

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. Cv. 440 OF 2000

BETWEEN

**CLIVE ASHTON
ROMANO JARDIM**

PLAINTIFFS

AND

**ELBON RAMPERSAD
CITIZENS INSURANCE CO. LTD.**

DEFENDANTS

Before The Honourable Mr. Justice Stollmeyer

Appearances:

**Mrs. H. Griffith for the Plaintiffs
Ms. J. Balkaran for the Defendants**

JUDGMENT

This trial concerns an accident which took place on 24th December, 1998, Christmas Eve, on the Diego Martin Road slightly west of its junctions with Bagatelle Road and Savannah No. 1.

There is perhaps an initial issue with which I might deal concerning amendments to the defence and counterclaim.

In essence, both the Plaintiffs and Defendants had pleaded that the other overtook a parked car and came across onto their side of the road consequently causing the accident. At the outset of the trial however, the Defendants sought and were granted leave to amend the defence and counterclaim to delete paragraphs a. and b. of the Particulars of Negligence thereby effectively removing totally the allegations of the Plaintiffs' vehicle attempting to overtake and driving onto the wrong side of the road. This represented a very clear departure from the case as originally pleaded and put something before me which was manifestly different. There is of course, an inference to be drawn

from an amendment of that nature at this stage in the proceedings. The other amendment sought on behalf of the Defendants was a matter of formality. It was in relation to the cost of repairs claimed to the Defendants' vehicle.

There came into issue the credibility of Terrence Romeo who gave evidence on behalf of the Plaintiffs. This was first raised during his cross-examination and comes down to the Defendants saying that Mr. Romeo was not the driver of the Plaintiffs' vehicle on the day in question, or at the time in question to be more precise.

When cross-examination ventured into that area I was told that it went to credibility. As it turned out, however, it had really little or no effect on my being able to determine the principal issue as to how this accident was caused.

In the event, I refused an application for an adjournment on behalf of the Defendants at the end of Elbon Rampersad's evidence to enable them to produce either or both viva voce or documentary evidence to support this contention. It had become apparent at that junction that Mr. Romeo's credibility would make little or no difference to the issue of liability for the cause of the accident.

In brief, the facts are that on that afternoon the Plaintiffs' vehicle, a Nissan Urvan maxi taxi, registration number HBD 4972, was being driven east along the Diego Martin Main Road.

On approaching a corner in the vicinity of Savannah No. 1 Road and Bagatelle Road, the driver says that he was suddenly confronted with the First Defendant's vehicle in his path. He says that he was travelling at about 30 k.p.h. and first saw this vehicle when it was about 25 feet away. That vehicle, he said, was attempting to overtake a car which was parked on the southern side of the road facing west. The First Defendant's vehicle was proceeding west.

The First Defendant does not deny that he was attempting to overtake this parked vehicle. He says that he was travelling at about 25 m.p.h. and first saw the Plaintiffs' vehicle when it was about 25 feet away. He stopped when he saw that vehicle and was at a standstill for 2 to 3 seconds before the collision. He says however, that the accident was caused by the very fast rate of speed at which the Plaintiffs' vehicle was being driven, and by the fact that the person driving it failed to exercise due care and attention.

What is clear from the evidence is that, first, the accident took place in the eastbound lane of the Diego Martin Main Road or at, the very least, in the centre of the road if not fully in the eastbound

lane. The eastbound lane is the one in which the Plaintiffs' vehicle was being driven. Immediately before overtaking the parked car, the first Defendant was driving on the westbound lane.

Second, the First Defendant was at the time of the accident overtaking a white Nissan Sentra which was parked on the south side of the road, in the westbound lane.

Third, it is clear that the accident took place while the First Defendant was still alongside the white Nissan Sentra. It is clear from the evidence that there was insufficient time for the respective drivers to take whatever action was necessary to avoid the accident taking place. They both describe it as taking place within a split second of each of them seeing the other vehicle.

Now, while the evidence of Terrence Romeo, who says he was the driver of the Plaintiffs' vehicle at that time, was challenged in several respects, more particularly as to him actually being the driver, there was no challenge to the evidence that the driver of the Plaintiff's vehicle, on seeing the First Defendant's vehicle, braked and pulled to his left. This accounts for two things. It accords the other evidence that after the accident the Plaintiffs' vehicle ended up almost on the extreme left of that eastbound lane. It also accords with the evidence that the principal area of the Plaintiffs' vehicle which was struck was the right front, the right front door. That door on a Nissan Urvan, as is well known, extends almost to the front of the vehicle.

It is clear from the law that there is a duty on a driver overtaking a vehicle, whether parked or not, to do so only when it is safe to do so. I agree with the submission on behalf of the Defendants that there is no prohibition against overtaking a car which is parked on a corner. But if the car is parked on a corner then it places on the overtaking driver an even greater duty to take care. That duty to take care, of course, is made all the greater if, as the First Defendant said at one time, you cannot "... really see around the corner"

The fact of the matter is that the First Defendant managed only to get alongside this parked car before the accident took place, and he was at least partly in the eastbound lane. That demonstrates his failure to meet the duty of care imposed on him. To my mind it really makes very little difference how far ahead of him he could see around that corner or into that corner, and as to which his evidence varied. The long and the short of it is that he either disregarded the approaching maxi taxi, the Plaintiff's vehicle, if he could see it, or he overtook at a time when he could not properly see approaching traffic.

In the event that he did not disregard the approaching vehicle then he sadly, badly, miscalculated the time he needed to overtake the parked vehicle. He says he did not see the Plaintiffs' vehicle until it was about 25 feet away and that it was travelling fast. This is by all accounts a corner

which has been described as being very wide. Terrence Romeo so described it when I asked him whether it was a gentle curve or a sharp bend. The First Defendant said that there was space for the Plaintiffs' vehicle to pass after he had stopped alongside the white Sentra. None of this was challenged, but whether it is a sharp corner or a gentle curve, being very wide would in my view put the Plaintiffs' vehicle over to the right of the First Defendant and would make it visible for as far as was possible ahead of the First Defendant.

As to the assault on Terrence Romeo's credibility, I have taken into consideration the late and fundamental change to the Defendants' case; the First Defendant's inability to recall the proper name of the person who he says was driving the Plaintiffs' vehicle, despite exchanging documentation with him and hearing his name at the police station when the report was made after the accident. He had known this person for some time as "Vaigo" he said, and I would have thought he would recall the full name after becoming aware of it, particularly since his car had been damaged and he was blaming the other driver. I do not for this, and other reasons to which I will refer, rate the First Defendant's credibility as being vastly superior to that of Terrence Romeo, who was himself unable to recall certain details relating to the accident, including the registered number of the Plaintiffs' vehicle while he was being cross-examined. I consider Terrence Romeo's evidence is sufficiently consistent with that of the First Defendant to place him at the scene, and also as the driver, as well as to allow me to consider and accept certain of his evidence.

Ultimately the issue of liability can be determined without difficulty on the First Defendant's own evidence. As to the issue of contributory negligence, I can also arrive at a determination based on the evidence of the First Defendant.

In sum, I have come to the conclusion that the accident was caused by the Defendant attempting to overtake a parked vehicle at the time when it was unsafe to do so. He pulled over into the other lane to do so, at least partly. He did not see the Plaintiffs' vehicle until it was about 25 feet away. That, however, is not the end of the matter. There is the issue of contributory negligence.

If I accept the First Defendant's evidence only, then the Plaintiffs' vehicle was about 25 feet away where he first saw it and it was travelling fast. He also says that he was at a standstill for 2 to 3 seconds before the collision, but that is improbable given his other evidence as to the speed of the Plaintiffs' vehicle and distance from him when he first saw it. This does not assist his credibility. Nor did he assist himself when he attempted to make out in cross-examination that his car was not on the wrong side of the road – at least partly – because of the absence of a white line in the centre of the road.

Further, the change to his pleaded case and his further evidence, or lack of it, as to the true identity of the other driver, give rise to doubts as to the reliability of his evidence and his credibility generally.

He was not however, cross-examined, nor was anything put to him, as to any attempt made by the driver of the Plaintiffs' vehicle to avoid the accident. Nor was he challenged on his evidence that there was room for the Plaintiffs' vehicle to pass.

In the event, my assessment of the First Defendant's evidence would lead me to conclude that there was contributory negligence on the part of the other driver.

If, on the other hand, I am to accept any of the evidence of Terrence Romeo, then it would be that he did not see the approaching vehicle, that is the First Defendant's vehicle, until it was 25 feet away. Although the First Defendant's estimate of the speed of the Plaintiffs' vehicle being "very fast" was not challenged, it may well be that 30 k.p.h. going around a corner might be regarded by someone seeing that manoeuvre taking place as "travelling fast", although I am not myself inclined to that view in the circumstances of the corner being "wide". But more material is the fact that this corner curved away to the left of the driver of the Plaintiffs' vehicle. That has two consequences. First, the admitted existence of a passenger in the front seat would not necessarily obstruct the driver's view of potential passengers he hoped to see standing on the left side of the road, simply because on approaching the corner those persons would be more directly in his line of vision. If the road had been straight at that point, then the matter might be slightly different. His evidence is that by keeping his eyes straight ahead he would enjoy what might be described as a panoramic view. But I am not at all certain that that can be accepted without reservation.

More to the point, however, the driver of the Plaintiffs' vehicle says that he was paying proper attention but that the First Defendant's car suddenly pulled out from behind the parked car. He then came to say, however, that he saw it before it pulled out but that he didn't really pay attention to it. He also says that he was looking out for passengers.

He says that he had tried to avoid the accident but he could not. Well, if you first see a motor vehicle when it is only 25 feet away from you almost, if not directly, in your path then quite frankly you cannot not have been keeping a proper look out. In my view he should have seen the First Defendant's vehicle before he did, and probably in time to avoid the accident.

I have come to the conclusion, therefore, that whichever way the evidence is viewed there was contributory negligence on the part of the driver of the Plaintiffs' vehicle.

There will therefore be judgment for the Plaintiff on the claim. Contributory negligence is assessed at 20 per cent. The counterclaim is dismissed. The Defendants will pay the Plaintiffs' costs of the claim and the counterclaim. Damages are to be assessed by a Master.

15th January 2003

C.V.H. Stollmeyer
Judge