not entitled to assume that other road-users will exercise the appropriate degree of care, and if their conduct is within the realm of foreseeability they will be liable for injury: Common Law Series: The Law of Tort. Chapter 13, paragraphs 13.53*".

20. Thus the First Defendant would be expected to exercise the degree of care and skill that would be expected of a reasonably competent driver. This duty as pointed out by counsel for the Claimant would include observing the legal speed limit. The First Defendant owed the Claimant a duty of care just as he owed a duty of care to other road users.

21. It is the Claimant's submission that the First Defendant breached his common law duty of care to the Claimant. Additionally, the First Defendant breach his statutory duty under the **Motor Vehicle and Road Traffic Act Chapter 48:50** which states under 62. (1) of the said Act that

    "*Subject as hereinafter provided, it shall not be lawful for any person to drive a motor vehicle of any class or description on any road—*

    (a) outside a built-up area at a speed greater than the speed specified in the Second Schedule as the maximum speed in relation to a vehicle of that class or description;

    (b) within a built-up area at a speed greater than the speed specified in the Second Schedule as the maximum speed in relation to a vehicle of that class or description;

(c) whether outside or within a built-up area, in respect of which a special speed limit is imposed, at a speed exceeding the special speed limit imposed in relation to a vehicle of that class or description."

22. The motor vehicle driven by the First Defendant falls within the category of vehicles that must not be driven at greater than the speed specified in the Second Schedule as the maximum speed, such speed being 80 kilometres per hour outside a built-up area. Rahim J. said in Angela **Mitchell v Leon Brown** at paragraph 40 of his Judgment, that

   "*Reasonable care in this context connotes the observation of traffic rules and regulations. Failure to comply with these rules and regulations is a matter to be taken into account in deciding whether there was negligence: Charlesworth & Percy on Negligence (supra) Chapter 10, paragraph 10-127*".

23. Applying the foregoing principles, it is my finding that the First Defendant was negligent in driving too fast in the circumstances. Thus, he at least contributed to the accident. On the other hand I do not accept, as submitted by the Claimant that the doctrine of *Res Ipsa Loquitor* applies in the sense that the Claimant is relieved of all liability because the fact of the collision itself could not be explained other than by the First Defendant's negligence.

24. Counsel for the Claimant citing Gilbert Kodilinye in **the Commonwealth Caribbean Tort Law Fifth Edition** noted that in order to succeed in his Claim of *Res Ipsa Loquitur*, the Claimant had to prove:
    - That the thing causing the damage was under the management or control of the defendant or his servant or agent; and
    - That the accident was of such of a kind as would not, in the ordinary course of things, have happened without the negligence on the defendant's part.

25. However, the Claimant has only proved that the vehicle that collided with him was under the First Defendant's management and control. He has not proved that the accident was such that it could not have happened without the First Defendant's Negligence.

26. Even if the Claimant's account of having moved off slowly from being parked in the fast lane at night when he was hit is accepted, it should have been reasonably foreseeable to him that an accident could have occurred. I however accept the First Defendant's version of events, that the Claimant was not on the motor cycle when it was hit. He had parked it and was in a position somewhere nearby when it was hit and the bike collided with him. Whether he was driving off slowly from a parked position as he belatedly contends or standing near his parked motor cycle, the Claimant would have contributed to the possibility of the very foreseeable occurrence of a driver coming along the same fast lane colliding with him.

27. The Claimant's submissions as to why he cannot be contributorily negligent are not persuasive, as heavy reliance is placed on the Claimant's testimony that he used hazard lights and wore reflective clothing. As previously stated and as will be more fully explained, the inconsistencies between his pleadings and his evidence caused me to find the Claimant to be a witness lacking in credibility. I therefore find in favour of the First Defendant that the Claimant did not use these alerting mechanisms to protect himself that night.

28. Even on the Claimant's own case, he did not plead that he looked back before riding slowly off from a parked position on the highway fast lane. Instead, in his pleadings he simply denied ever parking.

29. Under cross –examination the Claimant said he did not see a vehicle coming behind him along the highway. He said however that he did look back. My finding is that he did not look back.

30. Further, on his own case the Claimant admits he would have been riding at no more than around 26km per hour on the 80km per hour highway. The Claimant would have known of the danger of oncoming vehicles, whether he was riding off slowly from a parked position when hit as he testified to or standing on the fast lane as the First Defendant contends and I have found that he was so standing. From his evidence he knew it was hazardous for the car he claims to have seen parked to stop on the fast lane of the highway without hazard lights on.

31. It is clear, and I so find, that the Claimant was negligent in parking his motor cycle, standing on the highway, not taking due care to look out for vehicles coming along the highway and not having on hazard lights or reflective clothing. Accordingly, while finding that the First Defendant was negligent by speeding on the highway I do not find that he was wholly liable for the accident and the injuries/property damage sustained.

Claimant's Negligence

32. I agree with the Defendant's submission that the Claimant's witness statement demonstrates marked and material inconsistencies with his other accounts of the accident in his Statement of Case and Defence to Counterclaim.

33. The only thing consistent in the Claimant's story is that he was driving along the Solomon Hochoy Highway when he got into an accident. The Claimant's account of the accident starts from the position that he was proceeding along the said highway and then develops along the way into a differing account of the same incident. The new account involves a stalled motor vehicle, the characteristics of which the Claimant seemed unable to recall in any useful measure. This is so despite having testified to parking behind it and then pushing it along with the driver across two (2) lanes of the highway.

34. Counsel for the Defendants in submitting that the Claimant's entire case should be dismissed as lacking credibility based on these inconsistencies, cited **S-1047 of 1983 Ramsamooj Chattergoon v Selwyn Agard**. In that case, which involved a motor vehicle accident, Mr. Justice Persad Maharaj, summarised the law on contradictory statements. At page 30 of the judgment he said;

> "*I have perused the learning in HCA 612 of 1979, …At page 22 of the judgment the learned Judge adopted a passage from the judgment of Telfer Georges J.A in the case of Texaco Trinidad Inc v Oilfield Workers Trade Union Civil Appeal (unreported) #42/1969 which read as follows;*

> *"**<u>A witness who makes contradictory statements on oath on an issue which is the kernel of the case ought not to be believed</u>** unless he is able to give a satisfactory explanation for having done this..."*

"The principle is also neatly and aptly set out in <u>*R v Harris 20 Cr App R 144:*</u>

> *"**when a person says one thing at one time, or swears or says something to the contrary at another, his evidence must be rejected in its entirety because the person has destroyed his creditability** unless he offers some proper and satisfactory explanation for his inconsistency. [Emphasis added]*

35. It is in keeping with these principles that I have stated my finding as to the Claimant's lack of credibility. I find as a fact that the Claimant did not wear reflective clothing and that he was parked on the highway without hazard lights on. The story he testified belatedly to, concerning assisting with a vehicle parked on the highway, was a concoction.

36. It is clear that the Claimant was negligent in not taking due care to avert the foreseeable risks to having his motor cycle parked on the highway.

37. **Clause 4 Part 3 of the Trinidad and Tobago Highway Code**, which is issued by the Licensing Authority in accordance with **Motor Vehicle and Road Traffic Act, Chap. 48:50,** mandates that all motorcyclists are to keep to the left except when overtaking or when passing stationary vehicles or for other reasonable or sufficient cause. Even if the Claimant's version of events as pleaded in his Statement of Case is accepted, the Claimant admitted in his testimony, that he was occupying the right lane of the said highway.

38. Further, the Claimant has not demonstrated that a sufficient cause existed for his presence on the right lane of the said highway. As such, the Claimant was in breach of this provision of the Highway Code by not only occupying but by coming to a stop on the right lane of the said highway.

39. Additionally, Clause 52 of the said Code strictly prohibits the parking of and/or waiting in vehicles on the right of the left lane. By his own account, the Claimant indicates that his motor vehicle was parked, *not stalled*, on the right hand side of the said highway. The Claimant's case leaves open other possibilities that the Claimant himself was in a place that he was not supposed to be by law and as such, was the author of all that transpired thereafter, including the damage to the motor vehicle being driven by the First Defendant.

40. On the other hand, while I agree with the submission of the Defendants that "the mere occurrence of the collision between the Defendant's motor vehicle and the Claimant's motor cycle is not by itself indicative of negligence on the part of the Defendant, especially when pieced together with the surrounding circumstances of the Claimant's location" account must also be taken of the Defendant's admission of driving at a speed of 100km per hour, which in all the circumstances I find to have been negligent

D] Decision

41. Having considered the pleadings, evidence and submissions of the parties it is my conclusion that Judgment is to be ordered for the First Defendant on the Counterclaim with an apportionment of 90% contribution on the part of the Claimant and 10% on the part of the First Defendant, for contributing to the cause of the accident and the resulting damage sustained to the vehicle he was driving at excessive speed.

42. The Claim against the Second Defendant, who pleaded that he is not the owner of the vehicle involved in the accident, is dismissed as is his Counterclaim against the Claimant with no order as to costs.

43. As to the Claimant's case, my decision is that he has only succeeded in proving that the First Defendant was liable as to 10% in causing the accident that resulted in his injuries and damage to his motor cycle. The Claimant's said injuries and damage were sustained partly due to his own contributory negligence in parking at night on the fast lane of the highway, without hazard lights on or reflective clothing and failing to look back so as to observe oncoming vehicles. Accordingly, on the Claim the order is Judgment for the Claimant against the First Defendant for negligence apportioned at 10% contribution on the part of the First Defendant and 90% on the Claimant's part.

44. **It is hereby ordered as follows:**

a. Judgment for the Claimant on his Claim against the First Defendant for negligence, apportioned at 10% contribution on the part of the First Defendant and 90% on the Claimant's part.
b. Judgment for the First Defendant on the Counterclaim against the Claimant, with an apportionment of 90% contribution on the part of the Claimant and 10% on the part of the First Defendant.
c. The Claim against the Second Defendant by the Claimant and the Counterclaim by the Second Defendant against the Claimant are dismissed with no order as to costs.
d. The costs of the Claim and the First Defendant's Counterclaim are to be paid by the Claimant to the First Defendant on the prescribed basis.
e. The quantum of damages, costs and interest to be awarded to the Claimant and the First Defendant are to be assessed by the Master if not agreed.

Delivered on February 15th, 2018

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Eleanor Joye Donaldson-Honeywell
Judge