



[2024] JMSC Civ. 80

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO.2013HCV 01180**

<b>BETWEEN</b>	<b>ALPHANSO BAILEY</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>VINROY CLARKE</b>	<b>DEFENDANT</b>

Mr Sean Kinghorn instructed by Kinghorn & Kinghorn for the claimant.

Mrs Suzette Burton- Campbell instructed by Burton-Campbell for the defendant

**Heard: June 27, 2023, and July 12, 2024**

***Negligence - Motor vehicle accident - Whether the defendant liable in negligence for injuries suffered by the claimant - Whether the claimant has established that the defendant breached his duty of care.***

**IN OPEN COURT**

**CORAM: JARRETT, J**

**Introduction**

[1] On the evening of Sunday July 29, 2012, Alphanso Bailey (“the claimant”) and Vinroy Clarke (“the defendant”) were involved in a motor vehicle accident along Burke Road in the vicinity of the Spanish Town Hospital in the parish of St Catherine. At the time of the accident, the claimant was riding a pedal cycle heading towards Ensom Meadows, and the defendant was driving his Toyota

Hiace public passenger motor bus heading to Spanish Town with passengers. This is the claimant's claim in negligence against the defendant for damages for personal injuries he sustained in that accident.

## **The pleadings**

### *The claim*

[2] In his claim filed on February 26, 2013, the claimant alleges that on July 29, 2012, he was lawfully crossing Burke Road when the defendant negligently drove and/or operated his bus that he caused it to violently collide with him. He claims that the defendant was negligent in that he drove at a fast rate of speed, recklessly and carelessly and into his path; and failed to stop, slow down, swerve or otherwise control his bus to avoid the collision. He pleads in the alternative, that he relies on the doctrine of *res ipsa loquitur*. He claims to have suffered injury to his face and a fractured clavicle. I allowed an application to amend the particulars of claim to include special damages in the sum of \$80,000.00 for medical expenses incurred at Oasis Health Care Limited and \$23,400.00 for medical expenses incurred at Portmore Pines Imaging Centre.

### *The defence*

[3] In his defence filed on October 14, 2013, the defendant admits that the accident occurred on July 29, 2012. He alleges that he was travelling in his correct lane along Burke Road when on reaching the vicinity of the Spanish Town Hospital he noticed the claimant riding in the layby to the left of his bus. He pleads that he was about to pass him, when the claimant suddenly and without warning swerved his pedal cycle right into the path of his bus. The defendant further pleads that he braked up and swerved to the right but could not avoid a collision with the claimant. He alleges that the collision was caused or contributed to by the negligence of the claimant in that he failed to keep a proper look out; failed to heed the defendant's presence on the roadway; suddenly and without warning turned right into the path of the bus; failed to indicate his intention to turn right; failed to ensure that it was

safe to turn right before doing so; rode in a reckless and dangerous manner and; failed to stop, slow down, or to manage his pedal cycle so as to avoid the accident.

## **The evidence**

### *The claimant*

- [4] The claimant's witness statement filed on February 3, 2022, as redacted after a successful application by the defendant to strike out portions of it based on hearsay, stood as his evidence in chief. He says that he was hit down by a van along Burke Road in the vicinity of the Spanish Town Hospital on the evening of Sunday July 29, 2012. He was heading towards Ensom Meadows, from Greendale when a Toyota Hiace van travelling behind him at the traffic light hit him. According to him the impact was great, he fainted and remembers waking up at the Spanish Town Hospital. He awoke to a sharp pain in his right shoulder, he had cuts and bruises all over his face, a cut on his right knee and he lost a tooth. He says he was treated at the hospital. An x-ray revealed a fracture to the left shoulder. He was later discharged with a referral to attend the orthopaedic clinic, and received a prescription for a broad shoulder sling which he purchased the same night. The following day, he went to the police station and made a report. He became aware that the driver of the van had also made a report.
- [5] As a result of the pain in his neck and shoulder getting worse, he sought further medical treatment from Oasis Health Care. There, he was examined and treated by a doctor and referred for physiotherapy and to an orthopaedic surgeon. Since he was having headaches, he also received a referral to do a CT scan of his brain. This he did at a cost of \$20,500.00. According to him, he did about 10 physiotherapy sessions and visited a private orthopaedic surgeon. Because of this, he did not go to the hospital's orthopaedic clinic. He was recommended for more physiotherapy sessions, but he could not afford the transportation costs. He says his job was to wash trucks on Sundays, but because of the accident and the

fracture he sustained, he had to stop working. His job was his only source of income.

**[6]** His shoulder has now healed but: “flesh has grown between the shoulder bones” and this has resulted in his left shoulder being slightly deformed. Presently he is unable to lift heavy objects and whenever it rains, he feels a terrible pain in his shoulder. He received medical reports from Dr Lisa Gaye Stephens of the Spanish Town Hospital and Dr Ravi Prakash Sangappa of Oasis Health Care Limited. He was diagnosed with the following injuries:

- a) Head injury with cerebral concussion
- b) Multiple soft tissue injury to face
- c) Healed abrasion to upper lip (philtrum)
- d) Fracture of left upper molar tooth
- e) Displaced fracture of lateral 1/3<sup>rd</sup> right clavicle
- f) Whiplash injury to neck
- g) Healing abrasion to right knee
- h) Healed abrasion to wrist

**[7]** On cross examination the claimant agreed that close to where the accident occurred there are two lanes going in the direction of Spanish Town and that on the left side there is a layby for buses. He also agreed that one lane allows traffic to go straight into the town centre, while the other is a filter lane which allows traffic to turn right. He said that where the accident occurred was right before the Spanish Town hospital. As soon as he reached the filter lane, he felt the impact. He denied the suggestion that on the day of the accident he was in the bus layby on the left side of the road, and not in the filter lane. Asked when he first saw the vehicle that was involved in the accident, the claimant said:

“Vehicle was back of me”

When pressed further he said he first saw the vehicle: “when I get hit”. The following exchange then took place between cross examining counsel Mrs Burton-Campbell and the claimant:

Q: Did you see the bus, before it hit you?

A: Madam, I cannot ride and look forward and look behind me at the same time.

Q: I will ask again. Did you see the bus before it hit you?

A: No.

**[8]** The claimant said he did not see the part of the bus that hit him, but it was the mirror, and he felt the impact. When asked from which of the mirrors he felt the impact, he said the right mirror. He denied the suggestion that the vehicle that hit him was in the left lane, and he denied making a right turn without giving any indication. He also denied that he collided into the left mirror of the bus. He agreed with the suggestion that the accident took place before he got to the stoplight. On re-examination, he said he got hit before he reached the stoplight and when he was already in the filer lane.

*Medical evidence*

**[9]** By a consent order of Master S. Reid, made on April 17, 2023, Dr Sangappa was appointed an expert witness and the claimant allowed to rely at trial on his medical report dated January 25, 2024.

**[10]** Dr Ravi Sangappa is the managing director of Oasis Health Care Limited. He says that the claimant presented on July 31, 2012, complaining of severe pain to his right shoulder, pain to the right side of the neck, pain in the neck especially when lifting his right knee and when walking. On examination he had multiple abrasions

over the forehead, an abrasion over the bridge of the nose and over the right side of the face associated with intra orbital swelling and multiple abrasions over the upper and lower lip. There was a fracture of the left upper molar tooth and healed abrasion over the right hand and dorsum aspect of the right wrist. Dr Sangappa also reported that there was a fracture of the lateral end of the right clavicle which was displaced. There was mild swelling and tenderness over the right shoulder and range of movements was painful and normal. His examination also revealed abrasions of 8x5cm over the right knee with normal range of movements. Save for a whiplash injury to the neck, which the claimant said was diagnosed by the doctors, Dr Sangappa's assessment mirrored the evidence of the claimant referred to above at paragraph 6 of this judgment.

**[11]** Dr Sangappa reports that he reviewed the claimant 6 further times after his initial presentation. The last review was on February 27, 2013. He concludes his report with the following opinion and prognosis: -

- a) "He had shown good improvement from his injuries.
- b) However, he was expected to gain fair recovery from his right shoulder pain in three months from his last review date.
- c) He complained of persistent headache for which he was advised to consult a Neurologist.
- d) His headache after head injury may last up to six to seven years after which is expected to fade away gradually.
- e) The prognosis on his headache will have to be further commented on by the Neurologist."

**[12]** Dr Lisa Gaye Stephens is a Senior House Officer at the Spanish Town Hospital. In a report dated October 26, 2012, she says that the claimant presented at the hospital's accident and emergency department on July 29, 2012, with a report of being hit by a bus from behind, falling from his bicycle to the ground onto his face

where he received several abrasions to the face and right leg and complaining of pain to the right shoulder. He was diagnosed with injury to the face and a fractured clavicle. He was treated with Voltaren and Zantac and sent home with Bactroban ointment. On discharge, he was referred to the Orthopaedic Outpatient Department and a Broad Sling was recommended.

*The defendant*

- [13] The defendant is a self-employed bus operator. In his witness statement filed on February 18, 2022, which stood as his evidence in chief, he says that in 2012 he owned a Toyota Hiace motor bus, a registered public passenger vehicle which operates on the Naggo Head to Spanish Town route in the parish of St Catherine. On July 29, 2012, the bus was involved in an accident while he was travelling on Burke Road in St Catherine. Burke Road is a main road wide enough to allow two lanes of traffic going in the opposite direction to pass at the same time. The accident took place in the vicinity of the Spanish Town Hospital at about 7:30 in the evening. He was driving in the left lane of the roadway going towards the town centre in Spanish Town. Traffic was flowing freely; he was travelling at about 25 to 30 kilometres per hour and there were about 15 passengers in the bus.
- [14] According to the defendant, as he drove along Burke Road, he saw a pedal cyclist riding in the layby near the bus stop at the Spanish Town Hospital. The pedal cyclist was going in the same direction as the bus. He was about to pass him, when he suddenly and without any indication made a right turn in the path of his moving bus. He swerved to the right to avoid hitting him, but he continued riding towards the bus and hit into the left front door. The cyclist fell from the bicycle and dropped in the road beside the bus door. He came out of the bus, and with the help of passengers, placed the cyclist in the bus and took him to the Spanish Town Hospital. After he left the hospital, he went to the police station to report the accident. When he examined his bus, he noticed that the left-wing mirror had broken off and there was a slight dent on the left door.

- [15]** In commenting on the claimant's evidence, the defendant said that on the day of the accident, the claimant was not in the filter lane, and the right rear-view mirror of his bus did not hit him. When asked if he was travelling behind the claimant in the filter lane, he said that the claimant was in the layby to the extreme left and he was behind him.
- [16]** On cross examination the defendant said that it was when he went to the police station the following day that he discovered that the claimant was blaming him for the accident. He denied that his right rear-view mirror was damaged in the accident and said it was the left rear-view mirror and the mid-section of the left front door that got damaged. He said nowhere on the front of the vehicle, or on the right side got damaged, not even a scratch. According to him, the left rear-view mirror extends about 6 inches from the vehicle and is mounted to the left front door. When asked about the damage the left rear-view mirror sustained, he said it completely came off the vehicle. As to the left door, he said there was a dent in the mid-section, and he assumes it was the bicycle handle that caused it.
- [17]** The defendant said the bus, which is less than 20 feet in length, travelled about a bus length or two, before coming to a stop. When he first saw the claimant, he was riding in the layby, about 15 or 20 feet or more away from him. He was in a line of traffic and not travelling fast. As he approached the claimant, he sped up since the traffic light was on green. He was travelling, at that time, about 25 to 30 km per hour. He said that as he proceeded to pass the claimant, he was about two to 2 to 3 yards away from the layby and the claimant was: "in towards my lane". It is when he saw the claimant make a sudden turn, that he swerved to his right. According to him, in swerving to the right, the bus went onto part of the filter lane and almost went over to the other side of the road which takes vehicles towards Kingston. The left lane is about 8 to 10 feet wide and from the time he applied his brakes and when he came to a stop, he travelled a distance of about 15 to 18 feet.
- [18]** When asked if he did anything to alert the claimant that he was going to pass him, the defendant said there was nothing he could have done because he did not



expect the claimant to make a sudden turn. When asked further if he sounded his horn, the defendant said he could not recall, but it is a hospital zone and drivers do not normally sound horns in that area. Asked why he did not apply his brakes given the slow rate of speed at which he was travelling, the defendant said he is a motorist for 36 years and the first thing to do is to try to avoid a collision, to brake and swerve. He could not recall if he had applied his brakes, but he swerved. According to him, if he had applied his brakes, the bus would have travelled about 20 feet before stopping. When he was shown his defence in which he pleaded that he had applied his brakes and swerved to the right, the defendant said: "I just say I don't definitely remember but I did swerve". He said that what is written in the defence is true, but he does not: "remember everything that took place from that time until now", but he remembers some of it. On seeing his defence, he admitted to applying his brakes when the claimant made the sudden right turn, and said he kept his foot on the brakes until he came to a stop about 15 to 18 feet away.

[19] The defendant denied the suggestion that when he saw the claimant he was in the filter lane to make a right turn and that the collision occurred in the filter lane. He said the collision occurred before he ended up in the filter lane. The suggestion that he was behind the claimant and collided with him from behind, was also denied.

### **Analysis and discussion**

[20] A good place to begin the analysis of the issues that arise in this case, is the following dictum of Thompson-James J in **Jowayne Clarke and Anthony Clarke v Daniel Jenkins** Suit No C.L2001/C211 unreported Supreme Court decision delivered on October 15, 2010, referred to by Mr Sean Kinghorn, counsel for the claimant, in his pre-trial written submissions<sup>1</sup>: -

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<sup>1</sup> No closing submissions were filed on behalf of the claimant.

“A driver of a vehicle on the road owes a duty to take proper care and not to cause damage to other road users whom he reasonably foresees is likely to be affected by his driving. In order to satisfy this duty he should keep a proper look out, avoid excessive speed and observe traffic rules and regulations”

- [21] It is not disputed that the claimant and the defendant owed each other a reciprocal duty of care to ensure that they did not cause damage to each other; that they both kept a proper look out; avoided excessive speed; and observed the traffic rules and regulations on the evening of July 29, 2012. As this is a claim in negligence, the claimant must show, on a balance of probabilities that the defendant breached the duty of care owed to him, and that he suffered loss because of that breach.
- [22] The defendant’s evidence is that he was in the left lane heading towards the town centre prior to the collision. I find it more probable than not, that he found himself partially in the filter lane after braking and swerving to the right, in an attempt to avoid hitting the claimant, and that the collision occurred before he got to the filter lane. I reject the claimant’s evidence that the collision occurred in the filter lane and that the defendant hit him from behind. If this were so, the defendant would have been in the filter lane to make a right turn, rather than heading towards the town centre, and the damage to his bus would not have been to the left rear-view mirror and the left door, but to the front. Furthermore, the claimant’s own evidence is contradictory, in that he claims to have been hit by the right rear- view mirror of the bus, but if this were the case, he could not have been hit from behind as he contends, because, based on the defendant’s evidence, it is reasonable to infer that the right rear view mirror was mounted on the right front door, just as the left rear-view mirror was mounted on the left front door. I accept the defendant’s evidence and find on a balance of probabilities that he did not have the opportunity to alert the claimant to his approach, because of the claimant’s sudden, unexpected right turn into the path of his bus.

- [23]** The medical evidence is that the claimant had abrasions over the right side of his face, over his right hand and right wrist, a fracture of the right clavicle, mild swelling or tenderness over the right shoulder and abrasions over the right knee. I find that these injuries to the right side of his body are consistent with that side of his body coming into contact with the left side of the defendant's bus, and with the defendant's account of how the accident occurred. The claimant insisted in cross examination that the damage to the defendant's bus was to the right rear-view mirror and that it was this mirror that hit him. This is improbable, given my earlier findings. Moreover, his evidence is that he fainted at the scene of the accident and recalls awakening at hospital. How then did he come to the knowledge that damage was done to the right rear-view mirror of the defendant's bus? The defendant's evidence, which I accept, is that there was not even a scratch to the right side of his bus.
- [24]** Mrs Suzette Burton-Campbell, counsel for the defendant argued that the claimant has not given any evidence in proof of the allegations in his pleadings that the defendant breached the duty of care owed to him. I agree with her. Neither his witness statement nor his evidence on cross examination, support these allegations. There is no evidence that the claimant was driving at a fast rate of speed; that he drove recklessly and carelessly; that he drove into the claimant's path, or that he failed to stop, slow down, swerve or otherwise operate the Toyota Hiace bus to avoid the collision.
- [25]** The defendant's evidence that he was travelling at 25 to 30 km per hour when the accident occurred has not been challenged and it has not been shown that this speed was excessive in the circumstances. The claimant's averment that the defendant drove into his path is not borne out by the evidence. His evidence is that the defendant hit him from behind. As observed earlier, the injuries sustained by him are consistent with him being on the left of the defendant and turning right in the path of the defendant. Nothing in the evidence proves that the defendant was driving carelessly or recklessly and that this led to the collision.

[26] The claimant has not demonstrated that the *res ipsa loquitur* doctrine, on which he relies, is applicable. As is well known, this doctrine requires the claimant to establish that the accident is of a kind that would not ordinarily occur in the absence of negligence on the part of the defendant, and that it was not caused or contributed to by him. In other words, he must show that the facts of this case raise a presumption that the defendant was negligent<sup>2</sup>. He has not done so.

[27] With the claimant failing to prove that the defendant breached his duty of care owed to him on the night of July 29, 2012, his claim must fail.

### Orders

[28] In the result, I make the following orders:

- a) The claim is dismissed.
- b) Costs to the defendant to be agreed or taxed.

**A Jarrett**  
**Puisne Judge**

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<sup>2</sup> See for example **Ng Chun Pui v Lee Cheun Tat (The Times, 25 May 1988)**.