REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2016-02506

BETWEEN

LEON MOSES Claimant

AND

DENASH MAHARAJ

CHANDRA BUSHAN RAGOO

TRINRE INSURANCE COMPANY (TRINIDAD AND TOBAGO) LIMITED Defendants

Before The Honourable Madam Justice Margaret Y Mohammed

Dated the 22nd August, 2017

APPEARANCES:
Mr. Phillip Wilson instructed by Cordell Salandy Attorneys at law for the Claimant.
Ms. Raisa Caesar Attorney at law for the Defendants.

REASONS

Background

1. This claim arises from a motor vehicular collision, which occurred on April 10th 2015. It involved motor vehicle TBL 7793, a Toyota Hilux driven by the Claimant ("the Claimant's vehicle") and PCX 5505, a Mercedes Benz driven by the First Defendant ("the Defendant's vehicle"). The Claimant is an air condition and refrigeration technician. The First Defendant is the servant and/or agent of the Second Defendant who is the insured of the Third Defendant.

2. As a result of the accident, the Claimant claims against the Defendants damages for loss of use of his vehicle, special damages in the amount of seventy-five thousand five hundred dollars ($75,500.00) interests and costs. The Claimant also claims a declaration that the Third Defendant is liable to satisfy any judgment that is obtained against the Second Defendant and his servant and or agent in addition to all the costs and interest payable in respect of any judgment and any other costs for which the Second Defendant may be liable.

3. The Claimant's case is that around 3:30pm on the 10th April 2015, while driving the Claimant's vehicle in a northerly direction along the Uriah Butler Highway ("UBH"), and upon reaching the intersection of the Priority Bus Route ("PBR") Champ Fleur, he received a green traffic light signal in his favour and proceeded to cross the intersection while still proceeding north. The First Defendant was driving the Defendant's vehicle in a southerly direction along the UBH when he made a sudden right turn to proceed in a westerly direction along the PBR and in doing so, the First Defendant negligently drove into the path of the Claimant's vehicle causing damages.

4. The Claimant contends that the collision and ensuing losses and damages were caused by the negligence of the First Defendant. The Claimant also contends that the entire front, engine, suspension and chassis of the Claimant's vehicle were damaged. A report conducted by the services of Simmons Claims Consultants Services dated October 13th 2015, ("the Simmons report") revealed that it would be uneconomical to repair the

Claimant's vehicle. The Simmons report set the pre-accident value of the Claimant's vehicle at $75,000.00 and salvage $20,000.00. The Claimant also argues that as a result of the accident he has been unable to do private jobs because of the loss of use of his vehicle which is integral to the performance of his job.

5. The Defendants have denied that the First Defendant was negligent and stated any damage that resulted from the collision was caused either wholly or in part by the negligence of the Claimant. They averred that at the First Defendant was proceeding south along the UBH in the vicinity of Mt Hope. At the intersection of the UBH and the PBR the First Defendant turned on his indicator and after receiving the green light he carefully executed a right turn on to the PBR in a westerly direction after ensuring that oncoming traffic was clear and it was safe to maneuver the turn.

6. The Defendants have also denied the Claimant's claim that the First Defendant was driving without due care and attention. They deny that the doctrine of res ipsa locquitur is applicable since the Defendants' version of the accident is different than that proffered by the Claimant and thus places the liability for negligence on the Claimant.

7. The Defendants further contend that the figure of $75,000.00 for the Claimant's vehicle, due to its age, and condition is inflated and they relied on the Adjustor's report of Ezekiell Joseph of Ezee Adjusting Services ("the Ezee report"); in which it was reported that the Claimant's vehicle had a pre-accident value of $60,000.00, the salvage valued at $25,000.00 and the total for the adjusted claim is therefore $35,000.00. He advised that the claim be settled on a Constructive Total Loss basis because the cost to repair exceeded approximately fifty per cent of the cost of the vehicle.

8. Two witness statements were filed on the 14th February 2017 in support of the Claimant's case, one by the Claimant and the other by Aaron Ragoo, passenger in the Claimant's vehicle. At the trial, both witnesses were called in support of the Claimant's case and their witness statements were tendered into evidence.

9. In support of their defence, the Defendants called three witnesses: Chandra Ragoo, the driver of the Defendant's vehicle; Julian Sandy, passenger in the Defendant's vehicle; and Ezekeill Joseph, the Adjuster who prepared the Defendant's report. Their witness statements were tendered into evidence.

10. In determining the version of the events more likely in light of the evidence the Court is obliged to check the impression of the evidence of the witnesses against the: (1) contemporaneous documents; (2) the pleaded case: and (3) the inherent probability or improbability of the rival contentions. (**Horace Reid v Dowling Charles and Percival Bain**[1] cited by Rajnauth–Lee J (as she then was) in **Mc Claren v Daniel Dickey**[2]).

Issues:

i. Who is liable for the damages to the Claimant's vehicle?
ii. If the Defendant is liable what measure of damages should be awarded?
iii. Whether the Third Defendant is liable to satisfy the judgment obtained against the Second Defendant and/or his agent, the First Defendant.

Who is liable for damages to the Claimant's vehicle?

11. A finding of negligence requires proof of: (1) a duty of care to the Claimant; (2) breach of that duty and (3) damage to the Claimant attributable to the breach of the duty by the defendant: **Charlesworth & Percy on Negligence**[3]. There must be a causal connection between the Defendant's conduct and the damage. Further, the kind of damage suffered by the Claimant must not be so unforeseeable as to be too remote: ***Clerk & Lindsell on Torts***[4].

12. The burden of proof of proving damages in negligence lies with the Claimant.

[1] Privy Council Appeal No. 36 of 1897
[2] CV 2006-01661
[3] 13th Edition, Chap 1 para 1-19
[4] 19th Edition, Chap 8 para 8-04

13. ***Halsbury's Laws of England***[5] states that:

> *"76. In order to establish contributory negligence the defendant has to prove that the claimant's negligence was a cause of the harm which he has suffered in consequence of the defendant's negligence. The question is not who had the last opportunity of avoiding the mischief but whose act caused the harm. The question must be dealt with broadly and upon common sense principles. Where a clear line can be drawn, the subsequent negligence is the only one to be considered; however, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the person secondly negligent might invoke the prior negligence as being part of the cause of the damage so as to make it a case of apportionment. The test is whether in the ordinary plain common sense the claimant contributed to the damage.*
>
> *77. The existence of contributory negligence does not depend on any duty owed by the claimant to the defendant and all that is necessary to establish a plea of contributory negligence is for the defendant to prove that the claimant did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury.*
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> *78. The standard of care in contributory negligence is what is reasonable in the circumstances, and this usually corresponds to the standard of care in negligence. The standard of care depends upon foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent person, he might hurt himself. A claimant must take into account the possibility of others being careless. As with negligence, the standard of care is objective in that the claimant is assumed to be of normal intelligence and skill in the circumstances...*

[5] Negligence, Volume 78 (2010), at para 76-80.

79. In a very large number of claims arising out of road accidents, issues of contributory negligence arise. Although the question is essentially whether the claimant has taken reasonable care for his own safety in the circumstances, certain principles have emerged. It may be contributory negligence for … a passenger to take a lift with a driver knowing him to be drunk and incapable of driving with due care.

80. Knowledge by the claimant of an existing danger or of the defendant's negligence may be an important element in determining whether or not he has been guilty of contributory negligence. The question is not whether the claimant realised the danger but whether the facts which he knew would have caused a reasonable person in his position to realise the danger. It is a question of fact in each case whether the knowledge of the claimant in the particular circumstances made it so unreasonable for him to do what he did as to constitute contributory negligence…"[Emphasis mine]

14. The particulars of negligence alleged by the Claimant against the First Defendant were:

13. Particulars of Negligence of the First Named Defendant

a) Negligently turn across the path of oncoming traffic;

b) Drove at an excessive and/or improper rate of speed having regard to the circumstances;

c) Failed to properly steer, swerve, slow down, brake, stop or otherwise control or maneuver motor vehicle PCX 5505 in sufficient time or at all so as to avoid colliding with motor vehicle TBL 7793;

d) Failed to keep and/or maintain any proper look out or to have any other proper regard for other users of the road that was or might reasonably be on the road;

e) Failed to avoid colliding with motor vehicle TBL 7793;

f) Negligently colliding with motor vehicle TBL 7793 causing damage;

g) Failed to have any or adequate control of motor vehicle PCX 5505;

h) Failed to give any adequate thought to the maneuver he was performing;

i) Drove in a reckless and dangerous manner in the circumstances;

j) Drove without due care and attention;

k) Failed to have any or sufficient regard to the traffic that was or might reasonably be expected on the roadway.

15. On the 9th November 2016, the Defendants filed their Defence, in which they stated as follows[6]:

"8. Paragraph 13 of the Amended Statement of Case and the Particulars of Negligence of the First Defendant are specifically and categorically denied. In response thereto, the Defendants state that the said collision was caused either wholly or in part by the negligence of the Claimant.

Particulars of the Claimant's negligence

a) Driving without due care and attention while approaching a major traffic intersection;

b) Driving too fast in the circumstances;

c) Failing to have any adequate control of motor vehicle registration number TBL 7793;

d) Failing to keep and/or maintain any proper lookout or to have any or any other proper regard for other users of the road that were or might reasonably be on the road;

e) Entering the intersection when it was unsafe to do so;

f) Failing to blow his horn or give any signal that he was entering the intersection when motor vehicle registration number PCX 5505 was already in the intersection;

g) Failing to ensure that the roadway was clear;

h) Failing to see or heed the presence of motor vehicle registration number PCX 5505;

i) Failing to take any or any adequate precautions to avoid a collision;

j) Failing to stop, slow down or turn aside or otherwise manage or control his vehicle as to avoid the said collision;

[6] Defence of the Defendants filed on the 9th November 2916, at para 8

k) Negligently colliding with motor vehicle PCX 5505 causing damage."

16. The Claimant in his witness statement stated that he was driving below the speed limit at approximately 40 kilometers per hour. He stated that upon entering the intersection of the PBR and the UBH, the Defendant's vehicle drove into his path. He said he did not see where the Defendant's vehicle emerged from because it turned into his path suddenly and he did he have the time to pull away from the Defendant's vehicle or apply brakes. He said it was only after his vehicle was hit that he was able to apply brakes and because he was not driving fast his vehicle stopped in the same area of the impact facing slightly west but more north. In cross-examination, when asked if he was driving fast, the Claimant responded by saying that he did not think it was wise to approach a T-junction with any excessive speed and he could not apply brakes. He stated that if he was speeding, because his vehicle is higher than the Defendant's vehicle he may have plunged over it and he would have caused a lot of damage. He denied driving fast. He stated that he had no need to blow his horn. He also testified that he did not see the First Defendant put on his indicator. He maintained that he was driving with caution and that he was unable to press brakes based on the quickness of the accident.

17. Aaron Ragoo's witness statement corroborated the Claimant's case. He said the Claimant was driving at a moderate speed and that the Claimant's vehicle was hit suddenly when the Defendant's vehicle made a right turn on to the UBH and into their path. So much so that it was impossible for the Claimant to stop or otherwise avoid colliding with the Defendant's. In cross-examination, Aaron's evidence slightly contradicted the Claimant's evidence when he testified that the Claimant applied brakes. However, he maintained that the Claimant was driving at a moderate speed approximately 40-60 mph and he did not blow his horn. He also said he did not see the First Defendant turn on his indicator.

18. On the contrary, the First Defendant stated in his Witness Statement that he stopped his vehicle at the intersection facing south. He said the light was on green and he turned on his indicator, the road was clear so he then proceeded to turn on to the Bus Route. He stated that he was driving at about 10 km per hour or less because he was turning. He said he did

not see the Claimant's vehicle because his view was obscured by a large maxi taxi. In cross-examination, the First Defendant admitted that he did not have a PBR pass and he was "taking a chance" as someone without a bus route pass. He testified that there was maxi taxi in front of him and he did not see the Claimant's vehicle. When asked by Counsel for the Claimant whether the accident was a result of his negligent driving, the First Defendant said "yes". When asked if he agreed that he was "taking a chance" on the PBR, he also said "yes". He was also asked if he knew the meaning of negligence and he said "yes".

19. Julian Sandy's witness statement corroborated the First Defendant's case. He said that the First Defendant stopped at the intersection and turned his indicator on. A vehicle heading north allowed the Defendant's vehicle to proceed. As the First Defendant turned west of the PBR, Mr. Sandy stated that he saw the Claimant's vehicle coming towards him "doing some numbers" and the Claimant's vehicle struck the left side of the Defendant's vehicle on the passenger side to the front. He stated that "the impact was so intense that the air bags deployed. I felt the seat belts tighten which held me into the seat and prevented me from being ejected".

20. An issue arose with respect to this witness. During the course of the trial, when Counsel for the Defendant was in the process of cross-examining one of the Claimant's witnesses, Mr. Sandy entered the courtroom and had a seat in the back. He said he was in court for about 10 minutes and he heard portions of evidence dealing with the impact of the accident. Mr. Sandy said that he was unaware that he was prohibited from entering the court room before testifying because it was his first time in court and he was not aware of the court procedure. Counsel for the Defendant sought to clarify the issue and submitted that the Court should take into account the forthrightness of Mr. Sandy. Counsel submitted that the fact that he was present in Court did not influence his evidence since he was giving his personal experience being a passenger in the Defendant's vehicle and this should not be held against him.

21. At the trial, Counsel for the Defendants submitted that despite the First Defendant's admission of negligence there was no factual basis for the First Defendant's comment. She

submitted relied on the authority of ***American Life Insurance Co. and Pan American Life Insurance Co of Trinidad and Tobago v. RBTT Merchant Bank Ltd***[7]**.** She submitted that the Court ought not to be charmed by certain phrases but they Court should look at the real evidence in this case and determine whether or not the Claimant has discharged the burden of proving the Defendant's guilt.

22. Counsel for the Claimant submitted that the Claimant properly made out his case. He submitted that the First Defendant had a duty to ensure that the road was clear of oncoming traffic when he was approaching the intersection and that the reason why the First Defendant did not see the Claimant's vehicle was because the maxi taxi was obscuring his view. Counsel noted that when the First Defendant said he was "taking a chance" that was in relation to the First Defendant not being an authorized user of the PBR so he would have been taking a risk as quick as possible. Counsel emphasized that the First Defendant admitted that he was negligent.

23. Alternatively, Counsel for the Defendant submitted that in light of the evidence, contribution should be considered and that the Claimant was 80 % liable for causing the accident. Counsel for the Claimant submitted that a greater contribution should be placed on the First Defendant and if any were to be placed on the Claimant, it should be 20%.

Analysis and Finding:

24. I was of the view that the Claimant presented himself as a witness of truth. He did not seek to mislead the Court and he came across as a credible witness. On the whole I preferred the Claimant's version to that of the Defendant's as being more plausible and consistent with the evidence. The First Defendant deviated substantially from his pleaded case when he admitted to being negligent on the day of the accident. In my opinion, he understood the nature of the question posed and the impact of his response. Having observed his demeanour while giving evidence I formed the view that he was being truthful when he

[7] CV 2008-00215, para 22

gave this response. Furthermore, the First Defendant said that a maxi taxi was obscuring his vision so he could not see the Claimant coming.

25. That being said, I did think that only the First Defendant was liable for the accident. In my opinion both the Claimant and the First Defendant owed a duty of care to proceed with caution since they were both approaching the intersection of the PBR and the UBH. However, in my view the First Defendant had the greater duty of care in the circumstances since he was turning from the Champ Fleurs traffic lights on to the PBR and into the path of vehicles proceeding in a northerly direction since those vehicles had the green light. In my opinion, the First Defendant was unable to exercise this greater duty of care since by his own admission his line of vision was blocked by a maxi taxi.

26. I therefore apportioned liability at 20% to the Claimant and 80 % to the First Defendant.

If the Defendants are liable what measure of damages should be awarded

27. The Claimant has claimed damages for loss of use of his vehicle. However, he has not furnished any evidence in support of this claim. No award was made.

28. Both adjusters reports advised that the claim should be settled on a Constructive Total Loss Basis for similar reasons namely the age of the Claimant's vehicle, the make model and cost of repairs. However, the Simmons report suggested a pre accident value of $75,000.00 less salvage of $20,000.00 leaving a sum of $ 55,000.00 and the Ezee report suggested $60,000.00 less salvage of $25,000.00 leaving a sum of $35,000.00. I have decided to accept the recommendation in the Simmons report since Mr Ezekell Joseph who prepared the Ezeee report for the Defendant admitted in his witness statement that the Claimant was not present when he conducted the inspection of the Claimant's vehicle. In the circumstances, I awarded 80% of $55,000.00, which was the sum of $44,000.00.

29. With respect to the claim for "Adjusting fees" no sum was awarded since there was no evidence to support this claim. The attachment of a receipt to a Statement of Case was not evidence.

Whether the Third Defendant is liable to satisfy the judgment obtained against the Second Defendant and/or his agent, the First Defendant.

30. The ***Motor Vehicle Insurance (Third-Party Risks) Act*** (hereinafter referred to as "the Act") provides that:

> *10. (1) If, after a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under section 4(1)(b) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, in addition to any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.*

31. At the time of the accident, the Second Defendant had an insurance policy with the Third Defendant effective from the 20th February 2015 to 19th February 2016.

32. It was not in dispute that at the material time that the Defendant's vehicle was insured by the Third Defendant. I was of the opinion that the Third Defendant is liable to satisfy the judgment against the First and Second Defendants, pursuant to ***Section 10(1) of the Act***.

Order

33. Liability is apportioned 20% to the Claimant and 80 % to the Defendants for the Claimant's loss.

34. The Defendants to pay the Claimant special damages ($ 44,000.00) with interest at the rate of 6% per annum from the 10th April 2015 to the date of judgment.

35. The Defendant must pay the Claimant prescribed costs in the sum $12,500.00.

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Margaret Y Mohammed
Judge