



[2024] JMSC Civ 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV02041

BETWEEN	DELORIS MOSS	CLAIMANT
AND	BARRINGTON EVANS	DEFENDANT

Miss Shanese Green instructed by Kinghorn & Kinghorn for the claimant

Miss Jamilia Maitland instructed by Campbell McDermott for the defendant

Heard February 27, 2023, February 28, 2023, and January 19, 2024

Personal injury - whether defendant liable in negligence – reliability of medical evidence

CORAM: JARRETT, J

Introduction

[1] On November 10, 2011, Deloris Moss (“the claimant”), set out to attend a meeting of the Jamaica Labour Party (“JLP”) being held in Black River in the parish of Saint Elizabeth. She alleges that while waiting to board a bus hired to transport persons to the meeting, she was injured when the bus owned and driven by Barrington Evans (“the defendant”), ran over her right foot. She brings this claim against the defendant to recover damages for what she alleges are serious personal injuries, loss and damage suffered by her because of his negligence.

The pleadings

- [2] In her Amended Particulars of Claim, the claimant pleads that on November 10, 2011, she was lawfully standing on the premises of Pine's Plaza in the parish of St Elizabeth waiting to board a motor vehicle with registration number PD5411 when the defendant so negligently drove or operated the motor vehicle that it ran over her right foot. She claims to have suffered a fracture of the right tibia/fibula, and she seeks special damages of \$85,000.00, for medical and transportation expenses.
- [3] The defendant in his Defence states that on the day in question, he was the driver and owner of motor vehicle registered PD5411. He denies the claimant's allegations of negligence and alleges that on November 10, 2011, he was hired to transport passengers from New Building in Nain to Black River, in the parish of St Elizabeth. He denies stopping to pick up passengers at any location other than at New Building. He also denies stopping or slowing down in Junction and /or in the vicinity of Pine's Plaza. He further pleads that if, which he denies, he is found to have run over the claimant's leg¹, the incident was caused or materially contributed to by the claimant's own negligence.

The evidence

The claimant

- [4] After striking out portions of the claimant's witness statement filed on August 24, 2022, because they were inadmissible hearsay, I allowed the claimant to rely on her redacted witness statement, as her evidence in chief. She says she is a farmer and lives at Brinkley District, Nain P.O. in the parish of St Elizabeth and was born on January 27, 1953. On November 10, 2011, at about 3 o'clock in the afternoon, she was in the company of her daughter and other persons waiting to board a bus

¹ The allegation in the Amended Particulars of Claim is of injury to the right foot.

to go to a JLP meeting in Black River. The Member of Parliament had organized transportation to the meeting from Pine's Plaza in Junction to Black River, and many persons were gathered in the middle of Pine's Plaza waiting for vehicles to pick them up. Those that were arriving were mostly cars and open back vans and the persons gathered rushed to get into them. She and her daughter however waited for a bus to arrive. After waiting for almost an hour, a coaster bus arrived.

[5] According to the claimant, persons rushed towards the bus, and so did she. She and her daughter were able to get close to the door, and many persons were bundled up at the door, waiting for the driver to open it. Due to the crowd, she had to place her hand on the bus and lean against it to balance herself. They stood at the door for a few minutes. Some persons in the back of the crowd started to jump up to see what the driver was doing, but the driver did not come to the door or do anything. Suddenly, the driver drove off, and the movement of the bus caused her to fall to the ground. After she fell, the back of the bus ran over her right foot. The driver of the bus left Pine's Plaza and returned to the main road.

[6] The claimant said that she could feel the pressure of the wheel of the bus riding over her right foot and she heard the bone 'pop'. But she did not feel the pain immediately because her: "blood was still hot". The bone in her foot was broken and could be seen sticking out of her skin. Her son-in-law and others placed her in a car, and she was taken to the Mandeville Regional Hospital. At the hospital her wound was cleaned by the doctors, and she was sent to do an x ray, after which she was informed that her foot was broken. She was given medication for the pain and her foot was bandaged. She was diagnosed with a fractured tibia/fibula and told to return the following day for a cast.

[7] A week later, the claimant said she and her daughter went to the Junction Police Station to report the accident. According to her, she did not request a police report because she did not know that she needed one. Due to difficulties sleeping and still in pain, she went to Howell's Medical Complex and saw Dr Ijah Thompson who gave her a prescription for analgesics. Her broken foot took a long time to

heal, and she was unable to walk for seven months. She had to get help from her children and her farming business suffered and lost money as a result. At the time of making the witness statement her business was still struggling as her leg: “does not work the way it used to”. She currently walks with a limp and sometimes her foot is bent when she walks. Her foot is swollen at times and the bottom burns her especially when it is cold. She said that her medical expenses amount to \$88,000.00, representing \$82,000.00, to obtain medical reports from Dr Ijah Thompson and \$6,000 .00 for medical visits to Howell’s Medical Complex.

[8] On cross examination the claimant did not know the time of the JLP meeting but said she was told to get to Pine’s Plaza by 2pm. The defendant’s bus entered Pine’s Plaza, but stopped before it reached where she and the other persons were standing. She described the bus as being white in colour with a green running board. When asked what time the bus arrived, the claimant said: “about 3, going down, we didn’t have a time piece looking on to see”. They walked down to where the bus had stopped, and she walked to the right-hand side of it, went around the back and then to the front door and stood there. Asked why she needed to balance herself, the claimant said it was because the crowd was behind her. Asked how long she stood at the door, the claimant said she could not recall. When asked whether she was referred to physiotherapy by the Mandeville Regional Hospital, she could also not recall.

[9] The claimant could also not recall whether she had done any physiotherapy at all. She agreed that she was told by Dr Ijah Thompson to return in one month after her November 22, 2011, visit, but could not recall if she did in fact return. Neither could she recall if he had informed her that she needed six physiotherapy sessions. On further cross examination, the following exchange took place between cross examining counsel Miss Maitland, and the claimant: -

Q. Did you recall your next visit was September 10, 2016, almost five years after the first visit?

A. I remember I went to Spanish Town to Dr Ijah Thompson but because I was still in the clinic in Mandeville is there they keep on change the cast until they finish.

Q. How long you wear the cast?

A. I don't remember Miss.

Q. You don't remember. One month? One year?

A. It's not that long years you talking about but I know it's more than a month.

Q. So, when you saw Dr Thompson on September 10, 2016, you were not wearing a cast?

A. No Miss, but there was still pain, pain.

Q. Since you wore the cast for more than a month, it is less than two months?

A. I can't recall, I wasn't checking on that.

Q Your witness statement you signed last year, August 16, 2022, you indicated: "I was unable to walk for about seven months and my children had to help me in every way". So, you recall it then but don't recall it now?

A. Last year is different from that long year.

Q. When did you stop going to the clinic in Mandeville?

A. I can't recall Miss. But I am going to the clinic in Junction for the pain in the foot.

[10] When Miss Maitland pointed out to the claimant that she had not mentioned any visits to clinics in her witness statement, the claimant said she did not know that she should have mentioned them. When asked to agree that she had not provided the court with any receipts for pain medication, she said she did not know she was to secure those receipts. She acknowledged that she had not provided the court with any appointment cards for her clinic visits but said she did not know that she should have produced them.

Medical evidence

- [11] Dr Ijah Thompson was appointed an expert for purposes of the trial. His medical reports dated December 20, 2011, and October 10, 2016, and the Medical Report Form dated July 28, 2017, from the Mandeville Regional Hospital were agreed documents. In his medical report dated December 20, 2011, Dr Ijah Thompson says that the claimant sought medical assistance from him on November 22, 2011, and that she reported that on November 10, 2011, the back wheel of a bus ran over her right foot. He says the claimant reported that she was taken to hospital and treated for an open comminuted fracture to the right tibia. At presentation she complained of difficulty sleeping, pain in above knee cast, a pain score of four out of ten and activities of daily living globally impaired. One of his findings was of an above knee cast insitu. Under the rubric: "Investigations", Dr Ijah Thompson writes: "X-ray- Fracture right tibia", while under the heading: "Assessment", he writes: "Healing open comminuted fracture to right tibia with AK casting". In terms of treatment, Dr Ijah Thompson gave the claimant analgesics and muscle relaxants to be taken at home. She was to return for follow up in one month. His prognosis then was that the claimant's injuries were serious with the risk of permanent impairment. Under the rubric: "Future medical care", Dr Ijah Thompson writes that: "Miss McLean will need at least 6 sessions of rehabilitation physiotherapy ..."
- [12] In his medical report dated October 10, 2016, Dr Ijah Thompson says that the claimant presented on September 10, 2016. Her sleeping difficulty had resolved but she complained of discomfort and swelling to her right distal leg, weakness and pain to her right foot, and a pain score of four out of ten. One of his specific findings was an above knee cast insitu and discomfort to the distal leg and right foot. His assessment was of a healed fracture to the right tibia with residual swelling and pain to her right foot.

[13] Mandeville Regional Hospital's Medical Report Form is signed by Dr Errol Thomas. It is dated July 28, 2017, and states that information was obtained from: "patient's record". There is no indication as to when the claimant presented to the hospital. Under the heading: "Incident", Dr Errol Thomas writes: "Patient accidentally (sic) fell whilst trying to board a bus on the 10th November, 2011. Complained of pain and swelling with deformity to same". On examination, there was a bruise to the ankle. The reported diagnosis was a fracture of the right tibia/fibula. It is reported that the following treatment was administered:

- a) Analgesia
- b) Plaster of pairs
- c) Wound cleaned and dressed
- d) Referral to physiotherapy
- e) Referred to nearest health centre for dressing.

The defendant

[14] The defendant's direct evidence was by witness statement filed on May 7, 2020, which he amplified at trial. The defendant lives at Top Hill in the parish of St Elizabeth, and he is a mechanic. He says that on or about November 10, 2011, he was chartered to use his motor vehicle registered PD5411 to transport passengers from Junction to Black River. On the day in question, he drove to Pine's Plaza because he thought that that was where he was to pick up the passengers. However, when he got to Pine's Plaza, he was advised by the organizer of the trip that it was New Building District he was to do the pickup. He wanted to turn back, but the area was crowded, and a policeman directed him to drive through Pine's Plaza and then drive back out. According to the defendant, he slowly drove through Pine's Plaza but did not stop to pick up any passengers and so it cannot be true that the claimant was waiting on him to open the door of the bus, when she got

injured. He says that at no time on November 10, 2011, was he involved in an accident on the premises of Pine's Plaza.

[15] In commenting on the claimant's evidence, the defendant said that he did not arrive at Pine's Plaza until approximately 5.30 pm because he was dropping off students. He said that when he arrived at Pine's Plaza and was diverted to New Building, there were many police officers there as well as a few persons, but those persons were not going to the meeting. There is an island inside Pines Plaza which he went around, but he did not stop inside Pine's Plaza. There were not many persons left inside Pine's Plaza, just: "a few little gatherings" On leaving Pine's Plaza, he went back on the main road and headed straight to New Building.

[16] On cross examination the defendant said that he owns other buses and has several drivers but on November 10, 2011, he was driving the bus registered PD5411. He did not give the meeting organizers an agreed time that he would do the pickup because he knew he had students at Hampton to pick up at 3.30pm and also at Munroe. He did not know the time the meeting was to start but he told the Member of Parliament that he would bring the passengers to Black River at about 7.30 pm. It takes about an hour from New Building to Black River and he did not get to Black River until 8pm. He described his bus as white on the top and green at the bottom. When asked why he did not mention in his defence that he had students to pick up on the day in question, the defendant said he did not think it was necessary at the time. Asked whether he knew when he was preparing his Defence in 2014, that he had been diverted from Junction to New Building, the defendant said he knew, but did not think at the time that that information was necessary.

[17] When asked whether anyone from the small gatherings inside Pine's Plaza, which he mentioned on direct examination, rushed towards his bus, the defendant said:-

"They were away from the bus, they were not in my path, so I had no occasion to stop".

On being told that he had not answered the question, the defendant's response on the question being repeated was: "No I didn't see any of them". Asked if the persons in the small gatherings looked like they were going to the meeting, the defendant's response was: -

"No, because I did not notice. No one was in my path, so I keep straight and go ahead".

Asked how he knew there were small gatherings inside Pine's Plaza, the defendant said that when he got there, he was able to see the gatherings which were: "one or two people".

- [18] The defendant disagreed that his bus ran over the claimant's foot and said that if either one or two of the wheels ran over the claimant's foot, her foot would: "crush to pieces" and he would have realised it . At the end of the cross-examination, I asked the defendant when did he become aware that the claimant was claiming that he drove over her foot. He said that it was when he arrived at the meeting at approximately 9 pm that night.

Submissions

The claimant

- [19] Miss Shanese Green, counsel for the claimant, began her written submission by stating the well-known principles governing the law of negligence. She quoted the following dictum of Harris JA **in Glenford Anderson v George Webster [2012] JMCA Civ 43:-**

"Liability will be affixed to negligence where the defendant's act is the sole effective cause of the claimant's injury, or it is so connected to it to be a cause materially contributing to it. The negligent act as a cause of the claimant's injury may arise out of a chain of events leading to liability on the

part of the defendant but the claimant must so prove. Proof that a claimant's injury was caused by the defendant may raise a presumption of the defendant's liability. However, the claimant must satisfy the court that his or her injury was caused by the defendant's negligence or that for want of care the defendant's negligence substantially accounted for the injury."

Learned counsel submitted that as a road user, the defendant owed the claimant a duty of care not to cause her any loss and damage. In driving his bus in a crowded area in the way he did, he breached the duty he owed to the claimant who was herself another road user. To support her submission, counsel cited the decisions of **Jowayne Clarke and Anthony Clarke v David Jenkins Claim No 2001/C211 delivered October 15, 2010**; and **Pamella Thompson et al v Devon Barrows et al Claim No CL 2001/T143 delivered December 22, 2006**. Miss Green argued that the defendant's evidence that there was no crowd in Pine's Plaza ought to be rejected as the court should take judicial notice of the fact that crowds are usually associated with political meetings.

[20] According to Miss Green, the claimant's account of how the accident occurred is consistent with the injuries reported in the medical reports and those injuries are consistent with a bus running over a person's foot. The real issue, she argued, is whether it was the defendant who drove over the claimant's foot. The claimant identified the defendant's bus by its colours and a similar description was given by the defendant. The defendant was aware of the accident from the night of the meeting at about 9 pm. Counsel also submitted that the defendant's position has changed since he filed his Defence as he now says that he went to Pine's Plaza but claims that he did not stop while there. The claimant's evidence, posited Miss Green, is more believable than that of the defendant.

[21] In terms of the quantum of damages, it was submitted that general damages ranging from \$2,000,000.00 to \$2,500,000.00 would be a reasonable award. The decisions in **Maureen Golding v Conroy Miller and Duane Parsons** reported in **Khan's Volume 6 at page 62**; **Ankle v Cox, C.L. 1987/A157** and **Cecil Jack v**

Geoffery Madden C.L 1984/J483, were said to be good comparable authorities under this head. Counsel urged me to award special damages of \$98,000.00 which she said is supported by the evidence.

The defendant

- [22] It was argued on behalf of the defendant that the defendant's motor vehicle was not on the premises of Pine's Plaza at the time the claimant placed him there. Counsel Miss Maitland argued that based on the claimant's evidence she could not have sufficiently seen the bus. All she had was a fleeting glance of the driver, and therefore was not in a position to identify him. She questioned how the claimant, and her daughter were able to get next to the door of the bus, despite the crowd she claimed had gathered in Pine's Plaza. Counsel pointed out that there was no police report of the incident or any evidence that the defendant was warned by the police for prosecution. She described the claimant as having selective memory and posited that in not getting any physiotherapy, the claimant failed to mitigate her losses.
- [23] On the claimant's own evidence, she leaned on a bus when she was not clear what the driver's intentions were. That was not a responsible thing to do, argued Miss Maitland. Counsel said there is: "much that is wrong with the Medical Report Form from the Mandeville Regional Hospital". Among them, is the fact that it does not state when the claimant visited the hospital, it refers to the claimant complaining of pain and swelling with deformity when on examination there was only a bruise to the ankle; and the diagnosis made was that of fracture to right tibia/fibula.
- [24] In relation to Dr Ijah Thompson's report dated December 20, 2011, Counsel said that he stated that the claimant reported that she was treated for an open comminuted fracture, yet the Medical Report Form from Mandeville Regional Hospital did not describe the fracture as open or closed. Besides, Dr Ijah Thompson did not state that he had the benefit of Mandeville Regional Hospital's Medical Report Form, how then, she asked, can the claimant report that she was

treated for an open comminuted fracture? Miss Maitland also observed that Dr Ijah Thompson refers under Future Medical Care to: “Ms McLean”. Who is Ms McLean, she asks, and which aspect of the medical report refers to her and which aspect to the claimant? As to his report dated October 10, 2016, Miss Maitland said it was inconsistent with the claimant’s own evidence in that he says the claimant presented on her second visit on September 10, 2016, with a cast insitu, when the claimant said that when she went to see him on that day, she was not wearing a cast. According to counsel, Dr Ijah Thompson cannot assist the court with when and how the accident occurred.

- [25] It was submitted that the claimant should either get nothing in general damages or if any award is considered, it should be a nominal amount. But if the court is minded to do otherwise, the claimant ought to be given no more than \$1,406,112.47, for general damages, which is the updated award in **Michael Shields v Herdly Stephenson [2022] JMSC Civ 130**, which counsel argued is a good comparable authority.

Discussion and analysis

- [26] Simply put, to succeed in her claim against the defendant, the claimant must prove on a balance of probabilities that he owed her a duty of care, that he breached that duty of care and that she suffered injury as a result. All three elements of the tort must be proven.

Did the defendant owe the claimant a duty of care

- [27] In deciding whether the defendant owed the claimant a duty of care, it must first be determined whether the defendant drove his bus with registration number PD5411 inside Pine’s Plaza on November 10, 2011, and whether the claimant was part of a crowd in Pine’s Plaza that had rushed towards the bus in order to board it. The defendant has admitted that he was the person driving the bus on the day

in question, and that he drove inside Pine's Plaza. However, he says that he did not get to Pine's Plaza until around 5.30pm, there were only small gatherings inside and he did not stop to pick up any passengers. On the question whether the claimant was part of a crowd that rushed the defendant's bus, I prefer her evidence to that of the defendant. I will explain why.

[28] When commenting on the claimant's evidence during his examination in chief, the defendant said that when he drove through Pine's Plaza there were only small gatherings inside, as many persons were not left there. On cross examination he was evasive in answering the question whether any of the persons in the small gatherings inside Pine's Plaza rushed towards his bus. Instead of answering a simple question directly, his response was that no one was in his path, persons were far away from his bus, and he had no occasion to stop. In my view even that rather oblique answer is quite telling. If, as the defendant contends, he did not stop inside Pine's Plaza and simply drove through to turn around, why did he say that the persons gathered there were far away from his bus? Indeed, this would lend support to the claimant's evidence that the defendant stopped his bus some distance from where she and the other persons were gathered, and they rushed towards the bus. What is perplexing is that in his examination in chief, the defendant described the persons he saw inside Pine's Plaza as small gatherings, but on cross examination he described them as: "about one or two persons".

[29] Although the defendant's evidence is that he was unaware that his bus ran over the foot of anyone inside Pine's Plaza, he said that he first became aware that the claimant was contending that he ran over her foot the very night of November 10, 2011, as someone at the meeting told him so at about 9pm. I find this significant in terms of placing the defendant at Pine's Plaza at the same time as the claimant. If this were not so, it is difficult to see how the claimant could have told anyone on that same night, that the defendant's bus (which he admits to driving inside Pine's Plaza on the day in question) , had earlier run over her foot.

[30] I find on a balance of probabilities that the claimant was in a crowd of persons on November 10, 2011, waiting inside Pine's Plaza to be picked up to attend a JLP meeting and that the defendant's bus entered the premises and stopped at some distance from where the crowd stood. I accept the claimant's evidence that she and others in the crowd rushed towards the bus and that she stood at the door and leaned against the bus waiting for the defendant to open the door to let them in and transport them to the meeting. I can find no reason to doubt this aspect of her evidence which seems more probable than not, particularly given Jamaica's social norms and its partisan political culture. I find that in circumstances where persons were crowding and leaning on his bus, the defendant had a duty of care to all them, including the claimant, to ensure that when he drove off and out of Pine's Plaza, he did so carefully so as to avoid causing injury to any of them.

Did the defendant breach the duty of care he owed to the claimant

[31] My earlier findings that the defendant stopped his bus some distance from where the claimant and others in a crowd had gathered inside Pine's Plaza and that in stopping, the claimant and others rushed towards his bus, are important in my determination of whether the defendant breached his duty of care to the claimant. I am of the view and accordingly find that the defendant ought to have seen and did see the crowd rush towards his bus and gather at the door. I find that the defendant drove off and returned to the main road, however, in driving off and away from the crowd, he had a duty to ensure that he did so carefully, all the while keeping a proper look out, to avoid causing anyone harm. The fact that the defendant maintained on cross examination that he saw no one in his path and did not notice anyone rush towards his bus, lead me to find that in driving off his bus as he did, he had no regard for the safety of the crowd (which included the claimant), that had gathered by the bus. In my view therefore, he breached the duty of care that he owed to the claimant.

Did the defendant's breach of duty cause or substantially cause the claimant's injury

[32] The dictum of Harris JA in **Glenford Anderson v George Webster [2012] JMCA** (supra), cited by counsel Miss Green, restates a fundamental principle in the law of negligence. In short, the defendant's lack of care must be shown to cause or substantially cause the loss or damage suffered by the claimant. Put another way, there must be a causal connection between the defendant's breach of duty and the claimant's loss. To assist me in ascertaining whether the defendant's breach of his duty of care, caused or substantially caused the claimant's injury, I must look to the medical evidence. I approach my analysis of the medical reports of Dr Errol Thomas and Dr Ijah Thompson, bearing in mind that in assessing expert evidence, a court should determine the weight to be placed on different aspects of the expert evidence and the assistance to be derived from it, but ultimately must reach its own conclusion.

[33] I agree with many of the concerns raised by Miss Maitland, in relation to the Medical Report Form from the Mandeville Regional Hospital. Firstly, it cannot assist me in determining when the claimant presented at that facility, because no such date appears in the report, despite the document indicating that information came from the patient's records. I do not know from this report whether the claimant presented on the night of November 10, 2011, or for that matter five years later.

[34] Secondly, I understand from the report that the claimant informed the medical team on presentation that she fell while trying to board a bus on November 10, 2011, and that she complained of: "swelling with deformity to same". But the report does not state what the claimant said was swollen and deformed. When the claimant was asked at trial by the court, what she meant when she stated in her witness statement that her right leg is deformed, she said the leg is a little bit bent and makes her walk with a limp. She however said that she had never informed any doctor of the deformity and only raised it because she was asked by me. In fact, Dr Ijah Thompson's report makes no mention of any limp or other deformity.

- [35]** Thirdly, on examination, the claimant was found to have a bruise to the ankle, and a diagnosis was made of a fracture of the right tibia/fibula. But there is no indication that any x-rays were done before the diagnosis, even though the claimant's evidence is that an x-ray was done. Fourthly, if the claimant's broken bone had protruded through the skin as she contends, why was this not observed on examination and referred to in the report? Such a fracture ought to have been patently obvious to the doctors and nurses treating her. No mention was made in the report of the fracture being open comminuted. Moreover, the treatment given to the claimant is said to include cleaning and dressing of a wound, yet no wound was found on examination, only a bruise. If the bone had fractured and protruded through the claimant's skin as the claimant said it did, why did the hospital send her home to return the following day for a cast to be placed on her leg? With such an injury, one would expect that there would have been some surgical procedure to treat the wound and stabilise the broken bones.
- [36]** I find that the Medical Report Form from the Mandeville Regional Hospital raises more questions than it offers answers. I do not find it to be helpful. It certainly does not assist me in determining the nature and extent of the claimant's injuries and whether those injuries were because the defendant's bus ran over her foot on November 10, 2011, as she alleges.
- [37]** Dr Ijah Thompson in his first report which is dated December 20, 2011, states that the claimant reported that she was taken to hospital where she was treated for an open comminuted fracture to the right tibia. I agree with Miss Maitland's observation that what is striking about this statement is that Dr Ijah Thompson does not say that he had the benefit of the medical report from Mandeville Regional Hospital, which in any event, made no mention of the claimant being treated for an open comminuted fracture of the tibia. How then was the claimant able to tell him about such a treatment?
- [38]** One of Dr Ijah Thompson's findings in his December 20, 2011, report is an above knee cast insitu. This means that when the claimant presented to him on

November 22, 2011, she was wearing an above knee cast. I understand the doctor's report to go on to say that investigations by x-ray revealed a fracture of the right tibia. This is peculiar for two reasons. Firstly, he did not say that he saw the medical report from Mandeville Regional hospital, which, in any event, did not indicate that any x rays were done, and secondly, how could he have had an x-ray done when he says the claimant presented with an above knee cast insitu? Furthermore, how could he assess the claimant with a healing open comminuted fracture when she presented with an above knee cast insitu? These questions lead me to seriously doubt his diagnosis of the claimant's injury as being serious with the risk of permanent impairment. As if these anomalies were not enough, Dr Ijah Thompson wraps up his medical report on the claimant, by stating that "Ms McLean may need at least 6 sessions rehabilitation physiotherapy . . .". Who is Ms McLean? No explanation was given for the inclusion of her name in the doctor's report. As Miss Maitland posited, how much of this report relates to the claimant and how much to one Ms McLean? In the end, I find Dr Ijah Thompson's report dated December 10, 2011, manifestly anomalous and I cannot place any weight on it.

[39] Five years after his first report, Dr Ijah Thompson in his second medical report dated October 10, 2016, states that the claimant visited him for a second time on September 10, 2016, at which time she presented with an above knee cast insitu. This finding is remarkably inconsistent with the claimant's own evidence that on this visit she was no longer wearing a cast. It is also blatantly inconsistent with his own assessment of the claimant on that very date of second presentation, as having a healed fracture to right tibia with residual swelling and pain to her right foot. Both things cannot be true. I find Dr Ijah Thompson's second report patently unreliable in its inconsistency on the material issue of the claimant's alleged injury.

[40] Turning to the claimant's own evidence as to her injury, I find her lack of recall on important issues in her own personal injury claim quite striking. She could not for example, recall whether she was referred to physiotherapy and whether she in fact did any. In her amended particulars of claim filed in July 2018 and in her witness statement made on August 16, 2022, she refers to and relies on the medical report

of Dr Ijah Thompson dated December 20, 2011, in which he said he referred her to physiotherapy. Yet, she could not recall at trial in 2023, whether she was referred to physiotherapy or whether she in fact did any. I would have expected her to have some recollection of these matters.

[41] Dr Ijah Thompson said the claimant only visited him twice. On November 22, 2011, and on September 10, 2016, but the claimant could not recall whether she had in fact returned to him one month after she saw him on November 22, 2011. Given the type of injury she alleges she suffered and given her ability to recall details of the events at Pine's Plaza on November 10, 2011, I would have expected her to recall whether she returned to see Dr Thompson in one month of seeing him on November 22, 2011. The claimant could not remember how long she wore a cast, but said it was for more than one month, but she could recall that she was unable to walk for seven months. I am struck by the fact that she could specifically recall that she was unable to walk for seven months but could not recall how long she wore a cast, and whether she did any physiotherapy. It is also befuddling that on cross examination, she could not recall when she stopped attending clinic in Mandeville and did not know that she should have stated in her witness statement that she had attended clinic on account of her injury. It is equally baffling that the claimant's explanation for not bringing to court any receipts for prescription medication she allegedly received at clinic, is that she did not know that she was to provide them, yet she provided and exhibited receipts for the cost of Dr Ijah Thompson's medical reports and consultations, and a receipt for the report from the Mandeville Regional Hospital.

[42] Given the state of the evidence, I am not satisfied on a balance of probabilities that the claimant suffered the injury she alleges as a result of the defendant's bus running over her foot on November 10, 2011. There are too many anomalies in the medical reports for me to place any weight on them, and the claimant's own evidence in relation to her alleged injury is not credible. So, while the defendant owed the claimant a duty of care and breached that duty in the manner in which he drove his bus away without regard for the safety of the crowd nearby, the

claimant has not proven, on a balance of probabilities, that the defendant's breach of duty caused or substantially caused the injury she alleges that she suffered. The third element necessary to establish that the defendant is liable in negligence has not been proven.

Conclusion

[43] In the circumstances, I make the following orders:-

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

A Jarrett
Puisne Judge