IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 01819

BETWEEN EASTON MARSH CLAIMANT

AND GUARDSMAN LIMITED DEFENDANT

Mr. Dale Staple instructed by Kinghorn and Kinghorn for the Claimant

Ms. Kristina Exell instructed by Bailey Terelonge Allen for the Defendant.

Negligence- breach of contract of employment- motor vehicle accident- whether caused from mechanical defect- provision of equipment by employer- duty of care- differing expert opinions- res ipsa loquitur.

Heard: July 25, 2011, July 29, 2011 and October 28, 2011.

Edwards, J.

THE CLAIM

[1] This claim for damages in negligence and/or breach of contract arose out of a motor vehicle accident which occurred on December 16, 2005. The claimant at the time of the accident was employed to the defendant on a one year contract, at the level of a Security Officer but with his substantive duties being that of a driver. He now claims before this court that whilst driving the defendant's vehicle in the lawful execution of his duties, the vehicle overturned. He has averred that the direct cause of the accident was a mechanical defect which was a

consequence of the defendant's negligence in the maintenance of the said vehicle. As a result, he claimed to have suffered injury and loss.

[2] He also claimed that he was in the lawful execution of his duties as a Security Contractor under a contract of service with the defendant when as a consequence of the negligent manner in which the defendant executed its operations in the course of his trade, he was exposed to risk of injury and as a result he sustained serious personal injury and suffered loss and damage.

[3] Further, or in the alternative, his claim against the defendant is to recover damages for Breach of Contract for that in or about the year 2005, he and the defendant entered into a contract of service whereby it was agreed that in consideration of certain remuneration he would provide his services as a Security Guard to the defendant. It was an expressed or implied term of the contract that the defendant would take all reasonable care to execute its operations in the course of his trade in such a manner so as not to subject him to reasonably foreseeable risk of injury. In breach of the said contract the defendant exposed him to reasonably foreseeable risks of injury as a consequence of which he sustained serious personal injury and suffered loss and damage.

[4] In his particulars of claim, the claimant particularized the defendant's negligence as;

a. Failing to take reasonable care to provide effective, danger free equipment to the claimant in the execution of his duties.

b. Providing the claimant with a defective vehicle to drive.

c. Failing to take reasonable care to carry out the requisite checks on the said motor vehicle to ensure that same was safe to be driven before giving the said motor vehicle to claimant.

d. Failing to provide the requisite warnings, notices and/or special instructions to the claimant and his other employees in the execution of his operations so as to prevent the claimant being injured.

e. Failing to provide a safe system of work.

f. Failing to provide a competent and sufficient staff of men.

g. 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.

h. Causing the said motor vehicle to lose control and overturn.

i. Failing to implement a safe system which would prevent the claimant sustaining injury as was sustained by the claimant.

j. Failing to warn or take reasonable care to warn, the claimant of the possibility of probability of the said motor vehicle being mechanically defective.

k. Failing to take reasonable care in all the circumstances to carry out its operation in such a manner so as not to expose the claimant to reasonably foreseeable risks.

[5] He also listed general particulars of negligence against the defendant for:

(i) Failing to take reasonable care to provide effective, danger free equipment to the claimant in the execution of his duties.

(ii) Providing the claimant with defective vehicle to drive.

(iii) Failing to take reasonable care to carry out the requisite checks on the said motor vehicle to ensure that same was safe to be driven before giving the said motor vehicle to claimant.

(iv) Causing the said motor vehicle to lose control and overturn.

(v) Failing to warn or take reasonable care to warn, the claimant of the possibility or probability of the said motor vehicle being mechanically defective.

[6] The Claimant averred that he suffered the following injuries which were listed in his particulars of claim:

(i) Dislocation of the right shoulder

(ii) Open fracture of the right elbow (olecranon)

(iii) Degloving injury to the right forearm

(iv) Degloving injury to the right hand

(v) 15 x 8 cm scar over the right olecranon

(vi) Deformity of the fingers of the right hand particularly the middle and ring fingers

(vii) Loss of the extensor tendon of the right index finger

(viii) Flexion of the elbow was grade 3

(ix) Deformity of the index, middle and ring fingers

(x) No extensor tendon to the index finger

(xi) Fixed flexion deformity of 30 degrees

(xii) No movement at the proximal interphalangeal joint of the middle finger and distal interphalangeal joint of the ring finger.

(xiii) Flexion of the fingers at the metacarpophalangeal joints was about 45 degrees.

(xiv) 45 degrees of flexion at the PIP J and 30 degrees of flexion of the distal IPJ.

(xv) Chronic dislocation of the PIP J of the middle finger and the DIPJ of the ring finger

(xvi) Permanent partial disability of 27%

The Defence and Counter Claim

[7] Guardsman Limited, through its attorneys, have denied any negligence or breach of contract as asserted and claimed that the accident was due wholly or partially to the claimant's own negligence. They have counter claimed for the cost of the repairs to the motor vehicle in the sum of $1,100,000.00.

The Issues

[8] The issues as itemized by both sides are:

(1) Whether the defendant is liable in negligence or in breach of contract of employment, for providing the claimant with a defective vehicle, if so;

(2) Whether the defect caused the accident;

(3) If answer to 1 and 2 is in the negative, was the accident and loss of the bus due to the claimant's own negligence.

LIABILITY

The Claimant's Submissions

[9] On December 15, 2010, the claimant commenced a full driving shift with the defendant's vehicle, a Toyota Reguaice, registered 1385 EN. His evidence was that before commencing the shift, he carried out his usual routine checks to ensure the vehicle was in reasonable condition to carry out the task. The shift began at 7 p.m. and involved several routes in and out of the corporate area.

[10] The accident occurred December 16, 2005 sometime after 7a.m. at the end of the claimant's shift. He was returning from his home in Port Royal and whilst negotiating a right hand corner, the bus continued drifting right. Another vehicle was coming in the opposite direction so he aggressively turned the steering wheel to the left, he felt the bus go down on his side, which was the right side, flipped over, slid on the side and ended in a ditch, flipped again and came to a stop on the left side of the road.

[11] The claimant had described it as the vehicle becoming unbalanced and it was submitted on his behalf that in the normal course of events, a vehicle does not become unbalanced unless there is an inherent defect. The fact of the vehicle becoming unbalanced required some explanation from the defendant to show that it was not due to any negligence in their maintenance of the vehicle.

[12] The claimant's description of the action of the vehicle, it was submitted, was supported by the vehicle examiner's evidence that the ball joint was broken. Mr. Forde, the examiner, testified that when a ball joint broke, the vehicle would go down on the side of the break and touch the road service. He also testified that the control arm would fall to the ground and would leave an indentation in the driving surface.

[13] It was submitted that the claimant's account did not suggest negligence on his part but suggested that the vehicle had an inherent defect. It was further submitted that the inherent defect was a damaged or worn ball joint which gave way following a hectic night of driving. It was argued that the only conclusion to be drawn was that it was the defective ball joint which caused the accident and therefore the defendant was to be blamed.

[14] It was also submitted that the defendant was in breach of contract with the claimant to provide him with the proper equipment with which to perform his task

and not to expose him to reasonable and foreseeable risk of harm in the course of his employment.

[15] The claimant's contention was that it was as a consequence of the failure by the defendant to properly and sufficiently maintain the motor vehicle that it developed a mechanical defect, resulting in the accident.

The Law

[16] The common law duty of care owed by an employer to an employee is to take reasonable care for their safety; ***Davie v New Merton Board Mills Limited*** *(1959) 1 ALL ER 346.* It includes the duty to provide a competent staff of men, adequate plant and equipment, a safe system of work with effective supervision and a safe place to work. The duty also involves providing sufficient staff to assist an employee in performing his tasks.

[17] The employer must take the necessary steps to provide adequate plant and equipment for his workers and he will be liable to any workman who suffers injury though the absence of any equipment which is obviously necessary or which a reasonable employer would recognize as being necessary for the safety of the worker.

[18] There may be instances where the employer is liable for a failure to install and implement improvements in equipment and appliances that are a part of the plant that the claimant would have to use in order to minimize the risks of injuries that may occur as a result of using outmoded equipment and practices; ***Toronto***

Power Company Limited v Kate Pas Kwan *(1915) AC 734*; per *Sir Arthur* Channel at p. 738 who said;

> "***It is true that the master does not warrant the plant and if there is a latent defect which could not be detected by reasonable examination or if in the course of working plant becomes defective and the defect is not brought to the masters knowledge and could not be reasonable diligence have been discovered by him the master is not liable.***

[19] Whether the employer is liable or not depends on the circumstance of each case. Counsel for the claimant also cited the case of **General Cleaning Contractors v Christine (1953) AC 180,** for the proposition that it cannot be left to the individual workmen to take precautions against obvious dangers. If the employer does leave it to the individual workman he would be failing in his duty to provide a reasonably safe system of work.

Was the Claimant Acting in the Course of his Duty at the Material Time?

[20] The defendant contends that the claimant had been on a frolic of his own at the time the accident occurred. However, it was submitted on behalf of the claimant that he had been driving in the course of his duty at the time of the accident. It was pointed out that the Managing Director of the defendant company despite giving evidence that the claimant was not authorized to use the vehicle for his personal business nevertheless agreed that she was made aware subsequently, that he had been given permission to use it to transport his daughter. The claimant's evidence is that he had carried home his daughter and some empty boxes and was returning to base at the time of the accident. The

submission was that at the time he was returning to base he was acting in the course of his employment.

[21] It is true that the claimant's last stop on his shift that morning was at Guardsman Armoured. His shift had ended but he did not hand over the bus; instead he collected three empty boxes and went to collect his daughter who had spent the night with friends, whilst he was on duty. He took her home to prepare her for school but discovered she would not be going to school that day. He returned to Guardsman Limited and on the way the accident occurred. There is irrefutable evidence that he had permission from an authorized officer to pick up his daughter and take her to school before returning the vehicle. The fact that he also took home three empty boxes does not negate this permission. There being no evidence to suggest that the claimant was acting on a frolic of his own at the time of the accident, I accept that he was then driving in the course of his employment.

Did the Defendant Fail to Provide Safe Equipment?

[22] The claimant relied on the evidence of Mr. Navardo Ford, the certifying officer employed to the Ministry of Transport and Works. He is trained in automotive technology and has been at the Ministry for 6 years at the time of trial. This means that at the time of the examination he would have had perhaps less than one year at this employment. He examined the subject vehicle at the instance of the police, after the accident.

[23] In examining the vehicle he came to certain conclusions based on his findings. He noticed along with the damage to the vehicle that there was also a left broken ball joint and damaged control arm at the front of the vehicle. He concluded that the damaged ball joint was the cause of the accident. He explained that when the ball joint is broken the driver of the vehicle would have difficulty maneuvering the vehicle. He explained further that if the driver is executing a right turn it would be impossible for the driver to get the vehicle to straighten. He explained that one could determine when a ball joint is worn or getting worn by the presence of excessive free play in the steering wheel.

[24] It was submitted on behalf of the claimant, that the vehicle would have gone through an extensive and vigorous amount of work that shift. Further, that there was no evidence as to the extent of the damage after the accident on 21st October 2005 and the nature and extent of the repairs at that time. The claimant's attorney bemoaned the absence of the vehicle service log book and the absence of evidence from independent mechanic to state that the vehicle was satisfactorily repaired.

[25] It was submitted that in light of the absence of any cogent evidence from the defendant as to whether the vehicle was being maintained, there was an inherent defect in the vehicle which made it dangerous. The court was asked to examine the evidence of Mr. Forde that the ball joint had to be hit for it to become broken. It was also possible to break if it fell into a pothole. It was suggested that the fact that four new tyres were purchased for the vehicle after the accident indicated

that the tyres had become worn. However, counsel for the claimant seem to have over looked the fact that the four new tyres had been purchased after the accident in October 2005 and not after the accident in December, which is the relevant date.

[26] It was submitted that the defendant's proof that the vehicle was recently serviced was actually only proof that it was repaired. It was also suggested by the claimant's attorneys that there is no evidence that at the time of alignment there was no problem with the ball joint. However, it is to be noted that the evidence from both sides was that the vehicle could not be aligned or balanced if the ball joint was defective.

[27] It was also submitted that the claimant was not a careless driver. It was argued that the only utility to the defendant raising the claimant's two previous accidents was to show he was careless. The claimant denied he was careless. The claimant contended however, that even if he was careless the employer's had a duty to do something about it citing, ***Allan Leith v Jamaica Citrus Growers Ltd (unreported Claim No 2009HCV00664,*** a judgment of this very court.

[28] On the authority of that case it was argued that if he was found to be careless the defendant's should have fired him, sent him on a driving course or stopped him from driving so that he would not be exposed to any further risk or harm.

The Independent Investigative Report

[29] It was submitted that the evidence tendered through Mr. Paul Silvera's report could not be treated as expert evidence as there was no evidence as to his qualifications to be so regarded. It was also suggested that any finding of fact the Investigator purported to come to, would be infringing upon the purview of the tribunal of fact and should not be accepted. It was also noted that the report was replete with hearsay. It was therefore worthless and should not be regarded with any seriousness.

[30] I am however, mindful of the expressions of Patterson J.A (AG.) as he then was, in the case of ***Gravesandy v Jamaican Auto and Cycle Co***. *(1993) 30 JLR 173,* where in looking at the value of evidence regarding the cost of repairs to damaged motor vehicles resulting from an accident, he noted that these were usually supplied by an expert. He expressed the view then, that, expert evidence may be given by anyone who had some experience and who had gained skills or knowledge from experience in a particular field.

[31] With this I respectfully agree. I accept that by virtue of the number of years he had been in the business and the years of experience gained thereby, Mr. Paul Silvera may give expert evidence in his area of expertise. Where his opinion falls outside of his expertise or is based on hearsay, that opinion is disregarded.

The Defendant's Case

[32] It was submitted that the defendant having put forward a defence and counterclaim they were now put to proof of the allegations made. It was further submitted that the defendant had failed to prove that they had discharged their duty by having the vehicle regularly maintained. It was pointed out that the vehicle maintenance log book was never produced. The court was also asked to not that it had also failed to prove that the claimant was negligent in his driving.

[33] The evidence, which was not disputed, was that the bus in question, described as a Hiace was in truth a Reguaice, which was said to be similar in appearance to a Hiace and often referred to as such. It was acquired by the Defendant in May 2005 through a lease from a company. The evidence is that the bus was inspected and road tested prior to its acquisition. This was done by the company's then Transport Manager, who was a trained automotive mechanic along with the senior mechanic. He is now Fleet Manager for Guardsman Armored.

[34] It was also the unchallenged evidence that the operational vehicles at the defendant's company were serviced every 3000 km. Information about service dates, problems, repairs and parts were said to be all recorded. Tyres, brakes and suspension were changed, wheels were aligned and balanced based on inspection of the vehicle and complaints by the drivers.

[35] The claimant's evidence was that he had no problems with the vehicle prior to the accident and noticed none. It was therefore submitted that up to December 2005 the bus was kept in proper repair and was safe for use. The claimant had been involved in two previous accidents involving the defendant's vehicles. The first in July 2005; that vehicle was damaged and after it was repaired it was removed from operational services.

[36] The second accident occurred on October 21, 2005 and involved the bus in issue. In that accident the windscreen and front of the vehicle was damaged. After the accident the windscreen was replaced, the vehicle was repainted and it was refitted with four new tyres and a disc pad. The front end was aligned and balanced November 30, 2005. The claimant resumed driving the bus without problems.

[37] It was submitted that there was sufficient evidence to show that the defendant company dealt responsibly with its vehicles to ensure they were safe for operations. It was further argued that if the claimant was able to drive the bus for an extended time during his shift without problems, this would be further proof that the bus was in good condition and road worthy at time of the accident.

[38] Mr. Silvera's report, it was submitted, contradicted the claimant's account. Counsel for the defendant argued that the claimant's account was exaggerated in order to invite the inference that the bus was defective. The court was asked to

recall that the claimant had previously stated that he could not recall much of the accident and had become unconscious soon thereafter.

[39] It was submitted that the speed at which Mr. Marsh was going, that is, 50 – 55 miles per hour was an elevated speed by his account. It was also pointed out that the claimant had said previously that it was a deep corner, but was now saying it was not so deep a corner.

[40] It was also submitted that claimant, not having had permission to carry out personal business using the vehicle and having done so, he was speeding to return the vehicle in time for the next shift; it was in so doing that he lost control of the vehicle.

The Damage to the Bus.

[41] The bus suffered a shattered front and rear windscreen; complete damage to the right side of the vehicle; left door and top of the vehicle was damaged and the left front ball joint was broken. In the opinion of the certifying officer the broken ball joint would have made it impossible for the driver to operate the bus.

[42] The certifying officer opined that a broken ball joint was easily identifiable on servicing and ought to be identifiable if worn. He further noted that one sign of a worn ball joint was excessive play in the steering wheel beyond an inch and half and worn tyres. He was of the view that the ball joint caused the accident based on an impression made on the control arm.

[43] It was submitted that because of the limited investigation made by the certifying officer, that is, his not visiting the scene or speaking to the driver, it was impossible to rule out other causes of the accident. The court was asked to note that he was not able to say with certainty whether the ball joint broke before, during or after the accident or whether it broke as a result of a defect in the bus. He therefore, was also not able to rule out driver error.

[44] It was further submitted that even accepting that the broken ball joint was the cause of the accident, it was not as a result of a defect. It was submitted that uneven wear in tyres being the first sign of a defective ball joint along with excessive play, the driver would have noticed these things, even if he did not run the technical checks. The argument was that if there had been such a defect the claimant would have noticed.

[45] It was further pointed out that the certifying officer had also agreed that if the ball joint was defective the bus could not have been balanced and aligned. The most recent service done to the vehicle was balancing and aligning done on November 30, 2005, two weeks before the accident. It was submitted that if ball joint had been defective it would have been detected during the process of alignment and balancing. This was also borne out by accident report of Mr. Silvera.

[46] It was submitted that, in light of the evidence that the bus was regularly serviced and had recently been aligned and balanced so that any defect would have been detected, the ball joint had to have been broken by some other cause. It was further submitted that the most likely explanation for the broken ball joint was the negligent manner in which the claimant operated the vehicle that day.

ANALYSIS

[47] There are instances of events occurring which imply negligence; such as a motor vehicle turning over and sliding along the road way. This usually requires an explanation by the driver, as it constitutes an accident which would not normally occur with proper driving. In this case the claimant driver's explanation is that the vehicle was defective. The vehicle was supplied to him by the defendant, so that if there is a defect the onus rest on the defendant to show that it used all reasonable care and skill to avoid danger.

[48] The question is whether on the established facts as known and proved negligence is to be inferred in the defendant.

[49] If an accident is due to a latent defect which is not discoverable by reasonable care, there is no negligence: ***Hyman v Nye*** *(1881) 6 QBD 685*. The duty of the owner is to supply a vehicle as fit for the purpose for which it was intended as skill and care could render it. He is not responsible for all defects, but he is bound to take care. He is not an insurer against all defects, only against those which care and skill could guard against.

[50] If this court finds that the accident was caused by defective vehicle, the onus is on the defendant to show that they had taken all reasonable care and despite this the defect remained hidden. It is enough for the defendant to give evidence of the history of the car and its maintenance and prove that they had a proper system for drivers to report all occurrences. They must prove that in all the circumstances of which they knew or ought to have known they had taken all the proper steps to avoid danger.

Did the Defendants Take All Reasonable Care?

[51] Lord Herschell in ***Smith v Charles Baker and Sons*** *(1891) AC 325* described the duty of an employer at common law as;

> ***"the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on his operation as not to subject those employed by him to unnecessary risk."***

This obligation is fulfilled by the exercise of due care and skill. So that the duty of an employer in supplying a worker with plant or material is a duty to exercise reasonable care to see that the plant or material is safe for the purpose for which it is intended.

[52] The onus is on the defendant to prove that the accident occurred despite all reasonable care on their part. This includes reasonable care in the acquisition, inspection and maintenance of the vehicle. They must show that in all their dealings with the vehicle they had taken all reasonable care to see that it was in good order and condition.

[53] Evidence of the acquisition of the vehicle came from two sources. The Managing Director gave evidence that the vehicle was acquired as a 2001 Toyota Reguaice Registration No. 1385 EN, through a lease finance arrangement from a car dealership. The vehicles were serviced by the dealer prior to signing the lease.

[54] This vehicle along with another which was also leased at the same time, were acquired to provide transportation for Guardsman Limited's security contractors to and from their various locations. The claimant was contracted as a bus driver for that purpose.

[55] The company had a standard procedure for accident reports. Accidents involving company vehicles were reported to the Group Chairman. The Managing Director would ensure that the accident was reported to the police, if the circumstances so required.

[56] Evidence also came from the Fleet Manager for Guardsman Armoured Ltd. He has training in motor vehicle servicing and is a certified automotive technician. He is also certified in diesel and gasoline technology and electronics as well as in Yamaha outboard engine technology.

[57] In 2005 he was the Transport Manager at the defendant company. He had responsibility for the day to day maintenance of Guardsman Limited's vehicles at

all locations. He was also responsible for procuring vehicle parts and vehicle registration and licensing. He was in charge of the operations vehicles and the servicing of the management vehicles once their warranties had expired.

[58] As transport Manager he had a team of mechanics and technicians including a senior mechanic. Altogether, he managed 70 operations vehicles in Kingston. He worked with a service log book in which was recorded vehicle information dates of servicing, fuel levels, reported problems, recommendations for repairs, parts requirements. Those vehicles were serviced every 3000 km. Servicing included tyres, brakes and suspension inspections amongst other things. Fuel filter was changed at every other service. Vehicles were sent out for front end parts, wheel alignment and balancing, based on inspection of the vehicle and wear and tear as well as any complaints from the drivers. A service sticker was placed on the vehicle after each service.

[59] Drivers were given incentives to take to care of the vehicles assigned to them. The senior mechanic and he inspected the vehicles on a weekly basis and they were subject to management inspections at any time. Each vehicle had a checklist and a file. Dents, kinks, scrapes and other problems were noted. The records were hard copies and recommendations were made for the incentive awards based on the condition of the vehicles.

[60] It was he who went to the dealership and selected the vehicle in question. It was inspected and road tested by his senior mechanic and himself. At the time of its acquisition it had been serviced.

[61] He knew the claimant and at the time he began working as a driver with the company, there were four buses for transporting security contractors. One of the four was a spare so that if one of the others were being serviced it was used by that driver instead. The drivers communicated with him all issues concerning their respective buses.

[62] He knew the claimant had been in two previous accidents. The first was in July 2005 in which that bus was taken out of active service. The second was in October involving the bus in question. In that accident, the bus had damage to the front of the vehicle and the windscreen. It is worth repeating that the vehicle was sent to be repaired. It was repainted and was fitted with four new tyres, a new windscreen and disc pads. The front end was aligned and balanced at a wheel alignment and front end repair business. The invoices were tendered into evidence at this trial. Four new tyres were bought in November, fitted and electronically balanced. It was also aligned and fitted with 2 sets of new disc pads, also in November. On December 12, it was fitted with two ring seals, 2 rear hub seals, one thermostat switch and a rear wheel cylinder washer. All purchased and fitted outside of Guardsman limited.

[63] During those repairs the claimant was given a temporary replacement vehicle. He was reassigned to this bus after it was fully repaired. The claimant's evidence supports the fact that the bus was repaired and that he was given another bus to drive during the period of repairs. The relevant bus was returned to him after the repairs and he had no difficulties with it thereafter.

[64] The evidence of the Transport Manager is that On December 16, 2005, on being informed of the accident involving the claimant and the company vehicle, he went to Port Royal road and saw the vehicle in a mangrove on its side.

[65] Based on the above it is clear to me that the system in place at Guardsman Limited for the care and servicing of the operation vehicles was sufficient and adequate for the employer to take reasonable care and maintenance of the vehicles to ensure the safety of the workmen, including the claimant.

Was There a Mechanical Defect

[66] The evidence of the claimant is that before leaving the compound he did his usual routine checks of the vehicle to ensure it was in a reasonable position to carry out the assigned task. He also said he was satisfied the vehicle was in good condition. He said this was something that was usual for him to do before carrying out his task. His tasks that shift involved a great deal of driving in and out of the corporate area. He said that during his journey from the various points he had no problems with the vehicle neither was there any indication of any

problem. He also admitted that prior to the accident he had no doubts that the vehicle was in good condition.

[67] He also admitted that if there was a problem with the vehicle there were persons to whom he would report it. These were persons at the company's garage. He admitted that as a driver he may be able to pick up certain things wrong with the vehicle depending on what it might be. He had never reported any problem with this particular vehicle before the accident on December 16th.

[68] His evidence was that the accident occurred whilst he was negotiating a right hand corner. He had been going about 50 miles per hour. He said it was not a deep corner (even though he had previously on another occasion said it was). I note here that Mr. Silvera's report suggests that it was not a deep corner. During the maneuver the vehicle failed to straighten, instead it continued drifting right heading into the bushes. He said he struggled to get the vehicle to change directions or at least go straight. His evidence was that the front of the vehicle made a sudden drop on the right side and it flipped over. The vehicle landed on its right side and slid along the roadway. It came to a halt on the left of the road way in a ditch. It was now on the other side of the road. He said he had been unaware of any defect in the vehicle.

[69] The evidence is that he had said in a previous statement that he felt the vehicle become unbalanced but he could not recall much more as he became

unconscious and when he became conscious he was in a pick up. He however, insisted that he could recall some details.

[70] The report prepared by Mr. Paul Silvera itemized the damage to the vehicle seen at inspection. Mr. Silvera is a Loss Adjuster, auto damage appraiser and auto accident investigator for 35 years. This is experience gained hands on. From that I assume he has no formal training. Of significance is the finding that the vehicle sustained a crushing force to the right front roof. It also had abrasions and scratches consistent with overturning and sliding along the asphalted roadway. There was damage to the left front side section of the stabilizer bar indicating point of impact which resulted in the left front ball joint being sheared off. He saw no damage to the wheel arch, tyre, rim lip, outer rim or inner rim. There were photographs attached to his report of the various parts of the vehicle inspected by him.

[71] According to Mr. Silvera's report there could not have been a damage or defect to the ball joint as the front wheel and front end could not have been aligned and balanced on November 30th. The ball joint would have had to be replaced prior to alignment and balancing work being done on the vehicle.

[72] Mr. Silvera also raised the tantalizing red herring, that is, that Mr. Marsh may not have been driving the vehicle at the time. He emboldened this statement with the result of his analysis of blood spattering in the vehicle, which he said was concentrated on the left of the vehicle only. Blood spatters were on the left front

side, roof, door support panel cover, left front roof panel cover, left rear side panel door glass, left rear side and the roof support panel cover. There was no blood at all on the right side. The claimant was injured whilst driving a right handed vehicle which turned over on the right and came to rest on its right side. However, I will not follow that red herring as there is no bait provided to catch it.

[73] The vehicle came to a rest on the left side of the road 581 feet from the right hand corner. This meant that the vehicle did respond to the turn to the left made by him. The vehicle also ended up on the left side of the road. The conclusion made by Mr. Silvera was that if the ball joint had sheared off causing the accident, the claimant could not have corrected the vehicle from a right turn to a left turn, travelled in excess of 581 ft at a speed of 50-55 miles per hour without causing extensive damage to (a) the left front wheel arch; (b) the tyre; (c) the rim; (d) left front lower panel; and (e) left side of the front bumper.

[74] Mr. Silvera's opinion was that the left ball joint was not the cause of the accident and was sheared off due to impact and not as a result of being defective.

[75] Mr. Navardo Ford was called as a witness by the claimant. He is a motor vehicle certifying officer employed to the Island Traffic Authority, Ministry of Transport and Works. Certifying Officers issue certificate of fitness for Motor vehicles, they also issue reports on behalf of the police for a vehicle which had been in an accident and also issue reports on motor vehicles put up for sale by

the government. He gained a diploma in automotive technology in 2002 and taught automotive technology to 4th and 5th form students. As I said before, at the time he examined the vehicle in question he had less than one year in experience as a certifying officer. He was requested by the Port Royal police to examine the vehicle in question. He did so on the 20th December 2005 at the Port Royal Police Station. He was given no information by the police except the owner's name, type of vehicle and registration number.

[76] He recorded damage seen to vehicle registered 1385 EN as being to the front and rear windshield, right front and rear sliding glass, left sliding door, complete right side, top, left front rim, right tail light, broken front left ball joint. He was of the view that the accident was as a result of a broken ball joint.

[77] He opined in evidence that the broken ball joint would have made it impossible for the driver to control the vehicle. He said that from the breaking of the ball joint he figured the driver made a swing in order to correct the vehicle. This in my view is a strange thing to say in light of his later statement that the ball joint cannot break from just the driver's manner of driving.

[78] He said that when the ball joint breaks, the vehicle would normally swerve to the side the ball joint broke on. So, according to him, if the ball joint broke on the left the vehicle would automatically drift to the left. He went on to say that if the driver was making a right and the ball joint broke the driver would not be able to put it back to the left side. He said that if a vehicle was going around a corner

and the ball joint broke, having locked to that direction already the vehicle would continue to drift to that side.

[79] He explained that the steering is connected to the ball joint, so once the ball joint is broken there is no control over the steering. He noted that if the ball joint was broken the driver would not be able to start the vehicle and drive off because it could not move. He said once the ball joint was broken, that section of the vehicle would go down and touch the surface.

[80] He told the court that a broken ball joint was easily identifiable at servicing and is also easily identifiable if worn out. A ball joint, he said, could get worn out. If it was worn out, it is something that should be easily identifiable when the vehicle is being serviced. He also said when a ball joint was worn extensively the steering wheel would have excessive free play. A driver would have noticed something was not right even if they could not identify the exact technical problem.

[81] It is clear to me therefore from the evidence of both these men that a broken or worn ball joint was a defect which the use of reasonable care and skill could uncover.

[82] Mr. Ford mentioned seeing an impression on the control arm which he said would have occurred from the control arm hitting the road surface. It is to be recalled that Mr. Silvera's report indicated damage to the left stabilizer bar. Mr.

Ford explained that the control arm was under the wheel and it could be seen when the wheel hub was removed. The ball joint is attached to the control arm and holds up the control arm. If the ball joint breaks the arm will drop.

[83] He admitted that the ball joint could break as a result of the accident with another vehicle. He said the ball joint could not break unless it hit something. He denied that it could break from the vehicle impacting on itself by turning over and over. But he said that if it hit a rock it would break and it could also break from falling into a pot hole. He agreed that he could not look at the broken ball joint and say whether it caused the accident or that it was caused by the accident. He said his opinion was based on the impression on the vehicle.

[84] That impression he said was the finding of asphalt on the control arm to which the ball joint was attached. He said this meant that when the ball joint broke the control arm hit the road surface, which he said in most cases would leave a mark like a digging on the road surface. He, however, did not examine any road surface. He said the impression on the control arm showed that it hit something. He also said that the impression he saw on the control arm could not have occurred without the ball joint being broken. I note here that Mr. Silvera did examine the road surface and no report was made by him of a digging on the right of the road where claimant said the right side of the vehicle went down.

[85] Mr. Ford denied that the ball joint could break as a result of the claimant's manner of driving. He insisted that his conclusion was correct that the broken ball

joint caused the accident. He also agreed that that if the ball joint was defective the vehicle could not have been balanced and aligned. It is also to be noted that Mr. Saunders the Transport Manager for the defendant company had also indicated that a worn ball joint would also manifest itself in uneven wear in the front tyres.

[86] The claimant had been in a previous accident with this said vehicle in October 2005. The second accident with the vehicle occurred on December 16, 2005. I bear in mind the fact that this is a vehicle with which the claimant was familiar. He used it to carry his most precious cargo, his daughter. The evidence of Mr. Ford is that a defect in the ball joint is discernible from excessive play in the steering. There is also evidence that it is discernible from worn tyres. The vehicle was fitted with four new tryes on the 8th November 2005. The accident was the 16th December. The tyres were aligned and balanced on the 30th November 2005. Based on the two reports this could not have been done if the ball joint was damaged. The question for this court then is when did it become damaged?

[87] The claimant did not notice any defect in the steering mechanism throughout what appeared from his evidence to have been a hectic shit from 7p.m. to 7a.m. just before the accident. I accept the evidence that the vehicle could not drive if the ball joint was broken. The next question would be whether it was worn?

[88] I accept that the vehicle was aligned and balanced on November 30th, 2005. I accept that new tyres were purchased on November 8th 2005 and I accept that the vehicle was repaired and fitted with new disc pads after the October accident. The change in the tyres and the new disc pads are significant given the position of the stabilization bar, control arm and ball joint. I am of the view that a worn ball joint would not have been missed during this period of work.

[89] Again even if the ball joint was not worn up to November 30th, did it become worn thereafter? The driver noticed nothing wrong with the vehicle and this was after excessive driving between 7p.m. and 7a.m. He noticed nothing wrong with the steering mechanism up to the point of taking the right hand corner that morning. However, some time thereafter, the ball joint broke. Mr. Ford said it could not break from the claimant's manner of driving. If this is so, then worn or not, it could not break as a result of turning the corner in an ordinary way or by any other manner of driving. So what caused it to break?

[90] The evidence of Mr. Ford is that with the damaged ball joint a vehicle going right would continue right and could not straighten. This was supported by Mr. Silvera. However, the claimant's evidence is that he was going around a right hand corner, the vehicle continued going right at which time he saw a vehicle coming in the opposite direction. He struggled with the bus and straightened it and got it to go left. It flipped and ended up in a ditch on the left hand side of the road. It ended up as I said 581 feet left of where it supposedly broke. According to the evidence both Mr. Ford and Mr. Silvera this was not possible.

[91] It is clear therefore, that Mr. Ford's conclusion that the broken ball joint caused the accident could not be correct. It is just not supported by the evidence. He also admitted that a ball joint could be broken from hitting a stone or from falling in a pothole or hitting another vehicle but he denied that it could be broken on impact from flipping over. This defies commonsense as all three are as a result of impact. If it cannot be broken from just driving then either it or the control arm would have to be hit. Mr. Marsh gave no evidence of being hit except the impact from the vehicle flipping over and sliding.

[92] It must be recalled that Mr. Ford was ignorant of the facts surrounding the accident. He is taken to be unaware of Mr. Marsh's account of how it took place. On Mr. Marsh's account he was just driving along and the right side of the vehicle fell. Ostensibly this would be when the ball joint broke. Mr. Ford is saying this is not possible. But Mr. Ford is also saying the broken ball joint caused the accident because the control arm was impacted. On the other hand, Mr. Silvera's opinion was the stabilizer bar was damaged from the impact from turning over and that the impact damaged the ball joint. Taking into consideration both opinions in light of the evidence, I find the latter to be the more probable cause.

[93] The claimant's evidence is that whilst going around the right hand corner the vehicle continued going right then dropped on the right side, why did it then flip over? There is absolutely no reason for the vehicle to have flipped over and over having dropped on its right side. Then, with the steering mechanism gone how

did it get back over to the left? According to the evidence of Mr. Ford a vehicle in that condition should have continued right into the bushes.

[94] One final note of interest on the claimant's case is to be found in the evidence of both the claimant and the certifying officer. The ball joint broke on the left side of the vehicle. The certifying officer said that the vehicle would collapse on the side on which the ball joint broke. However, it is the evidence of the claimant that the vehicle went down on his side before it flipped over. It is the evidence that the claimant was the driver. It is a right hand drive vehicle. Therefore by "his side' he is taken to mean the right side. It is clear therefore, that the broken ball joint did not cause this to occur. I take the view that based on the evidence, on the balance of probabilities; the vehicle had no mechanical defect at the time of the accident.

[95] I conclude on a balance of probabilities that the ball joint broke on impact when the vehicle over turned. This was as a result of the claimant going around the corner at a fast speed and loosing control of the vehicle. I reject that the accident was a result of the broken ball joint.

Is the Claimant Liable?

[96] The claimant raised the issue of defect and the defendant has discharged the onus placed on it to show that there was no defect. But there having been an accident, it still remains for me to determine whether the claimant is liable. The claimant has raised no other cause for the accident except a defect in the

vehicle. He was going around a corner at 50 miles per hour loss control and aggressively forced the vehicle back to the left and in my view it is this which caused the vehicle to overturn flipping over and over. Res ipsa Loquitur applies. I accept that it was in all probability when the vehicle overturned that the control arm impacted and the ball joint broke. In the absence of any other satisfactory explanation by the claimant, I am left with the conclusion that the accident must have been as a result of the negligent driving of the claimant. See the case of ***Ludgate v Lovett*** *(1969) 1 WLR 1016*.

[97] Because the claimant had two previous accidents in a short time of his employment, I have been asked by his attorneys to consider whether the employer was negligent in allowing him to continue to drive the company vehicles in those circumstances. The first accident in July 10, 2005 was as a result of him swerving to avoid a cow at which point he ran into an embankment. For that accident he received a warning. The second was as a result of his attempt to pick up a fallen cell phone whilst driving thus running into the back of a parked truck which was not lit. For that he was made to compensate the company for the damage to the vehicle. Should the company have considered him a careless driver and removed him from driving duties for his own safety and that of his passengers? Or better yet sent him on a training course as suggested by his counsel?

[98] It is not possible to conclude from the previous accidents that the claimant was accident prone. No evidence was led by either side that the claimant was not

qualified to do the job he was in fact doing. One act of careless driving does not make him necessarily a bad driver who was in need of further training. I find that the defendant was not negligent in this regard.

DISPOSITION

[99] This matter is disposed of as follows:

1. There will be judgment for Guardsman Limited on the claim.
2. There will be judgment for Guardsman Limited on the Counter claim in the sum of $800,000.00.
3. Guardsman Limited is to have its costs against Mr. Easton Marsh which is to be taxed, if not agreed.