

30-07-04

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**C.I.C.A. (Civil) # 07 of 2003**  
(GC Cause 781 of 2000)

**KAREL LIEBAERS ET AL**

**Plaintiffs/ Respondents**

and

**EGBERT SMITH ET AL**

**Defendants/ Appellants**

and

**JULIE NICHOLE HARRIS**

**Defendant/Respondent**

**BEFORE:** The Rt. Hon. Mr. Justice E. Zacca, President  
The Hon. Mr. Justice G. Collett, J.A.  
The Hon. Mr. Justice M. Taylor, J.A.



In the presence of Mr. Norman Hill Q.C. instructed by Mr. S. McField of A. Steve McField & Associates for the Appellants and Mr. Hector Robinson of Quin & Hampson and Mr. Shaun McCann of Campbells for the Respondents.

Heard: April 26<sup>th</sup> & 30<sup>th</sup>, 2004

Released: 30<sup>th</sup> July, 2004

**ZACCA, P.**

**REASONS FOR JUDGMENT**

On April 30, 2004 we dismissed the Appeal and affirmed the Order of the trial Judge. Costs of the Appeal were ordered to be paid by the appellants to

the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents, to be taxed if not agreed. We promised to put our reasons into writing. This we now do.

This is an Appeal from a Judgment of Edwards J. whereby on the issue of liability he held that the 1<sup>st</sup> and 2<sup>nd</sup> appellants were solely liable in negligence for the injuries sustained by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in a collision involving a motor vehicle driven by the 1<sup>st</sup> appellant and owned by the 2<sup>nd</sup> appellant.

The injuries to the 1<sup>st</sup> and 2<sup>nd</sup> respondents were sustained when they were hit whilst walking off the travelled portion of the road, by a vehicle driven by the 3<sup>rd</sup> respondent Julie Harris whose car had been involved in a collision with the car driven by the 1<sup>st</sup> appellant.

The issue before the trial judge was whether the collision was caused by the negligent driving of the 1<sup>st</sup> appellant or the negligent driving of Julie Harris.

The case presented by Julie Harris supported by Judith Nadine Ebanks-Oyog was that she was driving a sunfire motor vehicle in the South Sound lane close to the south shoulder of Red Bay Road. She was about to pass an escort motor car driven by the 1<sup>st</sup> appellant and which had stopped in a line of traffic in the George Town west bound lane. As she approached the escort, the driver suddenly pulled to the left into the path of Harris' car and there was a collision. In swerving to the left to avoid the escort, she went over to the shoulder of the road hitting the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

The case for the appellants was that the escort had stopped in a line of cars in the centre of the George Town lane and whilst stationary, the escort was side swiped on its left side by the sunfire. The appellant denied that he had suddenly pulled out from his lane to the left. The appellant was supported by Linda Dixon who was a passenger in the escort.

Baron Phillipson an accident reconstruction expert was called as a witness on behalf of the appellant. He stated that having reviewed the statements of witnesses and observing the damage to both vehicles, he is of the opinion that the collision occurred in the manner described by the appellant and Linda Dixon.

The appellant testified that he had not looked in the rear view mirror whilst waiting in the line of traffic.

After the collision the appellant moved his car and drove away prior to the arrival of the police. His explanation for doing so was that he had to take Linda Dixon to her home. He was on his way home and passing the scene of the accident when he was stopped by the police.

As a result of this the police were unable to ascertain the physical position of the vehicles at the time of the collision. If as he stated he was stationary in the George Town lane when he was side swiped by the sunfire, why did he move his vehicle. His vehicle would have been in the George Town lane at the time of and after the collision. The police would have seen this if his evidence was truthful.

If on the other hand he pulled to his left into the path of the sunfire, then a portion of his vehicle would have been in the South Sound lane.

The main grounds of Appeal argued by Mr. Norman Hill, Q.C. were:

- (1) The physical evidence of the damage to the motor vehicles did not support the findings of the trial judge.
- (2) The notes of evidence had several omissions and did not accurately set out the evidence before the trial judge.
- (3) The trial judge was in error in allowing Sgt. Redden to testify as an expert witness.
- (4) The trial judge ought to have held that if the appellant was negligent, there was contributory negligence on the part of Julie Harris.

Mr. Hill submitted that there were demonstrations by the witnesses on a diagram placing the cars position at the time of the collision; these were not noted by the trial judge. He argued that the notes of evidence did not contain the evidence of material facts in the case.

The notes of evidence included in the record were therefore the only record available to the Court at the hearing of the appeal.

The Judge's notes were forwarded to the parties by the Registrar as the evidence taken at the trial. The matter came before this Court in July 2003. Counsel for the appellant complained at that time about the quality of the Judge's notes. The Court suggested to counsel that any defect in the Judge's notes could be cured by comparing the notes taken by counsel at the trial. Although copies of counsel's notes were produced to counsel for the appellant, no attempt was made by the appellant to reach an agreement as to the alleged omissions in the notes. The Court was told that counsels' notes did not record the evidence as to the demonstration.

It is accepted by the respondents that there was a defect in the Judges' notes, in that it was recorded that Mr. McField who appeared at the trial, "accepted the Sgt. Redden's evidence". It was conceded that Mr. McField had objected to the witness, Sgt. Redden, being accepted as an expert witness. Directions had been given by the Grand Court for the reports of expert witnesses to be prepared and served on the parties prior to the trial. No report was prepared or tendered on behalf of Sgt. Redden.

A report was prepared by the expert Mr. Phillipson for the appellant's case. It was argued that Sgt. Redden should not have been allowed to give evidence as an expert. He could, of course, have given evidence as a police officer who was investigating the accident.

We find it unnecessary to make any finding on this matter as the trial judge did not in any way rely on the evidence of Sgt. Redden in coming to his findings.

The trial judge in his reasons at page 8, stated :

“ Neither the written report nor Mr. Phillipson’s testimony at the trial persuaded me “the physical evidence” was inconsistent with the independent witnesses’ “ version of events”. There was no physical evidence on the road surface to indicate that the collision occurred in the George Town lane or did not occur in the South Sound lane. I find the physical evidence of damage to the vehicles provide no sound basis for extrapolating where the collision occurred as to rule out the possibility it occurred in the South Sound lane as described by the independent eye witnesses interviewed by the police immediately after the collision.

I reject the evidence of Mr. Smith that he remained stopped in the George Town lane at the time of the collision”.

The trial judge also rejected the evidence of Linda Dixon.

The trial judge heard and saw the witnesses for the appellant and the respondent. He rejected the evidence of the appellant and his witnesses. He accepted the evidence of the respondent and her witnesses and held that the physical evidence was not inconsistent with the version of these eyewitnesses.

In our view it cannot be said that the judge was in error in coming to this conclusion.

Mr. Hill submitted in the alternative that this Court should hold that there was contributory negligence on the part of Julie Harris. The appellant had not pleaded contributory negligence. His defence was that the accident was caused solely by the negligence of Julie Harris. This was also his case at the trial. It does not appear that the issue of contributory negligence was an issue at the trial. The judge did not deal with it.

In any event we are of the opinion, that the findings of the trial judge, that the appellant was solely liable for the collision and injuries to the respondents, should not be disturbed. The issue of contributory negligence does not, therefore, arise for our consideration.

It was for these reasons we dismissed the appeal and made the order as stated above.

E. Zacca, P.

G. Collett, J.A.

M. Taylor, J.A.

