



**[2025] JMSC Civ 64**

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

**IN CIVIL DIVISION**

**CLAIM NO. 2013HCV01149**

<b>BETWEEN</b>	<b>ZELPHA JONAS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>TREVOR BERNARD</b>	<b>FIRST DEFENDANT</b>
<b>AND</b>	<b>MARJORIE NUGENT</b>	<b>SECOND DEFENDANT</b>
<b>AND</b>	<b>DONOVAN SLOLEY</b>	<b>THIRD DEFENDANT</b>

**IN OPEN COURT**

**Mr Sean Kinghorn instructed by Messrs. Kinghorn & Kinghorn for the Claimant**

**Ms Raquel Dunbar instructed by Dunbar & Co. for the Defendants**

**Heard October 16, 2024, & May 22, 2025**

**NEGLIGENCE – MOTOR VEHICLE COLLISION CAUSING DEATH OF DRIVER –  
LIABILITY– CREDIBILITY - DAMAGES**

**WINT- BLAIR, J**

**[1]** On or about July 31, 2012, the claimant was travelling as a passenger in a Toyota motor car registered PD 2492, operated as a taxi (“Mr Spear’s vehicle”). That vehicle was being driven by Mr Earl Spear (now deceased). The first defendant is the servant and/or agent of the second and third defendants. He was driving motor vehicle registration number PD 0961, also being operated as a taxi.

**[2]** It is agreed that there was a collision on July 31, 2012, between both vehicles while they were travelling in the same direction, along Old Hope Road towards Papine.

It is agreed that this collision was in the vicinity of Hope United Church and Shady Grove Basic School in the parish of St. Andrew. The first defendant was driving in the left lane; Mr Spear was driving in the right lane.

- [3]** After the collision, it is agreed that the vehicle driven by Mr Spear crossed the median, went over into the opposite lanes of oncoming traffic where it collided with a bus then ended up on the sidewalk. Mr Spear died at the scene.
- [4]** The claimant claims in negligence against the defendants in that, the first defendant, the servant and/or agent of the second and third defendants, so negligently drove and/or operated and/or managed motor vehicle registered PD 0961. The first defendant caused and/or permitted the said motor vehicle to violently collide with motor vehicle registration number PD 2492 and consequently the driver of motor vehicle registration number PD 2492 lost control and collided into motor vehicle registration number CB 1903. As a consequence of the said collision, the claimant sustained serious personal injury and has suffered loss and damage.
- [5]** The claimant relies on the agreed medical report of Dr. Ijah Thompson dated the 30th day of September 2012<sup>1</sup>. She was diagnosed with the following injuries:
- (i) Strain to her upper back
  - (ii) Post-traumatic stress
  - (iii) Soft tissue injury to her right and left forearm with healing bruises
  - (iv) Soft tissue injury to her right and left leg with healing bruises
  - (v) Soft tissue injury to her thigh
  - (vi) Fractured left ulna

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<sup>1</sup> Exhibit 1

### **Particulars of negligence**

**[6]** The claimant particularised the negligence of the first defendant as follows:

- (i) Driving at too fast a rate of speed in all the circumstances.
- (ii) Driving recklessly and carelessly.
- (iii) Failing to apply his brakes within sufficient time or at all.
- (iv) Failing to stop, slow down, swerve, or otherwise conduct the operation of the said motor vehicle so as to avoid the said collision.

### **The Defence**

**[7]** In the defence, the defendants admit the collision between the parties' vehicles and maintain that the accident was caused solely and/or substantially contributed to by the negligence of Earl Spear (deceased), who drove too close to the vehicle driven by the first defendant, hitting off the side mirror. Mr Spear then lost control, swerved to the right, crossing into the opposite lanes, where his vehicle collided with a bus.

### **The Evidence**

**[8]** The claimant gave evidence that on the 31st day of July 2012, she was involved in the stated motor vehicle accident. Sometime after 6:00 pm, she boarded Mr Spear's vehicle at Halfway Tree outbound to Papine. She was one of four (4) passengers and was seated at the front.

**[9]** The thoroughfare was very busy with motorists and pedestrians. Mr Spear was driving towards Papine in the right lane, and they encountered bumper-to-bumper traffic from Halfway Tree to sections of Old Hope Road. The road surface was in relatively good condition.

**[10]** In the vicinity of the United Church and Shady Grove along Old Hope Road, the first defendant's vehicle collided into the right side of Mr Spear's vehicle. The

impact of that collision caused Mr. Spear to lose control of his vehicle, which swerved to the right into oncoming traffic and collided with another vehicle on the opposite side of the road. When the vehicle came to a halt, it was facing the direction it was coming from.

- [11]** During the collision, the claimant's body was badly shaken up. She sustained injuries to her both arms, both elbows, both knees, thigh and back. At one point during the collision, she held her head in a "crouch" position, as she thought she was going to die.
- [12]** Minutes after the collision, onlookers flocked to the scene. The claimant said her foot was fastened. She and another female passenger were taken to the University Hospital of the West Indies ("UHWI") where she underwent several X-rays and tests and received an injection to help with the pain. She was kept overnight for observation.
- [13]** The following morning, she was given a prescription and sent home. About two days after the accident, she realized that the painkillers were not helping and that her left hand was very painful, it was particularly sensitive to touch, and was gradually swelling each day.
- [14]** On or about August 15, 2012, approximately fifteen (15) days after the accident, she sought further medical treatment. She was experiencing pain in her upper back, thigh, both knees, both legs and both arms. The pain was now affecting her rest and she was having sleepless nights.
- [15]** She was seen and treated by Dr. Ijah Thompson at Essential Medical Services. She was given analgesics and muscle relaxants to help alleviate the pain. Subsequent to her first visit, she had three follow-up visits. While the pain in her legs and knees was not as bad as before, the pain in her left hand seemed permanent.

- [16]** On August 29, 2012, Dr. Thompson examined her forearm. The claimant did an X-ray of her left forearm, which revealed a comminuted fracture of the left proximal ulna, which was healing. She was referred to an orthopaedic specialist. She could not afford to consult one immediately and later saw orthopaedic surgeon, Dr. Mark Minott, who requested an X- ray of her left forearm. She was advised that as her arm was healing a re-fracturing of the arm was not recommended. He advised that she ingest a mixture to fill out the space between the bones. The claimant consumed this mixture for about a month.
- [17]** Since the accident, she has been unable to travel in a motor vehicle without first mentally preparing herself as she has been reliving the evening of July 31, 2012. While the injuries she sustained do not affect her daily, she still experiences pain from time to time, especially in her left forearm. She relies on the receipts in evidence for the expenses incurred as a result of this accident.
- [18]** In cross-examination, the claimant gave evidence that the first defendant's vehicle was coming up in the left lane, it swerved into the vehicle she was travelling in and collided with its left side. It was the first defendant's vehicle that came over onto her vehicle. When confronted with her witness statement, she testified that the first defendant's vehicle swerved into Mr Spear's vehicle hitting it on the left side, correcting her witness statement which said the impact was to the right side of Mr Spear's vehicle.
- [19]** It was put to the claimant that nowhere in her witness statement did she say that the first defendant swerved into her vehicle, the witness responded that she did not say "swerved"; rather she had said that the first defendant "collided with" the vehicle driven by Mr Spear. Her evidence was that the vehicles were in bumper-to-bumper traffic moving at minimal speed with the vehicle ahead of hers about a car length away (estimated at eight feet.)
- [20]** She disagreed that Mr Spear drove too close to the first defendant's vehicle, hit off the first defendant's side mirror and then sped up the road. She disagreed that she

was not involved in the accident, as there were two ladies and a gentleman in her motor vehicle. She could not say whether the damage to the first defendant's vehicle was minor, nor had she ever spoken with him, as she had only gotten a glimpse of his vehicle. She did not see the licence plate number, which she later received from the police.

**[21]** The claimant did not accept the suggestion that she was confused about how the entire accident occurred. Her evidence was that she did not see whether it was the mirror or the front of her vehicle that got hit.

**[22]** The claimant added that when she felt the impact, the driver of her vehicle made a swing, and that is when he lost control. After the collision, her vehicle lost control, went over the median in the middle of the road, across both lanes on the opposite side, and ended up on the sidewalk. She disagreed that the first defendant was lawfully in the left lane when the impact occurred and that it was because of his speeding that Mr Spear lost control and ended up on the opposite sidewalk. The claimant said that Mr Spear died on the scene. His side of the vehicle came over onto hers, the engine came in through the dashboard.

**[23]** The first defendant gave evidence that on Tuesday, July 31, 2012, at about 6:45 p.m., he was driving a taxi in the left lane along Old Hope Road from Half Way Tree towards Papine. In the vicinity of Hope United Church and Shady Grove, there are concrete medians with spaces between. The road is straight and flat.

**[24]** On reaching the vicinity of Hope United Church, he felt an impact to the right side of his car. He saw Mr Spear's vehicle travelling in the right of the two lanes towards Papine. The vehicle that hit the right side of his taxi was owned and driven by Earl Spear known to him as Preacher, for over 10 years.

**[25]** The first defendant said Mr Spear was speeding and passed too close to his vehicle, hitting the wing mirror. Mr Spear drove past and on ahead of the first defendant. The first defendant decided to wait until they both arrived at Papine to discuss the mirror and reduced his speed after the impact.

- [26] Suddenly, Mr Spear's vehicle got out of control, it swerved right hitting the island in the centre of the road and went over into the opposite lanes where it collided with a bus travelling in the opposite direction. Upon seeing this, the first defendant pulled over, parked and ran towards Preacher's car, there he learnt that Preacher was dead.
- [27] He stated that he was in shock and sat down on the sidewalk, watching the crowd and the police. He told a police officer that Mr Spear had hit his car before colliding with the bus. He saw people taking passengers, who appeared to be injured, for medical attention. However, he does not know who the claimant is as he did not see her.
- [28] In amplification, the first defendant disagreed with the claimant that there was bumper-to-bumper traffic. He further disagreed that Mr Spear's vehicle was travelling at minimal speed, and that he swerved into the vehicle driven by Mr Spear, causing the latter to lose control.
- [29] In cross-examination, the first defendant testified that Shady Grove is before the United Church. Mr Spear hit his car at Shady Grove, continued driving and lost control at the United Church. He at first disagreed, then agreed that the collision occurred in the vicinity of Hope United Church and Shady Grove, as it was in that vicinity that he felt an impact to the right side of his vehicle. He stated that the accident between Mr Spear and bus in the opposite lane occurred at Hope United Church. He said that after the collision with his vehicle, it took Mr Spear some seconds, travelling sixty-five metres, before he went across to the other side of the road.
- [30] When asked whether he saw Mr Spear encroach into his lane, the first defendant said that he did not see him, but Mr Spear hit the mirror while he (the first defendant) was holding to his lane. He stated that prior to the collision, he did not see Mr Spear's vehicle. When asked whether he had previously said that *both vehicles were travelling along when Preacher was speeding past me and pass me*

*too close and hit off the wing mirror of the car I was driving,"* the first defendant stated that he could not recall. When confronted with his affidavit,<sup>2</sup> the first defendant maintained that he had not seen Mr Spear before the collision.

**[31]** He stated that he did not see any damage to Mr Spear's vehicle after the collision with his vehicle nor did he see anything that caused Mr Spear to lose control. He disagreed that the collision was caused by his motor vehicle encroaching upon Mr Spear's lane and colliding with Mr Spear's vehicle which led to the loss of control. He agreed that he told the police on the scene that Mr Spear hit his vehicle before colliding into the vehicle on the opposite side.

**[32]** In re-examination, the first defendant clarified that sixty-five metres was the distance between the entrances of Shady Grove and Hope United Church. No other vehicle collided with Mr Spear's before it went over onto the opposite side of the road. At the time of the collision, he was travelling at about 35 km. The first defendant's mirror was hanging after the collision and he could not do anything. He reduced his speed and continued driving towards Papine as he could not call out to Mr Spear.

**[33] Issues**

1. Whether a duty of care was owed by the defendants to the claimant.
2. Whether there was a breach of this duty of care.
3. Whether this breach resulted in damage to the claimant that was foreseeable and caused by the breach.
4. Whether the damage suffered was not too remote as a result.

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<sup>2</sup> Dated November 21, 2016



## **Submissions**

- [34] Counsel for the claimant relied on **Claudia Henlon v Sharon Martin Pink et al**,<sup>3</sup> **Pamella Thompson** and Section 51 (2) of The Road Traffic Act for the law of negligence. It was submitted that, upon the agreed facts and the evidence presented, the ingredients of negligence are established, therefore the defendants are liable.
- [35] The pleadings and the pre-trial memorandum filed by the defendants make the following admissions, first that there was a collision at the vicinity of the Hope United Church and the Shady Grove Basic school between the vehicles driven towards Papine by the first defendant and Mr Spear. The first defendant's evidence is inconsistent with the very case that he has pleaded. The pleadings and pre-trial memorandum are in fact in keeping with the claimant's pleaded case and evidence which is that the accident occurred in that area.
- [36] Further it is submitted that the collision was a result of the first defendant swerving to the right which caused his vehicle to collide into the left side panel of Mr Spear's vehicle which lost control ending up on the opposite side of the roadway. It is of note that the claimant's witness statement was filed as early as March 11, 2016, long before the defendant filed a defence or filed the said pre-trial memorandum.
- [37] The first defendant attempted to shift this position in cross-examination in that he sought to place the collision between the United Church and Shady Grove as well as to place the collision "some distance" away along Old Hope Road in the direction of Papine. However, when confronted with paragraph 2 of his witness statement he admitted that the collision between the two vehicles did in fact occur in the vicinity of the United Church and Shady Grove.

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<sup>3</sup> [2017] JMSC Civ. 144

- [38]** The first defendant said that "some seconds" after that collision Mr Spear's vehicle lost control and collided with an oncoming vehicle. He was also candid when asked if he saw anything that would have caused Mr Spear to lose control of the vehicle. He responded that he saw nothing to cause that and further that the only collision with Mr Spear's vehicle was with his vehicle.
- [39]** The claimant's evidence which was clear and cogent establishes that just before Mr Spear lost control of his vehicle, the first defendant's vehicle collided with the left side of Mr Spear 's vehicle. On a balance of probabilities, it was that collision in the vicinity of United Church and Shady Grove, that caused Mr Spear to lose control of his vehicle.
- [40]** It is submitted that the question of whether the first defendant was liable, is a question of fact to be decided based on the credibility of the parties. The claimant's version on a balance of probabilities is clearly more credible than that of the first defendant. The claimant had no interest to serve as she could easily have claimed against Mr Spear's estate and the owners of the motor vehicle if it was that Mr Spear was liable. She could also have brought proceedings against both the drivers and owners of each vehicle.
- [41]** The account given by the first defendant is just simply incredulous. He first tried to place the collision "some distance" away from the vicinity of the United Church and Shady Grove and then had to recant. His account of his side mirror being hit off and doing nothing about it is both incredible and ridiculous. It seems to be a made-up story to account for the collision he caused and the obvious damage that resulted, it is an attempt to distract from the truth.
- [42]** On his own admission and account, this sudden loss of control by Mr Spear as he made his way toward Papine is unexplained. The first defendant says that he could see nothing that would have caused Mr Spear to just simply lose control, swerve to the right and collide with this oncoming vehicle. This is neither a believable nor reasonable account. The claimant's account however is sensible and truthful. The

claimant is clear that the first defendant hit the left side of the vehicle she was in. That would account for the vehicle losing control and going to the right of the road.

- [43] The first defendant was asked if he saw Mr Spear before the collision to which he responded in the negative, despite previous statements made in an affidavit, he nevertheless maintained that he had not seen Mr Spear prior to the accident.
- [44] The admitted facts in this matter, the credibility of the claimant and the incredulity of the first defendant's evidence show clearly that it is the first defendant who is liable for this unfortunate accident. When the claimant prepared and signed her witness statement in March 2016, she spoke of the collision between both motor vehicles when the first defendant had not yet filed his defence. The claimant has been credible from the very outset of this matter and has not changed.
- [45] Counsel for the defendant relied on the cases of **Lochgelly Iron & Coal Co. Ltd. v. McMullan**<sup>4</sup> and **Anns v. London Borough of Merton**<sup>5</sup> to submit that in considering whether there has been a breach of the duty of care, the court considers whether or not a reasonable man placed in the position of the first defendant would have acted as he did. The court looks at the risk factors namely the likelihood of harm, the seriousness of injury that is risked, the importance or utility of the defendant's conduct and the cost and practicability of measures to avoid the harm.
- [46] Once it has been established that the first defendant breached his duty of care, the court must then determine whether the claimant suffered damage and if so whether the breach was the direct cause of that damage, i.e. the remoteness of the damage. The claimant must prove that she suffered damage and that it was

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<sup>4</sup> [1934] A.C. 1

<sup>5</sup> [1977] 2 All ER 492 at 498

caused by the first defendant's breach. It is only when the answer to this is "yes" that the first defendant will be liable to the claimant.

- [47] The matter before the court is in negligence, and as such it is the claimant who must prove that the accident happened in the manner she claims, on a balance of probabilities. In other words, could the accident have occurred in the same way she says it did when all the evidence is considered?
- [48] It is the evidence of the first defendant that the accident occurred as a result of the negligence of Mr. Earl Spear, also known as "Preacher". The evidence from the first defendant is that he was in the left lane when Mr Spear's motor vehicle collided with the right side of his vehicle and hit off his mirror. There was no bumper-to-bumper traffic as the claimant testified, traffic was free-flowing traffic, and Mr Spear was speeding.
- [49] The account of events given by Mr. Bernard is the most logical account as between the parties. Ms. Jonas, in her particulars of claim, asserted that Mr. Bernard swerved right and caused his motor vehicle to collide into the left-side panel of her motor vehicle. In her witness statement filed on March 14, 2016, she contradicted her pleadings by stating that the first defendant collided into the right side of Mr Spear's vehicle. During the trial, Ms. Jonas gave evidence that the assertions in her witness statement were true and correct to the best of her knowledge. Yet shortly thereafter, she gave evidence to say that paragraph 5 of her witness statement contained an error, regarding the section of the vehicle that was impacted in the collision.
- [50] Ms. Jonas admitted to being a confused witness when she explicitly gave evidence to say, *"I was confused in the whole situation of the lanes"*. However, when asked whether eight (8) years after giving the witness statement and twelve (12) years after the motor vehicle accident she was not confused anymore, Ms. Jonas admitted that she was still confused, but she was "trying". Ms. Jonas is confused.

She has demonstrated that she is an unreliable witness whose recollection of the events are unstable at best, unreliable and untruthful.

- [51]** Ms. Jonas testified that the cars were in bumper-to-bumper traffic and that the vehicle she was travelling in was not speeding. If the car she was in was not speeding, how then would that vehicle have had the momentum to go over the concrete median, into the other lanes, collide with another vehicle on the other side of the road and come to a rest on the opposite lane's sidewalk? All while both vehicles were proceeding along in slow-moving traffic. Furthermore, how could the vehicle she was in have been so badly damaged that the engine came in through the dashboard? All while Mr. Bernard's vehicle was able to slow down after the initial collision between his vehicle and Mr Spear's vehicle which is uncontested evidence. The only realistic explanation for how Mr Spear's vehicle could have gone over into the other lane would be that he was speeding and was not in bumper-to-bumper traffic, as alleged by the claimant.
- [52]** It should also be noted that at no point did Ms Jonas give any evidence that she saw Mr Bernard's vehicle speeding. Furthermore, nowhere in her evidence does the claimant positively assert that Mr Bernard's vehicle veered out of its lawful lane and swerved into the vehicle in which she was a passenger.
- [53]** It was submitted that Mr Spear's vehicle travelled 65 meters further up the road after the initial collision before he lost control of his vehicle. It went into the opposite lane and collided with another vehicle. There was no damage to the vehicle being driven by Mr Bernard save and except that the right wing mirror was hit off and hanging. There is no evidence about the condition of Mr Spear's vehicle after the collision to establish any ascertainable damage to substantiate an impact to the left side of Mr Spear's vehicle, significant enough to cause him to lose control of his vehicle. Yet it is agreed that Mr Spear's vehicle sustained extensive damage after it got out of control, veered into the opposite lanes and ended up on the sidewalk as there was evidence speaking to the damage caused by the second

collision of Mr Spear's vehicle, when that vehicle's engine came in through the dashboard.

- [54]** It is a reasonable inference that that type of severe damage to the front of the motor vehicle is attributable to that vehicle's speeding. The property damage to both vehicles substantiates Mr. Bernard's version of the events and at the same time, casts doubt on Ms. Jonas'.
- [55]** By contrast, Mr Bernard's evidence remained consistent even under heavy cross-examination. He calmly maintained every assertion in his witness statement. He has shown that he is an honest witness and a more credible witness than the claimant. When asked multiple times under cross-examination if he saw Mr Spear's motor car before the collision, he maintained his stance without contradictions.
- [56]** Mr Bernard has maintained his position since immediately after the accident when he was forthcoming and told the police at the scene of the accident that Mr Spear had collided with the right side of his motor vehicle before going on to cross the median and going over into the opposite lane. The impact between his and Mr Spear's car occurred several metres before Mr Spear lost control of his car and can in no way be attributable to that impact.
- [57]** The accident could not have occurred in the way the claimant says it did when all the evidence is considered. Any injuries sustained by Ms Jonas were caused by the actions of Mr Spear and it would be unjust to attribute any responsibility to Mr Bernard. The evidence overwhelmingly supports the conclusion that the first defendant was not at fault for the accident. The sole cause of the collision was the negligence of Mr Earl Spear (deceased), who was speeding and collided with the right side of Mr Bernard's vehicle and then continued speeding past before suddenly losing control, entering the opposite lanes and there colliding with a bus.

## Discussion

[58] The learned author of Commonwealth Caribbean Tort Law<sup>6</sup> states that:

*“The tort of negligence may, therefore, be defined broadly as the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. There are three elements to the tort:*

- (a) a duty of care owed by the defendant to the plaintiff;*
- (b) a breach of that duty by the defendant; and*
- (c) damage to the plaintiff resulting from the breach.”*

[59] The question whether a duty of care in negligence has arisen and, if so, whether that duty has been breached, is a question of mixed law and fact, in respect of which the burden of proof is on the claimant on a balance of probabilities. The issue becomes whether the accident which occurred was reasonably foreseeable and whether in the view of the court, it is fair and reasonable to impose a duty of care.

[60] The court also bears in mind the statutory position as provided in section 51(2) of the now repealed Road Traffic Act which states:

*“Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid a collision, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.”*

[61] The question of whether the first defendant was liable is a question of fact which has to be decided on the credibility and reliability of the evidence presented by the parties. In assessing the credibility of a witness, demeanour is but one of the many factors to be considered. There is also the substance of the evidence which is

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<sup>6</sup> Gilbert Kodilinye

generally to be approached with reason, logic and common sense. In resolving the issues of fact, Lindo, J in the case of **Moore v D'Aguilar & anor**<sup>7</sup> said:

*“[29] In this case where there are diametrically opposed accounts of the accident, the court has a duty to analyse the available evidence and decide which of the accounts is more likely.*

*[30] Having considered the facts of this case and the submissions of both Counsel, I recognize that the issue of liability rests on the credibility of the parties and the plausibility of the accounts given by them...”*

### **Facts Found**

- [62]** The court finds the following facts against the backdrop of the duty of care owed by the driver of a vehicle on the road to other road users to drive carefully, from the evidence presented in this case:
- [63]** It is undisputed that there are two lanes heading towards Papine from Half Way Tree and that both the first defendant and Mr Spear were travelling towards Papine from Half Way Tree in the same direction.
- [64]** It is agreed that there was a collision between motor vehicles bearing registration numbers PD 0691 driven by the first defendant, and PD 2492 driven by Mr Spear on the 3<sup>rd</sup> of July 2012. The right mirror of the first defendant's vehicle and the left side of Mr Spear's vehicle came into contact.
- [65]** The claimant was a passenger in Mr Spear's vehicle. The first defendant admits to not knowing whether the claimant was in Mr Spear's vehicle as he did not see her. He therefore cannot seriously challenge her presence as a passenger on the material date. In addition, the evidence is that she was taken to the UHWI along

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<sup>7</sup> [2017] JMSC Civ 118



with others and the agreed receipts in evidence from the UHWI casualty bear the date of her initial examination there as the date of the accident.

- [66]** The claimant in her witness statement said, the first defendant collided with the right side of Mr Spear's vehicle. She corrected this in cross-examination to the left side. She admitted to being confused as to the lanes. When confronted by the discrepancy between her witness statement and her evidence in court about which lane Mr Spear was travelling in, the claimant clarified that she had made a mistake in her witness statement as Mr Spear was travelling in the right lane. This is what was pleaded in the particulars of claim. It is also the case of the first defendant that Mr Spear was travelling in the right lane. The lanes of travel were agreed between the parties in their submissions, the first defendant was in the left lane and Mr Spear was in the right lane.
- [67]** As was pointed out by Ms Dunbar, though it was pleaded that the first defendant swerved into the vehicle driven by Mr Spear, there is actually no such evidence from the claimant. The claimant specifically denied that she had used the word "swerved" in her witness statement. When she was taxed in cross-examination about the absence of that word "swerved" from her witness statement, she maintained that she had said the first defendant "collided with" the vehicle driven by Mr Spear. There is therefore no evidence that the first defendant swerved into the path of or into the vehicle driven by Mr Spear.
- [68]** The unchallenged evidence is that there was a space of one car length between Mr Spear and the car ahead of him. The claimant gave evidence of a busy thoroughfare with bumper-to-bumper traffic with Mr Spear driving at minimal speed. The first defendant does not speak to the press of traffic, he said that he was travelling at 35 km/h. It can be inferred that there was a press of traffic from the evidence of both witnesses, and it is accepted that both drivers were moving slowly. This does not mean that this was what was obtained on the entire journey. The claimant did not pinpoint at what point there was traffic which was bumper-to-

bumper and where the traffic was moving ahead as for example when a traffic light changes from red to green and there is the flow of traffic.

[69] Each witness gave evidence that their vehicle was in its proper lane. The claimant said the first defendant's vehicle collided into Mr Spear's left side, and the first defendant said that Mr Spear hit off his side mirror by passing too close. It was suggested to the claimant that Mr Spear swerved into the first defendant's vehicle, the claimant disagreed with the suggestion.

[70] The claimant gave the cause of the second collision in cross-examination in this way: "*when he got that impact he made a **swing** and when he did he lose control.*" There are two factors raised by that response, the first is the impact caused by the collision between Mr Spear's vehicle and that of the first defendant. This impact if the claimant's evidence of traffic and speed is to be accepted, happened while both drivers were going at minimal speed in bumper to bumper traffic. The "swing" she describes is the second factor. This "swing" is given by the claimant as the reason Mr Spear lost control. This "swing" was an action on the part of Mr Spear. Myriad factors could account for this "swing", all of which would engage the court in speculation, as there is no evidence as to why he took that action. In other words, there was the impact, there was the swing. Did one have to do with the other? What is the evidence that the two things are connected if they are?

[71] I find that the claimant's evidence that "*when he got that impact he made a **swing** and when he did he lose control*" is a conclusion that the claimant has drawn which she purports to give as fact. The claimant's use of the word "when" suggests that she employed two premises: the first was that there was an impact; the second was that because of that impact, Mr Spear swung the vehicle. From these premises, the claimant concluded that the impact was the reason for the loss of control.

[72] There was no evidence as to why Mr Spear "made a swing" from her observation or hearing, though she was a witness to the events happening inside the motorcar.

She was sitting in the front seat. She did not say Mr Spear was frightened by the impact as he exclaimed or Mr Spear reacted to the impact by jumping back then swung his vehicle in a bid to avoid a greater collision. The swing is also separate from the loss of control, which is a third factor.

**[73]** Further, the evidence of the claimant is inconsistent with Mr Spear's vehicle crossing the median and ending up on the opposite sidewalk, which it can be inferred is the loss of control, if the vehicle was in fact travelling in bumper-to-bumper traffic and at minimal speed, rather than speeding.

**[74]** The evidence of the first defendant is accepted over that of the claimant as being more credible and reliable. I find that it was Mr Spear who was speeding. He encroached into the first defendant's driving lane, hitting off the side mirror. It is therefore plausible and more probable that Mr Spear attempted to correct his position by means of the swing described by the claimant. This means that Mr Spear, while moving at speed, drove from the left side to the right side of the road over the course of some 65 metres in order to correct his course.

**[75]** However, Mr Spear while speeding, lost control after the impact rather than correcting his course. The inference can be drawn from all the evidence that Mr Spear was speeding, moved left, colliding with the first defendant, and while still speeding attempted to correct the vehicle's position, over-correcting by means of a swing to the right. He failed to maintain a straight course and rather than slowing the vehicle, mounted the median and crossed into oncoming traffic. There was no evidence that Mr Spear fell ill or lost consciousness. There was no evidence of mechanical failure.

**[76]** The first defendant said that after the collision between his vehicle and that of Mr Spear, he saw nothing that would have caused Mr Spear to lose control, leading to the collision with the bus in the opposite lane. There were no external forces in other words. Neither did the claimant. In fact, the claimant said she had her head held in a "crouch position" so she did not see what Mr Spear did or did not do to

“lose control” of the vehicle. This is why the claimant concluded that the impact led to the loss of control.

[77] I find that the sole cause of the collision which led to the claimant’s injuries was the negligence of Mr Earl Spear (deceased), who was speeding and collided with the right side of Mr Bernard's vehicle and then continued speeding, while swinging to the right causing a loss of control with the vehicle, entering the opposite lanes and there colliding with a bus.

[78] On the first question of whether there is a sufficient relationship of proximity as between the defendants and the claimant as to whether a prima facie duty of care arises this can be answered affirmatively. On the second question of whether there are any considerations which ought to negative, reduce or limit the scope of the duty or class of person to whom it is owed, or the damages to which a breach of the duty may give rise, the court finds there are none.

[79] The claimant must show by evidence, on a balance of probabilities, that but for the defendant’s negligent act, the injury to her would not have occurred. There also has to be evidence from which it can be established or inferred that there is a causal connection between the injury, and loss alleged and the defendant’s breach of duty. This breach of duty cannot be too remote as a defendant will only be found liable for the consequences of his negligent conduct which are foreseeable.

[80] In the case of **Roe v Ministry of Health and Others. Woolley v Same**<sup>8</sup> Lord Denning stated that:

*“The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to a person when you could not reasonably foresee that he might be injured by your conduct: see Hay (or Bourhill) v Young and Woods v Duncan ([1946]) AC 426, per Lord Russell of Killowen, and ibid, 437 per Lord*

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<sup>8</sup> [1954] 2 All ER 138 B-C

*Perter). The second question is whether the neglect of duty was a “cause” of the injury in the proper sense of that term: and causation, as well as duty, often depends on what you should foresee.”*

[81] The evidence does not establish that the first collision between the first defendant and Mr Spear led to the injuries suffered by the claimant. It was not reasonably foreseeable that the claimant would have been involved in a second collision with a bus in the opposite driving lanes. There is no evidence of the first collision being such that it would have necessitated or resulted in what has been described as a loss of control by Mr Spear. The claimant has not established that there was a breach of the duty of care on the part of the defendants. Even if I am wrong in that conclusion, she has failed to establish a causal connection between her injuries and the loss claimed as it is too remote.

[82] In the particulars of negligence, the claimant pleaded the doctrine of *res ipsa loquitur*, which applies where (a) the occurrence was such that it would not have happened without negligence, and (b) the thing that inflicted the damage was under the sole management and control of the defendant and (iii) there must be no evidence as to why or how the accident took place. In *Clerk & Lindsell*<sup>9</sup>, citing **Henderson v Jenkins & Sons** it is stated that:

*“Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine”.*

[83] The doctrine of *res ipsa loquitur* operates to raise an inference of negligence, whereupon it is then for the defendant to provide a reasonable explanation of how the accident occurred.<sup>10</sup> In the case at bar, there is evidence regarding the acts and omissions of the defendants. The court has evaluated all of the evidence to see if it is reasonable to draw an inference of negligence from the mere fact of the

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<sup>9</sup> (op. cit. para. 8-154)

<sup>10</sup> *Clerk & Lindsell on Torts*, 17th edn, paras 7-176 to 7-180

accident. In other words, the evidence from the defendants must provide an answer sufficient to displace the prima facie inference of negligence from the fact of the accident.

**[84]** In this claim, the first collision was not the cause of the injury to the claimant. She alleges that this first collision resulted in the second collision, however, she did not give sufficient evidence to support this conclusion. On a balance of probabilities, the evidence of the first defendant is clearly more credible than that of the claimant. It is the claimant who bears the legal burden of proof in a civil claim. The evidence she relies upon is inconsistent with the reason Mr Spear lost control of the vehicle such that it ended up in the opposite lanes causing her injury and loss. In all the circumstances of the case, it cannot be said that the criteria for the application of *res ipsa loquitur* exists. As a consequence of the foregoing, the court makes the orders below.

#### **Orders**

**[85]** The court makes the following orders:

1. Judgment for the Defendants.
2. Costs to the Defendants to be taxed if not agreed.

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Wint- Blair, J