[2023] JMSC Civ. 126

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 02592

BETWEEN	**NOVELETTE HARE**	**CLAIMANT**
AND	**GARFIELD HESLOP**	**1st DEFENDANT**
AND	**JAMAICA URBAN TRANSIT COMPANY LIMITED**	**2nd DEFENDANT**

IN OPEN COURT

Ms Shanese Green instructed by Kinghorn and Kinghorn for the Claimant.

Mesdames Georgia Hamilton and Ashley Clarke instructed by Georgia Hamilton and Company for 2nd Defendant.

Heard: March 13 and 14, 2023, June 23, 2023 and July 7, 2023.

Negligence – Motor vehicle accident while claimant being trained to drive employer's bus – Employer's Liability – Duty of care owed by an employer to an employee – Whether employer provided employee with a safe system of work – Whether employer should have trained an employee who had no driver's licence and no prior experience in driving – Whether employer provided employee with adequate training – Whether driving instructor did all that he reasonably could do to assist the claimant to avoid the accident – Defence of contributory negligence and *volenti non fit injuria* – Whether claimant heeded driving instructor's instructions and whether claimant was contributorily negligent – Whether claimant voluntarily accepting risk of accident.

N. HART-HINES, J

BACKGROUND

[1] In or around 2008, a decision was taken to cease using bus conductors and conductresses on the buses owned and operated by the 2nd Defendant, the Jamaica Urban Transit Company Limited ("JUTC"). It seems that in an effort to avoid making these persons redundant, the 2nd Defendant offered such persons the option to apply to become bus drivers. This option was open for persons with a driver's licence or a provisional driver's licence.

[2] The Claimant, Ms Novelette Hare, is employed by the 2nd Defendant as a conductress and was so employed in 2008. She exercised the option to become a bus driver, although she was a novice driver with only a provisional driver's licence. On November 3, 2008, she was learning to drive a 2001 Torino Volvo JUTC bus. She took control of the bus along Dumbleholden Main Road en route to the JUTC Bus Depot in Spanish Town. On reaching the intersection of Lakes Pen Road and Port Henderson Road, the claimant hit a pedestrian, then panicked and lost control of the bus resulting in a second motor vehicle accident in which she sustained injuries. Other trainee drivers were on the bus at the time, as well as their driving instructor, the 1st Defendant.

THE CLAIM

[3] On 3 May 2013, the Claimant filed a claim seeking damages against the Defendants for injuries and loss she suffered in the motor vehicle accident on 3 November 2008, along Port Henderson Main Road in the parish of St. Catherine. She has averred that on the date of the accident, she was being trained as a driver by Mr Garfield Heslop, the 1st Defendant (and servant/agent of the JUTC), in a motor bus belonging to the 2nd Defendant. Mr. Heslop was never served with the claim form and accompanying documents. The Claimant alleges that her employer was negligent, and as a result, she was ill-equipped to control the bus, she hit a pedestrian, lost control of the bus and collided into a tree, which caused her to sustain injuries to her left leg. She further alleges that the 2nd Defendant breached its duty of care to her as its employee or breached an expressed or implied term of the contract of

employment that it would not expose the Claimant to any reasonably foreseeable risk of harm, would provide adequate supervision and/or training and a safe system of work in the course of the performance of her duties, and that the 2nd Defendant is therefore liable for the loss she incurred.

[4] As a result of the accident, the Claimant's left heel was cut, and the wound had to be sutured. The wound subsequently became infected and required treatment for more than a year until it healed. The Claimant alleges that she was unable to work for 18 months after the accident and to date has a difficulty in wearing shoes due to the tenderness in her heel. She further alleges that the heel is still tender and numb and that she experiences pain, decreased flexibility and stiffness to the left ankle, that she is unable to fully weight bear, has a permanent scar and disfigurement, that she walks with a limp and that there is a deformity of the left heel, and she therefore needs orthopaedic care. The Claimant alleges that she incurred $26,200.00 in medical expenses and $10,000.00 in transportation expenses.

[5] At paragraph 10 of the particulars of claim, the Claimant alleged several omissions or acts of negligence on the part of the 1st and 2nd Defendants. Although these are many, it is worthwhile quoting them here. As regards the 1st defendant, the following is alleged:

> *(i) Purporting to give driving instructions to the Claimant without the necessary qualifications and experience.*
> *(ii) Failing to give proper instructions in the driving of the said motor vehicle.*
> *(iii) Failing to properly supervise the Claimant in the driving of the said motor vehicle.*
> *(iv) Failing to take reasonable care to ascertain that the Claimant was of the requisite driving, skill, acumen, experience and composure to be driving on a public road with the attendant exigencies of driving on a public road.*
> *(v) Shouting at the Claimant while the Claimant was driving the said motor vehicle.*
> *(vi) Failing to stay in close enough proximity to the Claimant while the Claimant was driving he said motor vehicle to assist the Claimant in the event of an emergency.*
> *(vii) Causing and/or permitting other trainees to be on the said motor vehicle.*
> *(viii) Causing and/or permitting other trainees to be on the said motor vehicle and not exercising sufficient control over the said motor vehicle [sic] controlling those trainees.*
> *(ix) Failing to exercise sufficient control or any control over the said motor vehicle while the Claimant as his trainee drove the said motor vehicle.*

(x) Causing motor vehicle registration number PA 1372 to leave the road and collide with a tree.

(xi) Failing to take reasonable care in all the circumstances to so supervise and instruct the Claimant so as to prevent the said accident from occurring.

(xii) Failing to properly train the Claimant in the driving of the said motor vehicle before allowing the Claimant to be exposed to the public road.

(xiii) Failing to give to the Claimant sufficient training sessions before exposing the Claimant to the exigencies of the public road.

(xiv) Failing to allow the Claimant to use a training vehicle or a type of vehicle which was [sic] conducive to the training exercise she was undergoing.

(xv) Failing to utilize a motor vehicle in the training of the Defendant which had dual controls thereby enabling the 1st Defendant as Instructor to maintain sufficient control over the said motor vehicle.

(xvi) Failing to utilize a motor vehicle in the training of the Defendant which had dual controls when such a vehicle was necessary for the safety of the Claimant in light of the limited training that the Claimant had up to that time received.

(xvii) Causing the Claimant to drive the said motor bus without a valid driver's licence.

(xviii) Commencing training of the Claimant to drive the said motor bus without first requiring that the Claimant had some driving experience and was at the very least the holder of a driver's licence to drive a vehicle.

(xix) Failing in all the circumstances to do all that was reasonable and necessary to prevent the Claimant being involved in an accident.

[6] As regards the 2nd Defendant, it is alleged:

(i) [The Claimant repeats the foregoing Particulars of Negligence against the Claimant as an Employer, where applicable]

(ii) Failing to provide a safe place of work.

(iii) Failing to provide a safe system of work.

(iv) Failing to provide a competent and sufficient staff of men.

(v) Failing to modify, remedy and/or improve a system of work which was manifestly unsafe and likely at all material times to cause serious injury to the Claimant.

(vi) Employing the 1[5t] Defendant as a Driving Instructor to train the Claimant to drive a public passenger bus when the 1st Defendant neither had the competence, training, experience or qualification to do so…."

(vii) Failing to take reasonable care to ascertain that the 1st Defendant had the requisite competence, training, experience or qualification to properly and effectively train the Claimant to drive a public passenger bus,

(viii) Failing to take reasonable care to carry out is operations in the course of its trade so as not to unreasonably expose the Claimant to risk of injury.

THE DEFENCE

[7] The 2nd Defendant has denied that either it or its servant Mr Heslop was negligent. Instead, it contends that the Claimant's negligence caused the accidents, in that she failed to notice the presence of the pedestrian, failed to heed the instructions of Mr Heslop to steer the bus away from the pedestrian and, she resisted the physical intervention of Mr Heslop to avoid the collision. At paragraph 6 of the 2nd Defendant's defence, the particulars of the Claimant's negligence are set out as follows:

(a) Making representation that she was the holder of a valid driver's license/permit and that she was acquainted or in compliance with requirements of the Road Traffic Code;
(b) Failing to obey the Road Traffic Code and to drive with the requisite driving permit/license and/or comparable skills to the representation made;
(c) Failing to heed, follow or obey clear instructions of the competent instructor provided;
(d) Failing to subject herself to the supervision of the instructor;
(e) Failing to demonstrate and or exercise reasonable care, requisite skills. acumens, composure requisite to operate a motor bus;
(f) Failing to declare or express any apprehension to driving a motor bus and/or disclose any irrational fear in operating a motor bus;
(g) Failing to acquaint herself and/or follow company policies;
(h) Failing to take adequate steps to ensure her own safety and that of others;
(i) Pressing the accelerator pedal instead of applying or pressing the brake and in contravention to the instructions given;
(j) Panicking upon seeing a pedestrian on the roadway and driving close to said pedestrian thereby creating an emergency;
(k) Failing to steer away from the pedestrian;
(l) Driving off the roadway, into a pedestrian and subsequently into an ackee tree."

[8] Th defendant has since resiled from the assertion that the Claimant had made representation to have previously driven, held a driver's licence and was knowledgeable of the Road Code. However, the 2nd Defendant has not amended the pleadings. In presenting its own version of the events, the 2nd Defendant averred that it provided a safe place of work, a safe system of work and took all reasonable care and steps to carry out its operations so as not to unreasonably expose the Claimant to any risk of injury. Further, it exercised all reasonable caution and care in ensuring that its driving instructor was competent, experienced and qualified to carry out the tasks assigned and, that the said instructor performed his duties competently and did what he reasonably could in the circumstances. Finally, at paragraph 11 of its defence, the 2nd Defendant also relies on the defence of *volenti non fit injuria*.

THE ISSUES

[9] The issues for the determination of this court are:

1. Whether the Claimant has established a prima facie case from which an inference of negligence on the part of the Defendants can be drawn.
2. What is the standard of care expected of the 1st Defendant and 2nd Defendant?

3. Whether the 1st Defendant and 2nd Defendant took all reasonable precautions in the circumstances to discharge their duty of care owed to the Claimant who was being trained to drive a bus.
4. Whether there is evidence that negligence or a breach of a duty caused or materially contributed to the motor vehicle accident.
5. Did the Claimant accept the risk of injury?
6. What is the standard of care expected of the claimant as a trainee driver?
7. Did the Claimant's conduct fall below the standard of care expected of her and was she contributorily negligent?
8. How should liability be apportioned?

[10] Some of the issues will be dealt with cumulatively in my analysis below.

THE EVIDENCE

[11] I will summarise the evidence and more fulsomely address the salient points in each witness' evidence in my analysis of the case.

Novelette Hare

[12] The Claimant gave evidence that she has been employed by JUTC as a conductress since 2002. She stated that she only had a provisional driver's licence and presented that to her employer making it clear that she had no driving experience. She further stated that she was only given a few opportunities to drive the JUTC bus since she commenced training.

[13] On the day of the accidents, she was instructed by Mr Heslop to drive the bus registered PA 1372 belonging to JUTC from Port Henderson in Portmore to the JUTC depot in Spanish Town. There were about 15 other trainee drivers on board the bus. She stated that on making a left turn along Port Henderson Road to head on to Mandela Highway she heard the trainees in the bus screaming and that is when she noticed a male pedestrian in the left corner of the road. The Claimant alleged that the screams of the trainees caused her to panic and lose control of the bus, and, despite her best efforts to steer the bus away from the pedestrian, a

section of the bus collided with him. She further alleged that Mr Heslop was in the middle of the bus engaging with other trainees and after he heard the commotion, he ran to assist her by grabbing the steering wheel. However, by this time it was too late as the bus had already hit the pedestrian and the bus was about to collide with a tree. After she got off the bus she noticed that she had a cut on her left heel that was bleeding profusely. She was taken to hospital.

[14] The Claimant stated that she was the last person to drive and was tasked with bringing the bus to the Spanish Town Bus Depot. She stated that she had driven the bus on the road prior and stated that Mr. Heslop did not make any critique of her on that day. She stated that she had been driving for five minutes before the accidents occurred. She also stated that she was driving slowly. She stated that she stopped for about 15 seconds before proceeding to turn left at the intersection. She denied the suggestion that Mr Heslop was seated near to her.

[15] The Claimant said that she first saw the pedestrian when she made the left turn from Port Henderson Road and when she heard the other trainees making noise. She agreed that as the driver of the bus, she was closest to the windscreen. The Claimant also agreed that there was nothing obstructing the view of the road when she was at the intersection. When the suggestion was made that she failed to keep a proper lookout she responded that Mr Heslop was to be there to help her to manoeuvre to avoid mistakes. She admitted that she did not apply the brake at all that day.

[16] The Claimant called no expert or other witnesses in support of her claim that the JUTC bus could have been retrofitted to allow for dual controls.

[17] Medical reports from Dr Rory A Dixon, Orthopaedic Surgeon dated 10 August 2016 and Dr Sandra Bennett of the National Chest Hospital dated 17 January 2018 were tendered into evidence as exhibits 1 and 2 respectively. Dr Dixon first saw the claimant on 7 May 2014 with a view to preparing a medical report. He details the

history of her treatment as stated by the claimant and noted her inability to work for 18 months after the accident, as well as her complaints of difficulty in wearing shoes due to the tenderness in her heel. However, he noted that the Claimant did not report any significant difficulties in carrying out her daily activities. On examination, Dr Dixon found a horizontal, hypertrophied scar seen on the back of the left heel measuring 18 cm, and decreased sensation over the heel pad. The ankle joint was normal and no ligament instability was demonstrated in the left knee. She was assessed as having a healed degloving injury of the left heel with a hypertrophic tender residual scar. Dr Dixon found that the injury would have initially incapacitated her for about 2 years and that the claimant continues to complain of her heel being sensitive. Dr Dixon assigned a 9% WPI rating.

[18] Dr Bennett indicated that the claimant was referred to the Plastic Surgery Clinic at the National Chest Hospital from the Spanish Town Hospital, for surgery to her left heel and that the Claimant first attended the clinic on 1 July 2009. On examination, it was revealed that she had an unhealed linear wound extending from the medial to the lateral aspect of the heel. She was assessed as having a partially healed degloving injury to the left heel. The wound was dressed and she was again seen on 27 July 2009 where the wound was clean and she was booked for surgery. The Claimant had a split skin graft operation on 15 September 2009 and thereafter, she returned several times in 2009 to have the wound cleaned and dressed. By 10 October 2010, the wound was observed and found to be completely healed, save for oedema of the heel superior to the scar. The Claimant was given a 3 months follow-up. On the next visit, she was given general advice, referred to physiotherapy and the wound was described as satisfactory. On 25 May 2011, it was noted that physiotherapy was to be continued and the scar was softening well. On the last reported follow-up date 30 November 2011, the scar was still in satisfactory condition and the Claimant was discharged. It is Dr Bennett's observation that the left heel was flat but tender to touch but there was no impact on the mobility of her left ankle. It was assessed that there should be minimal interference with the Claimant's daily activities.

Eve Brooks

[19] Ms Brooks gave evidence that she is employed by the JUTC as a bus operator but prior to that, she had been a conductress with the company between 2000 and 2008. She stated that she underwent training with the company in 2008 and obtained her license to operate public passenger vehicles in December 2008. On 3 November 2008, while being trained, she was onboard the 2001 Torino Volvo JUTC bus, which the Claimant was driving under Mr Heslop's supervision.

[20] In her witness statement, Ms Brooks stated that on 3 November 2008, she and Mr Heslop were seated to the Claimant's left in the frontmost passenger seat of the bus, directly behind the front door. Mr Heslop was seated closer to the aisle, and she was seated at the window. After the Claimant made the left turn to get onto Port Henderson Main Road, she did not take the "lock" out and the bus continued to head towards the left. Mr Heslop called out to the Claimant to take the lock out, but she did not respond. She noticed that the bus was heading towards a male pedestrian who was on the soft shoulder of the road and Mr Heslop called out to the Claimant to "*ease up off the gas*" but she continued. Mr Heslop then got up and grabbed onto the steering wheel, but the Claimant held it tightly and he was unable to turn it. The bus continued and hit the pedestrian. The bus then headed towards an ackee tree on the left side of the road and at this point, Mr Heslop released the steering wheel and stepped back and braced for impact.

[21] In her viva voce evidence, under cross examination, Ms Brooks stated that Mr Heslop told the Claimant to take out the lock but she did not respond, and "*sir get up when she was heading towards the ackee tree. Sir get up to try to turn out the steering, but she held it tight. Sir told her to ease up off the gas. She did not ease up off the gas. Sir realized that the bus was going into the tree so he let go of the steering and braced back to the railing at the front of the bus*". Ms Brooks was asked which version of events was correct. She said the version in her witness statement was correct. However, shortly thereafter, Ms Brooks said "*I know 2 things happened.*

Sir told her to take out the lock and at that time the bus was going towards the pedestrian. She did not respond. It hit the pedestrian. Sir get up now and held unto the wheel but she held it and he told her to ease up off the gas". Ms Brooks also stated that she believed had the Claimant complied with the directions given by Mr Heslop, the pedestrian would not have been hit by the bus, and that he did all that he could do to prevent "the accident" (ie the collision with the tree) from happening.

[22] Ms Brooks stated that from where she was seated at the front of the bus, she had a full view of both the right and the left side of the road. She first observed the male pedestrian when the Claimant turned the corner. She estimates that he was about 10 feet from the corner and stated that "*the bus was not travelling at any speed"* at the time the pedestrian was hit because she had just moved off after stopping at the intersection. Ms Brooks estimated that around five seconds had passed between Mr Heslop telling the Claimant to take the lock out and the bus hitting the pedestrian. She also estimated that the bus was moving at a speed of approximately 5 km/h when the bus collided with the ackee tree.

[23] She stated that she did the driving course because she was at risk of losing her job and admitted that in 2008, she would have done whatever was necessary to keep her job. Ms Brooks stated that she volunteered to give evidence in this matter when she was informed about the case by her superiors. She frankly stated that she had the interest of the company at heart but denied that her employer told her to do so. During re-examination, Ms Brooks also stated that Mr Heslop was seated about five feet away from the Claimant and that it took him about two seconds to reach the Claimant from where he was sitting.

Garfield Heslop

[24] Mr Heslop gave evidence in court that he was previously employed by the JUTC as a driving instructor. He now resides in Canada. He stated that he became qualified as a trainer or driving instructor, after having been trained by experts engaged by the JUTC from Belgium and Canada in 2008, as well as by completing training at

the Advanced Driver Training Centre ("ADTC"), where he worked before joining the JUTC.

[25] He gave evidence about the JUTC bus driver training course in 2008, which was introduced with a view to helping the persons employed as conductors and conductresses to become drivers. At the time the only (internal) requirements to drive a JUTC bus were (1) having a learner's driver's licence and (2) being over the age of 18. However, the JUTC no longer hired drivers without driving experience and a valid driver's licence. He said that the training program would typically run for six to ten weeks. Mr Heslop explained that before trainees were taken on main roads they would train along the Hellshire strip in St. Catherine and during training, he would stand at the door to observe the trainee and as the trainees' comfort increased he would move to sit next to them. He stated that there is no dual steering wheel system in Jamaica for buses and he has not come across any dual steering system in Canada.

[26] Mr Heslop said he was aware that the Claimant had no driving experience before joining the JUTC driving programme, but by the date of the accident, she would have had at least six weeks of training and it was not her first time driving on the main road. At the time of the accident, the Claimant was driving the bus with a group of about 14 other trainees. She stopped at the intersection and, on seeing that the road was clear, he told her to proceed to make a left turn. The Claimant turned the steering wheel all the way left as she proceeded. When he noticed that the bus was heading towards a male pedestrian on the soft shoulder on the left side of the road, he called out to the Claimant to "*take out the lock*" but she did not respond. He alleged that he grabbed onto the steering wheel but was unable to manoeuvre the bus as the Claimant held it very tight. At this point, the other trainees began telling the Claimant that the bus had hit the pedestrian. He instructed her to "*ease off the gas*" but she sped up. The bus continued heading towards the ackee tree on the left side of the road. On seeing that bus was going to collide with the tree and that the Claimant was still holding onto the steering wheel, he said that he let go of the wheel

and braced for impact. During cross-examination, Mr Heslop was asked about his training and he indicated some of the things he was taught, including what to do in the event that a trainee loses control of the bus.

[27] He also gave evidence about the meeting with Human Resources in October 2008, during which the Claimant, Ms Brooks and some other trainees indicated a desire for more time to train and he agreed to assist them. He said that when the Claimant began training with him, he did an assessment of her but did not do any yard tests because she had gone through the practice and had passed that stage of training. He said that the Claimant was not relaxed but with the training, she became more relaxed in driving. Once she was doing well, he would sit and he sat close to her in the frontmost left aisle seat. He denied that he was in the middle of the bus with other trainees.

Peter Curtis

[28] Mr Curtis gave evidence that he has been employed with the JUTC for over 22 years. He was first employed as a driver from 2000 to 2009, then as an instructor in 2009, as an accident administrator between 2018 and 2019, and since 2019 as a training coordinator. Around the time of the accident, JUTC was transitioning from having a driver and conductor on board to just a single operator and this meant that conductresses were being made redundant. As an initiative to save their jobs, the company invited conductress to apply to be trained as drivers in a specialized programme. The specialized programme was based off the ADTC courses and has been accredited by H.E.A.R.T. Trust NTA and the National Council on Technical and Vocational Education and Training. Centre. The typical time for training drivers already with a licence was 8 to 10 weeks but for this special programme it was 13 weeks, however some trainee drivers took nearly six or eight months.

SUBMISSIONS

[29] I thank counsel for the diligence with which they prepared their written submissions. I have considered them and will briefly summarize them.

Claimant's submissions on liability and quantum

[30] Counsel Ms Green submitted that the 2nd Defendant breached its duty of care by failing to provide a safe system of work where it allowed a trainee driver to be trained on a public road unsupervised when she only had a provisional or learner's licence. Counsel submitted that the court should find that Mr Heslop was not standing next to the Claimant and he was distracted by the other trainees in the middle of the bus. It was submitted that, had Mr Heslop been sitting at the front of the bus, and if the bus was moving as slowly as he subsequently alleged, there would have been sufficient time for him to intervene to avoid the collision with the ackee tree. In essence, it was submitted that Mr Heslop negligently caused the accident, thereby making the 2nd Defendant vicariously liable.

[31] Ms Green further submitted that the 2nd Defendant having failed to equip the training buses with dual steering and braking controls, training should have been reserved for persons who already had a driver's licence and this amounted to a breach of the company's duty to the Claimant. Counsel relied on the case of **Schaasa Grant v Salva Dalwood and JUTC Ltd**, Supreme Court of Jamaica, Suit No. 2005/HCV 03081, judgment delivered on 16th June 2008, in which it was decided that the failure to equip JUTC buses with seatbelts for bus conductresses was a breach of the employer's duty to provide a safe system of work.

[32] Counsel also submitted that the 2nd Defendant failed to take reasonable care to ascertain that the claimant had the requisite driving skills and that it was reasonably foreseeable that a trainee driver with a provisional licence who had no driving experience would have a difficulty manoeuvring a vehicle in the event challenges were presented on the public road.

[33] Ms Green submitted that Ms Brooks was not a credible witness and had an interest to serve. Likewise, counsel submitted that Mr Heslop was not credible. Counsel further submitted that Mr. Curtis' evidence was hearsay and should be disregarded.

In contrast, counsel submitted that the Claimant's evidence should be accepted as credible.

[34] Counsel Ms Green relied on Dr Dixon's findings and ascribing a 9% WPI to the Claimant and counsel submitted that Claimant should be awarded a sum between $4,000,000.00 to $5,000,000.00 for general damages. Counsel relied on the authorities of **Peter Ankle v Florence Cox**, Supreme Court, Jamaica, Suit No. C.L 1987/A157, judgment delivered on 18 October 1994 (reported at Harrison's Assessment on Damages (2nd Edition) page 80), **Cecil Jack v. Geoffrey Madden**, Supreme Court, Jamaica, Claim No. C.L.1984/J483 judgment delivered on 23 January 1990 (reported at Harrison's Assessment on Damages (2nd Edition) page 80), and **Marsha Page v Malcom Campbell** (unreported) Supreme Court, Jamaica, Suit No. C.L. 2002/P-006 judgment delivered on 29 June 2004.

The 2nd Defendant's submissions on liability and quantum

[35] Counsel for the 2nd Defendant, Ms Hamilton and Ms Clarke, relied on the decision in **Livingston Laing v Charmaine Elesma Forbes** [2020] JMSC Civ 42 and sections 32(i) and 51(2) of the Road Traffic Act, 2018 ("the Act") to support their submissions that a driver of a motor vehicle owes a duty of care to other road users to take such actions to prevent an accident and, that a driver commits an offence where he fails this obligation. Counsel seemingly conceded that while a motor vehicle may be controlled by a person learning to drive, the duty of care is implicitly placed on the licensed driver (in this case, Mr Heslop), who was directing or in control of the learner. However, counsel also relied on the decision in **Cecile Perkins v The Attorney General of Jamaica** [2020] JMSC Civ where the court adopted the principle in the English authority of **Nettleship v Weston** [1971] 3 All ER 581, that the duty of care owed by a learner driver to the passenger instructor was the same objective and impersonal standard as that owed by every driver to other road users.

[36] Counsel also relied on the case of **Lavern Anderson v Marksman Limited and Kaiser Bauxite Company et ux** [2012] JMSC Civ 59 wherein Daye J reiterated that the employer has a duty at common law to his employee to take reasonable care for his safety and ensure that he carries on his operations in a manner as to not subject his employee to unnecessary risk. However, it was observed that the risk involved must be one which, in all the circumstances of the case, is reasonably foreseeable and one which the employer can proportionately guard against.

[37] Reliance was also placed on the case of **Adurrazaq McKnight v The Kingston Wharves Ltd** [2013] JMSC Civ 115 as a contrast with the instant case. In **McKnight**, George J found that there was a foreseeable risk of injury to the claimant and the defendants should have taken steps to reduce the risk by establishing a strict policy regarding the landing of containers, the provision of notices and warnings, the use of safety managers and monitors and the insistence of adherence to the policy. The learned judge held that had the claimant had a competent supervisor on the spot to provide warning or instructions, that would have prevented the risk of the injury occurring. Counsel submitted that the instant case was distinguishable since the Claimant has not denied the competency of Mr Heslop as a training instructor, and counsel further submitted that by implementing the training program and assessment for trainees, the 2nd Defendant provided a safe system of work which reduced the risk of injury to the claimant and other trainees. It was submitted that Mr Heslop's evidence that he supervised the Claimant at the material time and even attempted to intervene to prevent the second collision should be accepted. While counsel seemed to concede that the collision was a foreseeable risk, it was submitted that there was nothing further the 2nd Defendant could reasonably have done in the circumstances to prevent it.

[38] It was submitted that the claimant failed to discharge her duty of care to herself and others and thereby caused her own injuries when she failed to heed the instructions of Mr Heslop and resisted his intervention to avoid the collision.

[39] As regards the nature and extent of the Claimant's injuries, counsel Ms Hamilton relied on Dr Bennett's findings and the fact that no WPI was ascribed to the claimant and submitted that claimant should be awarded a sum not exceeding $1,000,000.00. Counsel relied on the authorities of **Errol Finn v Herbert Nagimesi and Percival Powell**, Supreme Court, Jamaica, Suit No. C.L. 1991 F 117 (reported at Khans Vol 4 pg 66) and **Aldene Miller (bnf Shirly Miller) and Shirley Miller v Winston Smith** Supreme Court, Jamaica, Suit No. C.L. 1994 M 030 (reported at Khans Vol 4 pg 68).

[40] Finally, at the hearing convened on June 23, 2023, counsel for the 2nd Defendant was afforded the opportunity to make oral submissions as regards the Claimant's allegations of negligence in paragraph 10 (xvii) and (xviii) of the particulars of claim as regards whether the Claimant should have been permitted to drive the bus without a driver's licence or without having had some driving experience. Following that hearing, counsel filed further submissions on July 4, 2023 quoting section 16 of the Act and indicating that section 16 makes no distinction amongst classes of vehicles which the holder of a provisional licence may learn to drive. It was therefore submitted that consequently, once the Claimant had a provisional licence, she was authorized to learn to drive motor buses. Counsel further submitted that neither the 1st nor 2nd Defendant was *"obligated to mandate that the Claimant have any experience or a driver's licence to commence training [and] [t]his would hold the 2nd Defendant to a standard above that mandated by law*".

[41] Counsel submits that the latter part of the provision is relevant only to persons who already have a licence to drive one class of vehicles and are learning to drive another.

THE LAW

[42] It is accepted by the parties that Mr Heslop and the 2nd Defendant owed a duty of care to the Claimant. What remains to be determined in this case is whether they breached the duty of care owed to her, and whether the Claimant's injury was

caused by that breach or by some other factor, such as the Claimant's own negligence, or both.

Negligence and employer's liability

[43] The tripartite structure of the tort of negligence requires that the Claimant must establish these three matters:

(1) that the 1st defendant owed her a duty of care;

(2) that the 1st defendant breached the duty of care in that its conduct fell below the standards that the law requires; and

(3) that as a result of the breach she suffered damage of a kind that the law deems worthy of compensation.

[44] The claimant must show that the breach resulted in, caused or materially contributed to the injury and that the injury is sufficiently closely connected to the breach. The risk of injury must be reasonably foreseeable. As Lord Denning said in ***Cork v Kirby Maclean Ltd*** [1952] 2 All ER 402 at page 406 "*[i]f you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage*".

[45] I am guided by dictum in the Privy Council decision in ***Ng Chun Pui and Ng Wang King v Lee Chuen Tat and another*** PC Appeal No. 1/1988. Lord Griffiths delivered the judgment of the Board and stated as follows:

> *"The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred…*
>
> *So in an appropriate case, the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is, nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case… it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he*

finds to have been proven and on the inferences he is prepared to draw he is satisfied that negligence has been established."

[46] In essence, the allegations of negligence as pleaded in this case are twofold. It is alleged that while the Claimant was being trained to become a driver with the 2nd Defendant, the 2nd Defendant as her employer, caused her to be put in charge of driving a bus on a public thoroughfare although she had no prior driving experience, received insufficient instructions, and had not acquired the requisite competence and confidence. It is further alleged that the 2nd Defendant is vicariously liable for the negligence of Mr. Heslop, one of its employees, when he breached a duty of care owed to the Claimant in failing to exercise sufficient or any control over the said bus and failing to do all that was reasonably required of him to assist the Claimant to avoid the accident.

[47] The law provides that the employer will be liable where an employee is injured in the course of employment where the employer breached its own personal duty of care owed to its employee, or, where there was a breach of an employee's duty of care owed to another employee. As pleaded, the claim for damages for injuries suffered because of a breach of a duty owed by the 2nd Defendant to the Claimant as her employer, is a claim brought under the common law. An employer has a duty at common law to ensure that its employees are safe while carrying out their duties at work. It has been established by case law (see **Wilson and Clyde Coal Co. Ltd v English** [1938] A.C. 5) that an employer owes four duties to his employees, namely, to provide:

(1) a competent staff of employees,
(2) adequate plant and equipment,
(3) a safe place of work and
(4) a safe system of work with effective supervision.

[48] The law requires an employer to introduce measures designed to keep its employees safe and reduce the risk of injury from reasonably foreseeable acts of carelessness or omissions. However, the law does not require the employer to

protect the employee from every eventuality, but rather, to do what is reasonable to ensure the safety of the employee. In **United Estates Ltd v Durrant** (1992) 22 JLR 468, the Jamaican Court of Appeal reiterated this common law duty of care is not absolute and can be discharged by the exercise of due care and skill. The court ought to consider all the circumstances of each case in determining whether the duty has been discharged.

[49] As regards the provision of a competent staff of employees, an employer will be liable if he does not provide his employees with sufficient training or engages an employee with inadequate experience and due to this employee's negligence, another employee is injured. For example, in **Hawkins v Ross Casting Limited** (1970) 1 All ER 180 an employee sustained injury to his foot because of spillage of molten metal at the obvious fault of a 17-year-old foreign untrained employee who barely spoke English. As regards the provision of adequate plant and equipment, an employer breaches that duty if he fails to ensure that the material provided by him was safe and adequate (see **United Estates Ltd** (supra)). As regards the provision of a safe place of work, it is settled that the nature of the place of work must be carefully considered when deciding whether it is safe. In the case of **Jenner v Allen West & Co. Ltd** [1959] 1 W.L.R. 554, the employees' place of work was a roof and a scaffold, and it was held that the standard of safety applied was that of a reasonably prudent employer who provided a safe roof and scaffolding for his men to work. The employer was held liable for failing to provide a safe place of work by failing to provide crawling boards.

[50] As regards the provision of a safe system of work, regard must be given to the nature and the circumstances of each job and the level of organization and supervision required in order to determine if the system devised is reasonable. Foster-Pusey JA in **Adolph Clarke (t/a Clarke's Hardware) v Wayne Howell** [2020] JMCA Civ 3 reiterated the dicta of Lord Green MR in **Speed v Thomas Swift and Co. Limited** [1943] KB 557 as regards what is included in a system of work. Lord Green MR at page 563 said:

"A system of working may consist of a number of elements and what exactly it must include will, it seems to me, depend entirely on the facts of the particular case. … I do not venture to suggest a definition of what is meant by system, but it includes, in my opinion, or may include according to circumstances, such matters as the physical lay-out of the job the setting of the stage, so to speak the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise."

[51] On page 564, Lord Green MR further stated:

"The way to test the correctness of my view is to consider the case where the master is: present himself. In such a case, if he lays out the job in a way which is not reasonably safe and sets his men to work in dangerous conditions which could be eliminated by the exercise of due skill and care, it appears to me impossible for him to say that he has not failed in a duty which lies on him and on no one else."

[52] I am also guided by the decision in **Byers v Head Wrightson & Co. Ltd**. [1961] 2 All ER 538 where it was held that where a workman has insufficient experience on the job and is unfamiliar with its dangers, such a workman requires adequate supervision and guidance to protect him from his own incompetence. In that case, the plaintiff was employed by the defendants as a charge-hand steel erector in connection with the construction of a nuclear reactor tank. On the date of the accident, the plaintiff's task was to remove a movable piece of machinery called a welding set from the site. He oversaw the operation and was assisted by two men. The welding set was a rather awkward machine to move and the best and easiest method of removal was by means of a crane, but no crane was available at the time. To move it, it had to traverse and cross a shallow depression or trench. The plaintiff and the other two men improvised and sought to widen and strengthen a plank bridge by adding three further planks. However, these were insufficient for the purpose of providing a safe passage for the welding set, which toppled over onto the plaintiff and broke his leg. The defendants were found to have breached the Building (Safety, Health and Welfare) Regulations 1948 and breached their common law duty to the plaintiff by exposing him to a danger at his work which "*proper planning and supervision would have avoided*". The judge observed at page 543 that "*the defendants, … required the plaintiff by means of improvisation at short notice and unassisted by supervision to undertake a task which, … was beyond his*

competence as a charge-hand steel erector". The plaintiff was not guilty of contributory negligence.

[53] **The Law of Tort** (Common Law Series) 3rd edition, states at paragraph [20.15]:

> "*It has been accurately observed that, in the area of employers' liability, "actions of negligence are concerned with the duty of care as between a particular employer and a particular workman" 1[1]. What is required of the reasonable employer will vary according to the age, experience and other relevant characteristics of each employee. … Employers should in any case be aware that young employees may have a rose-tinted view of their own experience and capabilities, and make inquiries accordingly rather than simply accepting the employee's own assurance of competence 5[2]. The need for special consideration also arises in respect of inexperienced employees of adult years 6[3], or those required to do work outside the ambit of their normal duties 7[4] , and the employer may be liable if an accident occurs because an employee has been entrusted with a dangerous task lying beyond his competence 8 [5]….*"

[54] The editors of the text went on state at footnote 4 state that dicta in **Kerry v Carter** [1969] 1 WLR 1372 per Lord Denning MR at 1375–6 that the duty owed to an apprentice in respect of instruction in the use of dangerous equipment, was probably higher than that owed to the usual employee is said to be doubted and remind its readers that "*in an action for breach of the employer's duty of care, the question for the court simply is whether the employer has taken adequate steps to ensure the employee's safety*".

ANALYSIS

Have the Defendants taken all reasonable precautions to discharge the duty owed?

[55] In answering this question, I will cumulatively address all the issues raised involving the system of work. I will also assess the credibility of the witnesses, determine

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[1] **Qualcast (Wolverhampton) Ltd v Haynes** [1959] AC 743–4, per Lord Radcliffe.

[2] **Kerry v Carter** [1969] 1 WLR 1372. Employers may also have to guard against such over-confidence in the case of their adult employees: see **Morris v Breaveglen** [1993] ICR 766.

[3] **Qualcast (Wolverhampton) Ltd v Haynes** [1959] AC 743, per Lord Radcliffe ('An experienced workman dealing with a familiar and obvious risk may not reasonably need the same attention or the same precautions as an inexperienced man …').

[4] **Payne v Peter Bennie Ltd** (1973) 14 KIR 395.

[5] See, eg, **Byers v Head Wrightson & Co Ltd** [1961] 2 All ER 538, [1961] 1 WLR 961.

whether the Claimant received adequate training and determine whether Mr Heslop's actions fell below what would reasonably be expected from a driving instructor.

[56] The allegations of negligence in this case are many, but the substance of the claim seems to be that the 1st Defendant and the 2nd Defendant knew or ought to have known that the Claimant was incapable of operating the bus safely due to her inexperience and inadequate training and therefore it was negligent of the 1st Defendant and the 2nd Defendant to put her in control of the vehicle. The system of work or training is questioned as well as the length of the training, and it is alleged that Mr Heslop failed to do what was expected of a reasonable driving instructor in the circumstances, in order to avoid the collision.

[57] Having regard to the circumstances of this case, it is necessary to examine what might be reasonably expected of a driving instructor. I now briefly set out the role and duties of a driving instructor, having regard to what the Island Traffic Authority Road Code (1987) ("Road Code") imparts as key areas for a driver to know and understand. The driving instructor's purpose is to develop and assess the trainee driver's skill and understanding of how to safely operate a vehicle. In my opinion, the driving instructor serves three main roles. First, he should teach the trainee various things including the following:

1. understanding the vehicle controls and handling these;
2. conducting safety checks before moving or stopping;
3. positioning a vehicle in the road when driving and making left and right turns at intersections;
4. proper steering, signaling and braking;
5. defensive driving techniques including scanning the road for traffic signs, pedestrians, other vehicles, animals and potential hazards;
6. thinking ahead with a view to exercising manoeuvres in good time;
7. driving in traffic with proper spacing and judging appropriate speed and distances;
8. understanding stopping distances and reaction times;
9. other manoeuvres such as overtaking, reversing and parking; and
10. common errors in driving (such as lacking concentration or not being observant) and anticipating risks or hazards.

[58] Secondly, the driving instructor should evaluate the competency of the trainee drivers. The driving instructor may do this by:

1. Observing the trainee driver's operation of the vehicle and execution of manoeuvres learned, to ensure correct procedure, control of the vehicle and safety for all concerned. This involves observing hand and leg movements, perception skills and reaction times;
2. Observing the road for potential hazards;
3. Anticipating the trainee driver's actions in relation to potential hazards;
4. Giving clear instructions in good time to allow for suitable response;
5. Assessing the trainee driver's confidence and understanding;
6. Giving feedback, performing assessments and encouraging the trainee driver to analyse their own skills and development; and
7. Conducting classes or exercises and giving written tests or assessments.

[59] Finally, the driving instructor should manage risks and intervene when it is necessary so to do. The driving instructor may do this by:

1. Verbal intervention in terms of giving commands; or
2. Physical intervention in terms of taking control of the steering wheel, applying the handbrake, or, where fitted, using the dual control brake; and
3. Giving feedback at an appropriate time.

[60] Having regard to the responsibilities of a driving instructor, it would follow that the 2nd Defendant had the responsibility of hiring a competent driving instructor who could properly instruct and assess the Claimant. It was therefore incumbent upon the 2nd Defendant to review the ability and performance of Mr Heslop as well as review the Claimant's performance and that of other trainee drivers who were under his instructions and direction.

[61] During the cross-examination of Mr Heslop, counsel Ms Green sought to introduce evidence regarding an allegation of another accident which took place while Mr Heslop was a driving instructor. However, there being no prior disclosure or reference to same in the Claimant's witness statement, this could not be allowed as this would not be in keeping with the overriding objective of the CPR to deal with cases justly, which includes preventing trial by ambush. Consequently, by the close of the Claimant's case, all that was presented to the court in relation to the competency of Mr Heslop and the adequacy of his instructions and that of other

driving instructors, was the Claimant's account of Mr Heslop's conduct on the day in question, and her assertion that she did not receive adequate training.

(1) Adequacy of training generally

[62] The Claimant alleges in her pleadings that she did not receive adequate training because Mr Heslop was not competent to train her, failed to give her proper instructions and adequate training sessions, and in her viva voce evidence she said she was only made to watch other trainee drivers. The Claimant further stated that she was training with Mr Heslop for about a week and was then taken to the examination depot but failed the Island Traffic Authority examinations ("driving test"). She agreed that after she failed the test she went back to training. She stated that the accident occurred a week after she failed the test. She denied the suggestion that she was being trained by Mr Heslop for six (6) weeks prior to the accident. She also denied that the accident occurred more than three (3) months into her training. She stated she did 3 weeks with her first instructor and then two (2) weeks with Mr Heslop. She subsequently stated that she had three (3) instructors, namely, the first instructor with whom she trained for two (2) weeks, then Mr Charles Beavers with whom she trained for one week, and finally Mr Heslop with whom she trained for one week. She denied that a training network was set up at the bus depot and insisted that there were only cones. The Claimant denied receiving a training manual. She agreed that she took the written test at the depot. She denied the suggestion that she passed the assessment in the yard test and she denied attending any classes focusing on the Road Code. The Claimant agreed that Mr Heslop allowed her to drive the bus on the road to boost her confidence. She agreed that when driving on the road Mr Heslop would provide guidance to stop, slow down, and make right or left turns. However, she insisted that she was one of the "lunatics" who was not grasping driving quickly and said that such persons were rarely given an opportunity to drive, but instead were made to observe the others who were progressing faster.

[63] I accept the evidence on behalf of the 2nd Defendant that there were different stages of training, which the Claimant admits. I accept the evidence of both the Claimant and Ms Brooks that they learned to operate and control the bus using cones as obstacles during yard training and that after they managed the yard exercises, the trainees were taken to less populated areas, such as the Hellshire community, to practice driving. I also accept that the trainees eventually drove into areas with traffic where they would practice their hazard perception skills. During this time at least one driving instructor was present providing guidance.

[64] Further, according to Mr Curtis, the conductors and conductresses chosen for the special training program had undergone an assessment to determine their "trainability" before being admitted to the program. Mr Curtis stated that before candidates commence training, they undergo a one-day assessment to determine their ability to be trained. He said the assessment included the trainees' ability to identify both basic controls and navigate confined area obstacle courses for them to manoeuvre the unit. Once satisfied that the trainees were ready, the next step was to engage in basic training which took no more than three weeks. Basic training included vehicle dynamics, yard manoeuvres, street line reversing, 90 degree reversing, and obstacle course. The next phase of training was to go on the road. Trainees would practice in less populated areas, at the time training was done Hellshire community. Training on the road training would include road signs and markings, hazard detection, safe speed maintenance and vehicle positioning. The trainees were made to learn on buses used for regular service. The class sessions included presentations on defensive driving techniques and the contents of the training manuals. Mr Curtis said that the manuals used in 2008 have been destroyed by rodents and moisture and so none was produced in court. He also indicated that instructors customarily would stand beside or close to the trainee. Under cross-examination, Mr Curtis stated that he was a part-time instructor in 2008. He stated that the noticeable difference in the training program now is the length of the program. The program took more time in 2008 as trainees then didn't have a driver's licence or experience so a considerable amount of time was spent on basic training.

The similarities he noted were the different stages of training and the fact that training took place in less populated areas.

[65] It is noteworthy that Mr Heslop gave evidence that when he began training the Claimant, he assessed her to determine if she had acquired the requisite skills to go on the road, bearing in mind that she had already been admitted to the program and was exposed to classes.

[66] I believe it is prudent to bear in mind the reason the Claimant said she failed the driving test. The Claimant stated the following in answer to questions from the court:

> *JQ: Do you know why you failed the test?*
> *A: I think it was the reverse and they say that I was lean on the ramp. I barely mek it. Since I failed the yard test they did not take me on the road.*

[67] Notwithstanding this answer, I am mindful of the fact that the Claimant did the driving test at least once, and that to put her forward for the test, an assessment must have been done by her instructor as regards her competence and general readiness to drive a bus. However, the Claimant sought to paint a different picture, that she was given a very limited opportunity to drive, and therefore she was ill-equipped to drive the bus on the date of the accidents. When she was afforded the opportunity by the court to explain what she was not mastering, she said "*the driving, like negotiating corners and all that*". When asked about the number of times she practiced turning, and about the number of times she practiced generally, I found her answers to be evasive and incredible:

> *JQ: In the 5 or 6 weeks, about how many times you drove on the road?*
> *A: I can't recall but I know he give me drive.*
> *JQ: How many minutes would you be allocated?*
> *A: It depends on them.*
> *JQ: How many minutes the first instructor gave you?*
> *A: **Like 5 minutes. In fact, we were not getting any drive**.*
> *JQ: Earlier you said that "as time goes by they took off those who were mastering and those who were not were at the back". Were you mastering or at the back?*
> *A: Me and the lady Brooks were the least. We were not mastering fast enough. ....*
>
> *JQ: How many times you practiced turning left or right at the depot?*
> *A: I can't remember how many times*
> *JQ: How many minutes or hours they gave you to practice generally at the depot?*
> *A: Each person get a little time to reverse at the assessment.*
> *JQ: After the assessment how much time [sic] you practiced at the depot?*
> *A: We go on the road at Hellshire and dem place deh.*

JQ: You practiced what on the road?
A: Driving.

[68] The Claimant would have me believe that after the initial assessment she did little training in the yard but still she progressed to driving on the road without having attained some level of competence. She seemed reluctant to indicate even an estimation of the minutes that she would get to practice at the depot. Instead, she proceeded to suggest that the focus of the training in the depot was on reversing, and that the trainee drivers were taken on the road immediately after the assessment. While I am mindful of the fact that the accident occurred over a decade ago and that memories fade, I would expect the Claimant to have some recollection of the nature and extent of her training, since she alleges that she was not mastering the programme and alleges that it was the failure to provide adequate training which contributed to the collision. I find the assertion that the driving instructors took the trainee drivers on the road immediately after the assessment to be incredible.

[69] In contrast, Ms Brooks gave clear answers to questions asked about the extent of her training both in the yard and on the road. Ms Brooks stated that she believed that she and the Claimant did most of the training sessions together from June 2008 up until the accident. She admitted that Mr Heslop was not always their trainer. She stated that she received a manual and a Rode Code as part of her training from JUTC. She stated that the JUTC administered tests and quizzes to determine how well the trainees knew the content of the Road Code and the manual. As regards the training exercise, she said that the trainee drivers went driving on the road in the morning and returned to the depot for classes in the afternoon. The training sessions would run from 8:00 am to 4:00 pm with a break for lunchtime. She was unable to recall at what stage they were permitted to drive on the road with traffic. However, she stated that when she just started driving, it was usual for the instructors to stand next to the trainees (on their left side) as they drove and later, to sit to the trainees' left. She added that trainees who were not doing the activities correctly were allowed to redo them after everyone had gotten a chance to drive. She said that instructors

could even be approached to allow trainees to continue to practice in the lunch break, which she did.

[70] I do not find the Claimant to be credible when she said "*the lunatics*" were made to observe the other trainee drivers. I find instead, based on the evidence of Ms Brooks, that the trainees were each given 15 or 30 minutes to drive several times per week, so that everyone got an opportunity to drive.

[71] Having regard to the extent and frequency of the training, I find it incredible that the Claimant would say that she had not grasped a basic manoeuvre such as turning left at an intersection. I note that the Claimant said that the intersection in question was "*a bend turn*" and not the usual corner. In the circumstances, it seemed she misjudged how to make the turn and "*overlocked*" the steering wheel. However, I accept the earlier evidence of the Claimant and that of Ms Brooks that the trainee drivers were trained to drive at the depot with the aid of cones as obstacles and this helped them to develop their skills in manoeuvring the buses. Ms Brooks gave evidence that on occasions when she practiced at the depot, she would sometimes have to drive through two obstacle courses for the day and there would be ten (10) or fewer trainees who were also practicing. When each trainee got the chance to practice, she would get an opportunity to repeat the exercise until she "*achieved it*". Likewise, she said that while learning to drive on the road, because there were about eight (8) trainees, they drove in turns. Each person got an opportunity to drive and to do a lot "*depending on where you go*".

[72] I found Ms Brooks to be a credible witness as regards the nature and extent of the training. I noted that she disagreed that she was trained over a sandy area, or a wet surface. She did not seek to embellish her account to allow the 2nd Defendant to be viewed in a favourable light. I prefer the evidence of Ms Brooks to that of the Claimant as I found her to be more forthright and I found her evidence reliable.

(2) Length of the training, number of minutes and number of sessions per week

[73] Under cross-examination, the Claimant agreed that she applied to be trained as a

driver in May 2008. She denied that she started training in June 2008, and also denied that she was trained for at least six (6) weeks before the collision.

[74] Although the Claimant was extensively cross-examined, she not asked about what appears to have been a crucial meeting which took place with Human Resources in October 2008, wherein, it is alleged, those trainees who were not mastering the programme requested more time to train. This evidence came from Ms Brooks and Mr Heslop for the first time in court. The court allowed this evidence since all three persons were said to have been present at the meeting and counsel for the Claimant could take instructions and cross-examine the witnesses as appropriate. Further, this evidence seemed relevant to the issue of how long the Claimant had been on the training programme before the collision and is also relevant to the issue of her level of competency in driving as at the date of the collision.

[75] Ms Brooks said that she started training in June 2008 and by a date close to the end of October 2008 a driving instructor took her and others who were not mastering the driving course to a meeting at the Human Resources office in Spanish Town and none of the other instructors wanted to take them. She said that was when Mr Heslop agreed to take them and continue their training. Ms Brooks agreed that as this meeting occurred sometime in October, this meant that Mr Heslop was her instructor for less than a month before the accident. Ms Brooks stated that she could not recall if the Claimant went to the Board to do the driving test because only those who mastered the course did the driving test. She opined that the Claimant was not mastering the training course but said that, as at the date of the accident, "*she was getting there*". I also note that the Claimant informed the court that "*me and the lady Brooks were the least. We were not mastering fast enough*". I find that she could only know this if she had trained together with Ms. Brooks, or at least to some extent. At one point in her evidence the Claimant stated "*the group I was in, they shift to another instructor and leave two of us along with some new trainees that came the same day Monday November 3, 2008*". Later, she said she could not recall if started training in June 2008. However, when was asked if Ms Brooks was part of the cohort

she trained with, she replied "*I can't recall if she was part of the first group, but she was on the bus*". While the Claimant did not state when this "first group" started training, this suggested to me that the Claimant herself was part of the "first group". When all the evidence is distilled, the evidence suggests that the Claimant was part of a group of trainee drivers who had been in training for some time (and for more than the 13-week period for the programme as alleged by Mr Curtis), which was why it was necessary to have a meeting with Ms. Brooks, the Claimant and others.

[76] I do not find the Claimant to be a credible witness as regards the duration of her training. In response to a question from the court, she said her training could a "*little bit over*" five (5) weeks. In the end she said she did two (2) weeks with the first instructor, one (1) week with Mr Beavers and then two (2) weeks with Mr Heslop. She sought to have the court believe that she had at least three (3) driving instructors over a five (5) to six (6) week period, with no more than two (2) weeks spent under the instruction of each driving instructor. In the same breath, she accepted that during that period, she was permitted to do the Island Traffic Authority driving test, even though she had no prior driving skills and was one of the slower learners within the cohort. However, if she was only exposed to a maximum of two (2) weeks of driving per instructor, how could any of them have assessed her as being suitably skilled or competent to do the driving test? When juxtaposed with the evidence of Ms Brooks, the period of five (5) to six (6) months of training seems more plausible. I find that the Claimant was in training for at least five (5) months before the collision, and not the five (5) weeks that she has alleged.

[77] Another issue is whether the total number of minutes or hours and number of sessions per week were enough to equip the Claimant with adequate training. When asked by counsel Ms Hamilton whether there was an assessment done before the trainee program started the Claimant, stated that they were taken to the Portmore JUTC Bus Depot to determine who could manoeuvre the bus well. When asked if she could manoeuvre the bus, she said "*No! No! but they still give us a chance to practice*". She then said she was given a chance to practice at the Portmore bus

depot and on the road. She stated that she practiced at the Portmore bus depot for about three (3) days before going on the road. However, she said that "*it is only who was progressing they allowed to drive daily*". Similarly, as regards the training in the yard, she also stated "*with the first instructor, when he tests us to see how we manoeuvre the bus, those who could manoeuvre well got to drive every day and we, as the lunatics, sit there watching them*".

[78] I have indicated above that I did not accept parts of the Claimant's evidence as regards how long she was afforded to practice. I also found that her evidence appeared contrived at times. For example, when the Claimant alleged that she did not know what a "speed limit" was and could not tell what speed she was travelling at around the time of the collision, and when she also stated that she was not given a copy of the Road Code until the day of her driving test. I note that the Claimant denied benefiting from any training on the road but I do not find this to be credible. It is hard to fathom instructors employed by the 2nd Defendant allowing her to sit and watch others drive almost daily for five (5) months, and it is equally hard to accept that she was content with that. In contrast, Ms Brooks gave evidence that each trainee would get at least 15 to 30 minutes each day to drive the bus and if time permitted, each trainee would get a second opportunity to drive and correct mistakes made. I accept this account.

[79] As regards the length of the training sessions, I must observe that because the trainee drivers were trained in a group of eight (8) or ten (10) persons (according to Ms Brooks) or 15 persons (according to Mr Heslop), the amount of time allocated to each person daily was relatively smaller than that which would have been allocated if each person had attended a private driving school. At first blush, practicing driving for only 15 minutes per day might seem to be insufficient for the Claimant to develop her confidence and her skills in driving. However, regard must be had to the cumulative effect of this practice three or more times per week over five (5) months. The practice and exposure to driving daily or regularly would have, over time, improved the trainee's observation and driving skills and confidence. I note as well that Ms Brooks said that although she benefited from the numerous sessions, she

still took the opportunity to train with an instructor during the lunch break. While this evidence might be interpreted in more than one way, this suggests to me that Ms Brooks was committed to learning to drive and made an extra effort to master the manoeuvres. If the Claimant felt that the amount of time allotted to trainees who were not adept was insufficient, she too could have requested extra tutelage. A significant part of learning to drive is the right attitude and mindset.

[80] During cross-examination, Mr Heslop said the Claimant drove two or three times with him on the road over two or three weeks he was her instructor and that the accident occurred on the day when he did not remain standing beside her. Prior to that he did an assessment with her in the yard of the depot, observing how she controlled the vehicle. He said that she completed the yard practice, and she passed that test. Mr Heslop maintained that everyone must successfully complete the yard activity before they can go on the road. He explained that the assessment itself would last one day, and the yard practice would last three (3) days. He also said that each person would be given 15 mins to an hour to drive depending on their driving skills and that the weaker trainees were given more time to drive. Mr Heslop denied that he was the driving instructor who took her to the Board, as he did not feel that she had reached that stage. Mr Heslop opined that the Claimant was getting to the "advanced level" of driving but needed about four more weeks of training. When scrutinized and compared with the evidence of Ms Brooks and the Claimant, I accept Mr Heslop's evidence that he in essence took the first week of training to reassess each trainee and have them practice in the yard of the depot. When I consider the two-week timeline alleged by both Mr Heslop and the Claimant, it seems that it was only after the first week of training at the depot, that she was permitted to drive on the road (in the second week of training), and the accident occurred on Monday November 3, 2008, the beginning of the third week of training.

[81] I accept that this system of training deployed by Mr Heslop was the correct approach, namely, that each new instructor should conduct an assessment of the trainee, and cause the trainee to demonstrate some level of competency in

controlling the bus in an off-road setting, before taking the trainee onto the road. I am satisfied based on the evidence of the witnesses for the 2nd Defendant, that the system of training was more than adequate to equip the Claimant with the knowledge, understanding, skills and confidence required to operate the JUTC bus. I do not find that the system of training was to blame for the collision.

(3) Effect of the presence of other trainee drivers on the bus

[82] I note that in cross-examination, the Claimant agreed that from the start of her training, she was part of a group and agreed that she had the benefit of observing the other trainees. However, she alleges in her pleadings and in her evidence that by permitting other trainees to be on the said motor vehicle and by not controlling those trainees, she became distracted, and this caused the collision with the pedestrian and with the tree. So, one issue raised by the Claimant seems to be whether, on the date of the accident, the presence of other trainee drivers on the bus contributed to the accident.

[83] While I accept that the other trainee drivers must have made some noise that day, I do not accept that it was the noise of the other trainee drivers which caused the Claimant to collide with the pedestrian and in the tree. The collision with the pedestrian was the basis for the Claimant's panic and the basis for the uproar on the bus. The answers given in response to some questions asked by the court suggest that she lost concentration and composure and panicked after she collided with the pedestrian. These answers are notable:

> *JQ: You did not try to avoid the tree?*
> *A: Well, I tried to.*
> *JQ: What did you do?*
> *A: I tried to pull away from it and straighten up back and pull and straighten up back*
> *JQ: What was your foot doing?*
> *A: I think my foot came off the brake. Let me think. It came off the brake and touched the gas.*
> *...*
> *JQ: Were you nervous that day?*
> *A: No, I was not.*
> *JQ: After you hit the pedestrian you got nervous [sic]?*
> *A: Yes, to tell the truth.*
> *...*
> *JQ: Why did you take your foot off the brake?*

A: I did not realize what was happening [pause] because of the uproar.

(4) Should the 2nd Defendant's trainee buses have been retrofitted?

[84] The Claimant has adduced no expert evidence that it was possible in 2008 to retrofit the JUTC training buses with dual brakes and/or dual steering. The court cannot speculate about the usefulness or even the possibility of the use of a dual control system on buses. In this regard, the Claimant has failed to make out a breach of this duty. Given the layout of the front of the buses, it is not even clear where such controls would go.

(5) Should the 2nd Defendant have trained only persons with a driver's licence?

[85] Counsel Ms Green submitted that the 2nd Defendant breached its duty of care by failing to provide a safe system of work where it allowed a trainee driver to be trained on a public road when she had no previous driving experience or full licence.

[86] It is my opinion that driving a large passenger vehicle is not the same as driving a car. For example, it might take longer to bring a large vehicle to a halt, and therefore potentially requires more knowledge and skill. As public safety is a major consideration when operating such a vehicle, prudence would dictate that the owner/operator of such a vehicle would hire only the most skilled, experienced and disciplined drivers rather than seek to train novice drivers. The advantages of using only experienced drivers are obvious. First, the perception skills required to recognize and anticipate a potential danger ahead are honed with the passage of time and experience. Secondly, the reaction time of an experienced driver in response to a hazard is likely to be swifter than that of a learner as it is developed with an appreciation of the speed of the vehicle and other vehicles as well as the distance from the hazard and the required braking distance. Finally, the level of confidence of an experienced driver is greater than that of a learner as it is developed after the accomplishment of performing various manoeuvres consistently at a high standard. Confidence cannot be taught, and it comes after much practice and a sense of achievement and belief in self, that one is able to control the vehicle in a wide variety of situations, without instructions or unaided.

[87] Whilst I have reservations about the prudence of a decision by the 2nd Defendant to train people who did not have a driver's licence, and to put them in charge of a large public passenger vehicle, albeit supervised, I am guided by section 16(1) of the Act which states:

> *"16.-(1) A person shall not drive a motor vehicle on a road unless he is the holder of a licence for the purpose (in this Act referred to as a "driver's licence") …*
> *Provided that this subsection shall not apply to a person who is being taught to drive (in this Act referred to as a learner) by the holder of such a driver's licence who is directing the learner or who is in responsible control:*
> *Provided further that-*
> *(a) such vehicle-*
> *(i) shall have displayed at the back and front thereof such distinguishing mark as may be prescribed; and*
> *(ii) shall be operated subject to such restrictions relating to the carrying of passengers or freight as may be prescribed; and*
> *(b) the learner is either the holder of a provisional licence issued under this section or, although not the holder of a driver's licence authorizing him to drive the class or description of vehicle in respect of which he is a learner, is nevertheless the holder of a driver's licence in respect of some other class or description of motor vehicle."*

[88] As counsel Ms Clarke submitted on July 4, 2023, the law does not require a person learning to drive a large vehicle to first have a driver's licence to drive a smaller vehicle. Consequently, the 2nd Defendant was not under any legal obligation to put in place a system whereby only holders of a driver's licence who were experienced drivers could be trained as bus drivers. I accept counsel's submission that to find the 2nd Defendant negligent would mean that a higher duty would be imposed on the company than that required by law or imposed on any other motorist. While there may be ethical foundations to decisions, judicial decisions are constrained by factual and legal considerations and it seems that if the law permitted the 2nd Defendant to hire and train novice drivers, the court cannot find the 2nd Defendant negligent without more evidence that the policy and practice were unsafe to the public and the trainees. However, it is noted that the 2nd Defendant has since changed its policy. No explanation was offered for this change. I believe I can take judicial notice of the fact insurance companies charge a higher premium to newly qualified drivers, on the basis that the risk of an accident is greater than that for an experienced driver. The 2nd Defendant must have been aware of this in 2008.

(6) Did Mr Heslop's actions fall below that of a reasonable driving instructor?

[89] At the outset, I must indicate that I have considered the qualification and experience of Mr Heslop as a driving instructor. I accept that at the time of the accident, Mr Heslop had over eight (8) years of experience in training drivers of large public passenger vehicles and that he had trained many of the company's drivers prior to 2008. I accept that he received training at ADTC prior to being employed by JUTC and then by experts sourced by JUTC in 2008 and that this training programme ran for 2 months. With his experience and training, he was competent to carry out his duties as a driving instructor.

[90] I accept Mr Heslop's account that he supervised the Claimant and gave her clear instructions when he observed the bus heading towards the pedestrian and I accept that she did not respond in a manner that averted a collision. I also accept his account that he was seated in close proximity to the Claimant at the time. Ms Brooks corroborates this account and I found her to be credible. However, I do not accept his account that he held on to the steering wheel before the bus hit the pedestrian. There would be no good reason for the Claimant to hold the steering wheel tightly at that juncture if she saw he was trying to assist her to avoid hitting the pedestrian. I prefer the account of Ms Brooks that the bus hit the pedestrian before Mr Heslop physically intervened. I find on a balance of probabilities that Mr. Heslop held on to the steering wheel after the bus hit the pedestrian, by which time the Claimant started to panic and then clutched the steering wheel. Notwithstanding this finding, I do find Mr Heslop to be generally credible.

[91] I also have doubts as regards Mr Heslop's evidence that the bus was travelling at about 8 km/h when it collided in the tree. I say this because the extent of the damage to the bus described by Ms Heslop suggests that the bus was travelling faster than that speed, and indeed I note that he opined that the bus picked up speed instead of slowing down, after he gave her instructions to "*ease up off the gas*". Further, the Claimant admitted that she pressed the gas pedal instead.

[92] I believe that Mr Heslop is mistaken in some of his recollections of the events of November 3, 2008, which was nearly 15 years ago. This is one of the dangers involved when cases take too long to be tried. Memories fade and false memories might be created. Notwithstanding, I observed his demeanour as he gave his evidence and formed the view that he was generally forthright. I gave consideration to any reason he would have to mislead the court on aspects of the evidence, and I could find none, particularly since he no longer works with the JUTC and has migrated. I do not find Mr Heslop to have been discredited on the salient matters in this case, namely, that he made reasonable attempts to intervene in the Claimant's operation of the bus, both verbally and physically, but his efforts proved futile since she panicked after the bus hit the pedestrian.

[93] The circumstances as outlined by all eyewitnesses, including the Claimant herself, suggest that the Claimant panicked and lost control of the bus. I accept Mr Heslop's assertion that the Claimant was unresponsive to his instructions and to his attempt at physical intervention.

[94] Mr Heslop was also cross-examined on whether the second accident could have been averted had he not waited to see the Claimant's response to his verbal instructions. He explained that this is what he was trained to do, that is, to give verbal instructions, observe the reaction and then physically intervene. If it was anticipated that a trainee would not have corrected the steering in time, then it would be appropriate for a reasonable instructor to physically intervention. It does not appear from Mr Heslop's evidence that the Claimant would not have corrected her steering. In any event, I believe in this case I am asked to address my mind to whether the second accident could have been avoided by some act on Mr Heslop's part. On the evidence before me, I do not find that it could have been. On the claimant's own evidence, in response to a question from the court, she said this:

> *JQ: How long it took you [sic] to move from where the man was to where the tree was?*
> *A: Maybe one or two seconds.*

[95] Given the short distance between the ackee tree and pedestrian (which was

estimated by Mr Heslop as being 6 to 8 feet and estimated by Ms Brooks as being about 10 feet), I do not find that it would have taken as much as two seconds for the bus to get to the tree. In light of the short timeframe in which the bus would travel that distance, and the fact that the Claimant clutched the steering wheel and did not apply the brakes, I find, on a balance of probabilities, that there was nothing Mr Heslop could reasonably have done to avoid the collision. I therefore find that the 2nd Defendant has discharged this duty to the Claimant.

[96] The case of **Gibbons v Preistley and Another** (1979) RTR 4 is instructive as regard what a reasonable driving instructor should do to avoid a collision. The facts of **Gibbons** are very similar to the case at bar. The headnote states:

> *"The plaintiff, a learner driver, was a middle-aged, intelligent woman, who acquitted herself as an average pupil and progressed reasonably well with increasing experience during the course of 18 driving lessons over 3 months from a driving instructor on a dual-control car owned by his employers, a driving school, he informed her seat belts could be used at her discretion. As part of a subsequent lesson from the instructor, she drove her husband's car which did not have dual controls, and the instructor did not wear and did not recommend her to wear a seatbelt available for her use. She drove satisfactorily for some 12 to 14 minutes; near the top of a hill at a T-Junction when turning left she let in the clutch sharply accelerating and over-corrected the steering wheel so that she was driving towards a tree. The instructor shouted 'brake, brake' and pulled on the handbrake but, some five seconds from the beginning of the turn, the car collided with the tree and she was injured. The plaintiff brought an action for negligence and breach of contract against the instructor and the driving school for allowing her to drive without dual controls and for failing to prevent the collision.*
>
> *Judgment was given for the defendants. It was held that during the five seconds terminating the collision, the instructor had done no more and no less than a reasonably competent instructor or supervising driver could or would have done in the circumstances …; that permitting the plaintiff to drive the car without dual controls was a reasonable and natural progression in the tuition being given to her …; and that although the instructor was negligent in failing to instruct the plaintiff more fully on the reasons for and the advantages of wearing a seatbelt and in failing to recommend her to wear the seatbelt, his negligence was not the cause of the collision and therefore, did not found a claim in the action … and that, accordingly, the plaintiff had not established her claim in negligence or breach of contract…."*

[97] It was accepted by the court that there is an implied contractual term that the driving instructor would exercise all due care and skill (1) in the management of the car while the plaintiff was learning, and (2) in the supervision of the plaintiff during the lesson and would give her all such instructions as necessary. However, the learned

judge stated[6] that the driving instructor should exercise all due care and skill in such management of the car, "*as it was reasonably possible for him physically to manage from his position*" in the vehicle which was not equipped with dual controls, "*because no person in the front passenger seat of a car … [with or without dual controls] would have quite the same opportunity to manage and control the car as the driver in the proper driving seat*". The judge found that the driving instructor did shout "*brake, brake*" and that he did pull on the hand brake. While the judge had some hesitation in finding that the driving instructor tried to steer the car, he said that he was "*not convinced that this would have had any effect on the passage of the car*" as he accepted that the plaintiff held the steering firmly because as she "*was in the process of over correcting a previous wide steerage*"[7]. The judge found that these acts were acts which a reasonably competent driving instructor could or would have done in the circumstances, particularly having regard to the fact that the driving instructor must have been taken by surprise by the events and having regard to the estimated five second time frame in which to react before the collision with the tree.

[98] Although the vehicle used in the **Gibbons** case was a more powerful car than the driving school's car and although the plaintiff was allegedly nervous, the judge found that the driving instructor was not negligent and did not breach a contractual duty in allowing the plaintiff to drive the car with no dual controls. He observed that "*a learner driver has not got the confidence of an experienced driver on the roads*"[8]. However, he noted that she had made good progress over the three-month period, and that the driving instructor, the plaintiff and her husband saw nothing wrong in allowing her to take control of a vehicle without dual controls. He observed that she was taught essential manoeuvres and operations and had mastered road procedures.

[99] Unlike the **Gibbons** case, the Claimant in the instant case had recently failed her

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[6] At page 9, paras g and h.
[7] At page 11, paras b and c.
[8] At page 12, para g.

driving test and had demonstrated that she was not progressing like the average trainee driver. In fact, Mr Heslop said that she was not relaxed when he commenced teaching her. However, it was not Mr. Heslop's assessment that the Claimant was unable to competently drive on the road. What was required was for her to be reassessed and trained further, and once she proved her competence in the training done at the depot, she required more driving practice and confidence to progress.

[100] When I closely examine the facts of this case, I cannot be satisfied the second accident could have been averted even if Mr Heslop stood beside the Claimant while she drove, given the state of panic that she seemed to have been in. Like the facts in the **Gibbons** case, although there was an attempt to steer the car, it would not have had any effect on the passage of the car since the Claimant held the steering wheel firmly. The cause of the collision was the fact that the Claimant panicked and failed to heed instructions and failed to apply the brake. I feel it is important to indicate that I do not find that the Claimant was either so incompetent or inexperienced in driving that putting her in control of the vehicle would amount to an act of negligence. I believe that she lacked confidence and keen observation skills, but she was capable of driving the bus safely, albeit under the instruction and guidance of driving instructors, and I find that she had safely done so for months.

Did the Claimant accept the risk of injury?

[101] The 2nd Defendant also relies on the defence of *volenti non fit injuria*. I am guided by dicta in **Nettleship** (supra), per Denning MR where he stated at page 587:

> "*This brings me to the defence of volenti non fit injuria. Does it apply to the instructor? In former times this defence was used almost as an alternative defence to contributory negligence…. Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of volenti non fit injuria has been closely considered, and, in consequence, it has been severely limited.* ***Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him****. …..*" (My emphasis)

[102] I find that the 2nd Defendant cannot rely on the doctrine in this case since it has presented no evidence to suggest that the Claimant accepted the risk of injury or agreed to waive any claim for injury.

What is the standard of care expected of a driver?

[103] Case law and the Road Code offer a guide as to the standard of care expected of a driver, and this includes:

1. Driving with due care, attention and concentration;
2. Being alert and keeping a proper look out for other road users, including pedestrians emerging suddenly into the road;
3. Driving within speed limits and adjusting the speed of the vehicle depending on the road conditions and vehicular and pedestrian traffic;
4. Driving slowly where pedestrians are seen, such as in crowded streets;
5. Honking the horn to alert others, including pedestrians, to the presence or the approach of the vehicle; and
6. Taking evasive action where necessary.

What is the standard of care expected of the Claimant as a trainee driver?

[104] All users of the road owe a duty of care to other road users (see **Esso Standard Oil SA Ltd and Anor v Ivan Tulloch** (1991) 28 JLR 557). A duty is placed on the drivers of motor vehicles on public roads to drive with such reasonable care as not to cause reasonably foreseeable damage to other road users. A trainee or learner driver is no exception to the rule and such driver is held to the same standard of care expected of a competent and experienced drive (see **Nettleship v Weston** (supra), **Lovelace v Fossum et al. (No. 1)** 24 Dominion Law Reports 561 and **Imbree v McNeilly** [2009] 1 LRC 518). The standard of care was objective and did not vary with the particular aptitude or temperament of the individual (**Imbree** (supra)). Some applicable sections of the Act include sections 57(2)[9], 57(3)[10] and

[9] The driver of a vehicle has a duty to take necessary action to avoid a collision. The failure of another driver to avoid the collision will not absolve him of his duty under this section.
[10] The driver of a vehicle has a duty to operate such vehicle with due regard to other vehicles and pedestrians and with due regard for the safety of any person or property.

59 (1)[11] and some relevant paragraphs of the Road Code include Part 2 paragraphs 15, 16 and 34[12]. The Road Code is not entrenched in law here, and breach of the Road Code does not create a presumption of negligence[13]. However, the Road Code is a guide for motorists and pedestrians and a breach of it may be regarded as evidence to support an allegation of negligence[14].

Was the Claimant contributorily negligent?

[105] In ***Jones v Livox Quarries Ltd*** [1992] 2 Q.B. 608, at 615, Denning LJ said:

> "*A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless*".

[106] The 2nd Defendant alleges contributory negligence on the Claimant's part. The burden of proving contributory negligence rests with the defendant at trial and this must be proved on a balance of probabilities. In essence, a defendant should show that the ordinary prudent worker would have taken more care than the claimant did. In the House of Lords decision in **Flower v Ebbw Vale Steel, Iron and Coal Co. Ltd** [1936] A.C. 206, Lord Wright observed at page 220, that contributory negligence was not made out as the respondents (defendants at the trial) presented no evidence of the instructions which the appellant disobeyed, which resulted in the plaintiff/appellant's injuries.

[107] In the instant case, the 2nd defendant asserts that the claimant disregarded the instructions of the driving instructor Mr. Heslop, first, to "take out the lock" and then to "ease up off the gas". Her explanation for her non-responsiveness to Mr Heslop's instructions, seem to be that after she hit the pedestrian she became nervous and *"did not realize what was happening … because of the uproar".* I find that on the

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[11] A driver of a motor vehicle commits an offence where he drives on the road without due care and attention or reasonable consideration for other road users whether or not there was a collision with a pedestrian, vehicle or property as result of his driving.

[12] Para. 15: approach all intersections with caution and have vehicle in control at all times. Para. 16: be prepared to stop, rest foot slightly on brake pedal and proceed cautiously. Para 34: when turning at an intersection always give way to pedestrians who are crossing.

[13] See ***Powell v Phillips*** [1972] 3 All ER 864.

[14] Per Batts J in ***Damean Wilson v Christopher Dunn*** [2014] JMSC CIV. 257 at paragraph 28.

day of the accident, the Claimant was driving satisfactorily for about five minutes. This is accepted by both the Claimant and Mr Heslop. I also accept Mr Heslop's evidence that this was not the first time she had driven on the road with him supervising her. I accept Mr Heslop's evidence that an assessment was done of the Claimant before she drove on the road under his supervision, and he was satisfied with her performance. It has been clearly established that the cause of the accident was the Claimant's oversteering the steering wheel to the left, then losing her composure and concentration and then failing to apply the brake pedal for her own safety and that of others. While I accept both the Claimant's account and Mr Heslop's account that she applied the gas pedal instead of the brake pedal, I still find the accident occurred at a time when the bus was moving at a relatively slow speed, so the claimant could have tried to correct her steering (which is a basic manoeuvre) or applied the brake but failed to do so. After having grasped an understanding of the controls of the vehicle, after having been in training for approximately five months, she was suitably equipped to have understood Mr Heslop's instructions and to apply the brake pedal. I find that if the Claimant had remained composed, she could have taken evasive action (such as swerving and braking) to avoid an accident. I therefore find that the 2nd defendant has adduced sufficient evidence to establish negligence on the part of the claimant.

[108] In considering the principles in the case of **Byers** (supra), while I find that the Claimant was still an inexperienced driver at the time of the collision, I do not find that she was incompetent to drive a motor vehicle. I find that she had adequate supervision and guidance to protect her from injury. However, I find that her failure to heed instructions and apply the brake makes the Claimant wholly negligent.

DECISION

[109] Having regard to the foregoing, judgment will be entered for the 2nd Defendant.

DISCRETION AS TO COSTS

[110] The general rule is that costs should cost follow the event. However, there may be circumstances which would warrant a departure from the general rule which might permit the court to exercise its discretion and not order costs to the successful party. The court should only depart from the general rule on a sound judicial basis. I can find evidence of improper conduct on the part of the 2nd Defendant and therefore find no basis for the exercise of my discretion in the Claimant's favour.

[111] In my opinion, this was not a clear-cut case. The Claimant had the benefit of legal advice and presumably she was advised to pursue her claim. Unfortunately, the Claimant lost on all issues argued before the court. However, I find that she did nothing wrong in bringing the claim. There is no factual or legal basis for finding that the 2008 policy of the 2nd Defendant to train novice drivers to become bus drivers was negligent. However, as I have indicated at paragraphs 87 and 88 of this judgment, the policy in 2008 appears imprudent. There may have been no legal duty to train only experienced people who already had a driver's licence, but in my opinion there was a moral or ethical duty owed to the public at large to ensure that only highly skilled and experienced drivers operated the JUTC buses. Furthermore, the 2nd Defendant is in effect a government owned public service which does not seem to be in the business of making profit. The 2nd Defendant should bear these factors in mind when they decide whether to pursue the Claimant (who is still their employee) for the costs in this matter.

ORDERS

[112] My orders are as follows:

1. Judgment for the 2nd Defendant.
2. Costs the 2nd Defendant to be agreed or taxed.