**IN THE SUPREME COURT OF BELIZE A.D. 2013**
**(CIVIL)**

**CLAIM NO. 647 of 2013**

**BETWEEN**

**RF&G INSURANCE COMPANY LTD. Claimant**

**AND**

**DELIA ANDREW HYDE Defendant**

**Before**: **The Honourable Madame Justice Griffith**

**Date of hearing**: **28th October & 27th November, 2015**

**Appearances**: **Mr. Jaraad Ysaguirre of Barrow & Co. for the Claimants and Mr. Hubert Elrington S.C. for the Defendants.**

## DECISION

***Liability for Accident – Proof of Negligence – Proof of Damage – Right of Insurer to Recover from 3rd Party***

**Introduction**

1. By contractual term with their insured, the Claimant RF&G Insurance Co. Ltd sues the Defendant Delia Andrew Hyde for damages in the sum of $17,980 arising out of a vehicular accident which occurred in Southern Belize in November, 2013. The Claimant alleges that the accident was caused by the Defendant's negligence in overtaking its insured when it was unsafe to do so and as a result causing a collision and a total loss of its insured's vehicle. The Defendant denies being the cause of the accident and avers instead that it was the Claimant's insured who was responsible for the accident, albeit there was no counterclaim by the Defendant. The short trial consisted of two witnesses from each side but there was no physical evidence from the scene of the accident, the damage or any investigation by police.

**Issues**

2. The issues to be determined are twofold:-

   (i) Did the Defendant cause the accident?

   (ii) If so, what amount of damages is payable to the Claimant?

**Issue (i) – The Cause of the Accident**

The Evidence

3. Despite four witnesses in all who testified, there was only one witness who was able to speak to the actual occurrence of the accident and that was Mr. Ivan Vallecillo, the driver of the insured vehicle, a Mazda pick-up. Of the other 3 witnesses, the Defendant's two witnesses arrived after the accident occurred and the Claimant's representative was not present at the scene of the accident at all. With respect to the occurrence of the accident, the evidence of Mr. Vallecillos was that whilst proceeding towards Belmopan on the Southern Highway, in the vicinity of Sitee River Junction, there was a bus parked on the road on the opposite side. As Mr. Vallecillos neared the bus to pass it on his side of the road which was clear, he saw a car come from the opposite direction which overtook the bus and in so doing the car came onto his side of the road and collided with his pick-up.

4. Mr. Vallecillos stated that he tried to avoid the overtaking vehicle which was on his side but as he was already very close to the bus he was unable to avoid to do so. The Claimant's representative Mr. Alberto Balderamos gave evidence that the vehicle was deemed a total loss as it was uneconomical to repair it, that a claim was settled in favour of the insured at replacement value and that the insurance company acquired ownership of the damaged vehicle and sold it as salvage. In support of her denial of liability the Defendant presented two witnesses but did not herself give evidence. The evidence of the Defendant's witnesses was that she was found unconscious at the scene of the accident. Whether the Defendant was able to speak to the circumstances of the accident but chose not to or had no memory of its occurrence at all was not known to the Court.

5. The Defendant's witnesses, Mr. Albert Todd and David Hyde her husband, arrived separately to the scene. In the case of Mr. Todd he places his arrival on the scene 10 minutes after receiving a call about the accident. Considering that the call to Mr. Todd was very likely not at the moment of the accident, and that he had to have travelled from somewhere within the area to the accident scene, his arrival on the scene is found by the Court to have been at least 15 minutes after the occurrence of the accident. Mr. Hyde arrived on the scene and met wife unconscious and his infant child already removed from the vehicle by onlookers.
6. Mr. Hyde's statement as to having arrived on the scene at 6.15 was unhelpful in ascertaining how long after the accident occurred that he arrived, as all other estimations of the time of occurrence of the accident were at variance with each other. At the very least, the Court concludes that Mr. Hyde arrived either around the same time as or after Mr. Todd as it was Mr. Todd who took the Defendant to the Hospital and there is no account in either of the gentlemen's evidence of any interaction with the other. The Court therefore finds that Mr. Hyde could have arrived no less than 20 minutes after the occurrence of the accident.
7. Both of the Defendant's witnesses were particular to say in their evidence in chief that the Defendant's vehicle was discovered in its correct lane, in the direction in which it was travelling. In the case of Mr. Todd, his evidence was that he saw the insured pick-up off the road in a ditch facing Dangriga. Mr. Hyde stated in his evidence in chief that his wife's car had been in its correct lane, i.e., still in the right lane facing the southern direction in which she had been travelling. Further, that there had been no indentation mark on the highway to suggest that the vehicle had been pushed to that position after the accident. Mr. Hyde, under cross examination, stated that he was a policeman of over 24 years, experienced in investigating accident scenes. Neither of the Defendant's witness addressed the Claimant's witness' assertion of the presence of a bus on the highway, but neither denied its existence.

Submissions

8. The case for the Claimant was that the evidence of the driver of the vehicle was not contradicted by the Defendants and by itself was capable of amounting to evidence from which the Court could find liability on the part of the Defendant. It was submitted that the presence of the bus on the road which the Defendant overtook thereby coming on to insured driver's side of the road was also not contradicted in any way by the Defendant. Having put forward no alternative version of how the accident happened - the Defendant gave no evidence and her witnesses arrived after the collision occurred - the likely inference that the Court ought to draw was that the accident was caused by the Defendant.
9. The Defendant's case on the other hand, was that liability was that of the Claimant's to prove and it had failed to do so. An inference had been raised, it was contended, by the presence of the Defendant's vehicle in her correct side of the road, facing the direction in which she was travelling, that she had remained in her correct lane at all times thus it must have been the Claimant's insured, who caused the collision by entering the Defendant's side of the road. In addition to this inference, learned senior counsel for the Defendant pointed out that the Claimant failed to adduce any physical evidence as to the cause of the accident, such as the presence of debris, photographs of damage of the vehicles and that there was no report to the Police.
10. Additionally, learned senior counsel raised the issue that only the Claimant's witness spoke to the presence of the bus on the highway and this was not supported by any other witness present on the scene. Instead, it was submitted that the only physical evidence in the case - the presence of the Defendant's vehicle in its correct side of the road, facing the direction in which it was travelling, with no evidence of having been moved - disputed the occurrence of the accident in the manner alleged by the Claimant. In the circumstances, the Defendant's case was that the Defendant was not obliged to disprove the Claimant's case, and that the Claimant had failed to discharge its burden to prove the Defendant responsible for causing the accident.

Analysis of Evidence by Court

11. It is fair to say that the evidence upon which the Court has been asked to determine liability was extremely poor and had this been a criminal charge against the Defendant, the requisite standard of proof would not have been met. This however is a civil case to be established on a balance of probabilities and the Court does find that there is evidence from which to make determination of liability. The Court firstly finds that the existence of the bus on the road was not improbable. The Defendant's witnesses arrived on the scene at least 15 minutes after the collision when the bus may have already left. These witnesses were silent as to the issue of a bus – namely - they neither positively averred that they saw no bus at the scene, nor did they deny the Claimant's assertion that there was such a bus. In the circumstances, as counsel for the Claimant submitted, the evidence of the bus was not contradicted and the Court accepts the evidence of the Claimant in this regard.
12. With respect to the position of the vehicles, it is found that the fact that the Defendant's vehicle was in its correct lane does not negate the probability of the accident having occurred in the way the Claimant said it did. On the other hand, the position of the insured's vehicle on its side in the ditch on the right hand side of the road – the side on which he was travelling - is more consistent with his account of the accident in having tried to avoid the Defendant who had overtaken the bus and was on the wrong side of the road. In considering the accident in the manner alleged by the Defendant (that the accident occurred on the Defendant's side of the road), it is less likely that the insured's vehicle could have ended up in the ditch on the right side of the road after a collision on the opposite side.
13. Finally, the Court considers the evidence of the Defendant's husband Mr. Hyde – a police officer for twenty-four years who advocated that he had experience in investigating accident scenes. The Court finds it a discredit to a professed veteran and expert police officer whose wife is found unconscious at the scene of an accident along with his infant daughter in the car, to be content to accede to a failure to properly investigate an accident then thought to be caused by the other driver involved with the accident.

This view is not favourable to the Defendant's witness and in this regard the Court dismisses the evidence of Mr. Hyde as being unreliable. The evidence of the other witness for the defence did not contradict the evidence of the insured driver. In the circumstances, the Court is satisfied with the evidence of the Claimant and accordingly finds liability established against the Defendant.

**Issue (ii) – Damage to Vehicle.**

14. With respect to the damages claimed, the claimant's case was that its insured's vehicle was valued at $40,500 pre-accident. Having been put to strict proof of damage suffered by the Defendant it is arguable that the Court ought not to accept the pre-accident value assigned by the Claimant as opposed to an independent valuation. The Court considers however that the Claimant within the course of its ordinary business of issuing motor insurance, is sufficiently well placed to assign values to the vehicles it insures according to a realistic market value. The Court accepts the value put forward by the Claimant but with a slight adjustment as the amount of $39,325 was the amount actually paid out by the Claimant to its insured. A copy of the release was submitted in evidence and this was not challenged under cross examination of the Claimant's representative.
15. Further, the salvage value was proven in the sum of $4000 in the form of receipts from the purchaser of the wreck which the Court accepts as proof that the insured vehicle was in fact damaged beyond repair. The Claimant also submitted receipts confirming the amounts claimed for towing, storage and transfer of ownership of the vehicle. The $20,000 received from the Defendant's insurers was also proven by receipt issued by the Defendant's insurers. None of these expenses, nor the value of the salvage were questioned by the Defendant. In the circumstances, the Court accepts the value of the salvage and expenses put forward by the Claimant. The award is quantified in the following manner:-

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| Pre-accident value | $39,325.00 |
| Towing from accident site | $ 75.00 |
| Storage | $ 1,000.00 |
| Towing from storage site | $ 390.00 |

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|---|---|---|
| Transfer of ownership fee | | $ 15.00 |
| Sub-total | | $40,805.00 |
| Less Defendant's 3rd party insurance | $20,000.00 | |
| Less salvage | $ 4,000.00 | $24,000.00 |
| **Total** | | **$16,805.00** |

16. There was an issue raised in brief by learned senior counsel for the Defendant to challenge the legality of the Claimant recovering beyond the payment received by the Defendant's 3rd party insurer. Additionally, that nothing further could be recovered as the Claimant had already contracted for the risk of accident and received its premiums. Despite being given the opportunity by the Court to make written submissions in support of this argument, no such submissions were received, but the Court addresses the issue to the limited extent that it was raised. In the first place, the argument briefly raised by learned senior counsel is addressed by the existence of the doctrine of subrogation as it provides for the right of an insurer to recover payments made out to its insured from the 3rd party responsible for the loss. This right is generally regarded with reference to the early decision of **Mason v Sainsbury**[1], in which the argument that the insurer had already recovered its premiums and had suffered no act by the defendant (the 3rd party) was rejected. The qualification that the insurer can sue only in the name of the insured unless the right was assigned was met in this case by the policy submitted by the Claimant containing a clause as evidence of such assignment.
17. With respect to the fact that the insured had already received a payment from the Defendant's insurers, the Court refers to **section 23(1) of the Motor Vehicle Insurance (Third Party Risk) Act, Cap. 231** which preserves the jurisdiction of the Court to hear and determine any claim for liability for damage for injury or to property notwithstanding any provision under the Act. Section 23(2) further provides that in awarding any compensation for bodily injury or damage to property the Court shall take into account any payment already received by the

[1] (1782) 3 Doug. 61

Claimant under the Act, which has been done by discounting the $20,000 received from the Defendant's insurer. In light of these provisions, the Court finds that the receipt of compensation from the Defendant's insurer did not preclude the Claimant to sue the Defendant for loss not covered by the payment of the Defendant's insurer.

**Final Disposition**

18. The following orders are made on conclusion of this matter:-

(i) The Defendant is found liable for the accident which caused damage to the Claimant's vehicle;

(ii) The Claimant has proved loss and is accordingly awarded damages in the sum of $16,805.00;

(iii) Prescribed costs awarded to the Claimant on the amount of $16,805.00;

(iv) Post judgment interest at the statutory rate of 6% is awarded on the judgment sum until date of payment.

Dated this 3rd day of December, 2015

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**Shona O. Griffith**
**Supreme Court Judge.**