

17/01/08

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

**CLAIM NO: HCV 01032 OF 2006**

<b>BETWEEN</b>	<b>ERRO WALTERS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>NATIONAL COMMERCIAL BANK JAMAICA LIMITED</b>	<b>1<sup>st</sup> DEFENDANT/ ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL</b>	<b>2<sup>nd</sup> DEFENDANT ANCILLARY DEFENDANT</b>

HEARD: February 2 and 3, 2009 and April 3, 2009

**Negligence: liability and balance of probabilities; ancillary claim by defendant; whether damages have been proven by claimant; No Case submission by defendant. Need to elect in making no case submission; costs; reasonable cost order in the circumstances of particular case.**

Maurice Frankson, Esq. instructed by Gaynair and Fraser for the claimant; Ms. T. Reid and Ms. Taneisha Watkins instructed by Vacciana and Whittingham for the 1<sup>st</sup> Defendant/Ancillary Claimant; Ms. L. White and Ms. T Dickens instructed by the Director of State Proceedings for the 2<sup>nd</sup> Defendant/Ancillary Defendant.

**ANDERSON J.**

1. In September 2004, Erro Walters, ("the claimant") was a district constable working with the Jamaica Constabulary Force. In the cool quiet early morning, on the first day of that month, at about 5 a.m., the Claimant was a passenger in the rear seat of a police service vehicle, a Toyota Corolla motor car, the property of the Government of Jamaica, which was being driven by Constable Creaton Davis ("Davis"). The car was proceeding in a generally southerly along the Old Hope Road in the vicinity of Downer Avenue, in the Parish of St. Andrew when there was a collision with a Toyota Hiace minibus owned by the National Commercial Bank Jamaica Limited, the 1<sup>st</sup> Defendant/Ancillary Claimant, and driven by one of its employees, Richard Barrett. Regrettably, the Claimant is unable to say how the accident happened. Insofar as that issue is concerned, the Claimant merely says that he was in the car along with Assistant Commissioner of Police, Keith Gardner, and the driver Davis. He recalls that as the car proceeded towards the office of the mobile reserve in the Cross Roads area, he heard

when ACP Gardner shouted "Look out". He does not remember anything after that until he woke up in the University Hospital of the West Indies at Mona. He is therefore unable to say what happened.

2. The direct evidence of what took place came from Davis and ACP Gardner for the 2<sup>nd</sup> defendant and Mr. Richard Barrett for the 1<sup>st</sup> Defendant/Ancillary Claimant. The Claimant witness statement was admitted into evidence as his evidence in chief and he gave oral evidence of expenditure he had incurred as a result of his injury. The Claimant then closed his case.

3. At the close of the Claimant's case, counsel for the 1<sup>st</sup> defendant having elected to rest on her submission, submitted that it should not be required to state a defence to the claimant's claim as it had not been identified or implicated by any evidence in the claimant's case. In light of that fact, then notwithstanding Mr. Frankson's attempt to suggest that Res Ipsa Loquitur applied, there had been no such pleading and the application was upheld.

4. Notwithstanding that the court had acceded to the submission of no case by the 1<sup>st</sup> Defendant/Ancillary claimant the ancillary claimant still had to pursue its case against the 2<sup>nd</sup> defendant. It called as its witness, a Richard Barrett the driver of the Hiace bus owned by the 2<sup>nd</sup> defendant. It was his evidence that as he proceeded along Old Hope Road in a southerly direction and was about to make a right turn onto Downer Avenue from Old Hope Road, he was hit in the right side by the police vehicle driven by Constable Davis. According to the witness, he had checked his mirrors and had put on his indicator to show that he was going to make the turn. However, the police vehicle still collided in his side. Mr. Barrett testified that he was aware of the valuation reports done on the damaged hiace bus and that the repairs had been carried out. However, it is not clear that the evidence which was contained in his witness statement as to the repairs and the payment as well as the name of the insurance company, are not hearsay and I will disregard it for the purposes of this judgment.

5. Under cross-examination by Miss White for the Attorney General's Department he admitted that he had not put in his witness statement that he had checked his mirror before making the turn. This may be of some significance as it is clear that there is a duty on the driver of a vehicle as he turns right into a side road to check to make sure that it is safe to do so. The witness was shown a copy of the statement that he had given to the police and accepted that in some parts it was inconsistent with the witness statement which has now been tendered as his evidence in chief. He insisted that the statements in his witness statement were correct although he gave the statement to the police with a matter of a few hours after the accident.

6. Constable Creaton Davis gave evidence on behalf of the 2<sup>nd</sup> Defendant/Ancillary Defendant. He stated that as he proceeded along Old Hope Road he came upon the hiace bus which was ahead of him by about two (2) car lengths. He said that he followed behind the bus for a while as he was in no hurry to get to his destination. He stated that when he was going to overtake he put on his right indicator lights, and while he was overtaking the hiace bus swung sharply to the right having moved over to the left at first and he, despite his best efforts, could not avoid colliding with the right side of the hiace bus.

7. **Submissions by Counsel**

Mr. Frankson for the claimant suggested that given the evidence, it was fair for the court to infer that the accident was caused by the police vehicle overtaking the hiace bus in an improper manner. He further submitted that the accounts of the accident as given by the driver, Constable Davis and by the passenger ACP Gardner were inconsistent with each other and that the evidence of the Assistant Commissioner should be believed. He suggested that the court should reject the evidence of Constable Davis that he drove along at about two car lengths behind the motor bus from the Shell gas station down to about a chain from Downer Avenue when he decided to overtake the hiace bus. He further submitted that in any event to overtake at the road junction formed by Downer Avenue meeting Old Hope Road was unlawful. Accordingly, it is fair to infer that Constable

Davis was negligent in seeking to overtake at the junction and so the Attorney General, whose agent he was, should be held liable for this negligence.

8. Counsel for the Attorney General, in her submissions, pointed out that there was a real inconsistency between the statement of Richard Barrett to the police in his report of the accident which he signed at Half Way Tree police station a few hours after the accident and his witness statement. It was noted that he was insistent that it was his witness statement which was the accurate account. In the statement to the police he said: "I was travelling along Old Road heading towards Cross Road. Upon reaching the intersection of Downer Avenue and Old Hope Road, I intended to turn onto Downer Avenue when I saw a vehicle coming off Downer Avenue. I swing left and then put on my indicator to turn right to go on Downer Avenue when I feel an impact on the vehicle at the back wheel. The bus come to a stop I then realized that a police car ran into the back of the vehicle."

9. It was submitted that it is clear from this account that the version in the witness statement and in his answer to cross examination in which he denied turning to the left before turning to the right is glaring inconsistency and destroys the credibility, if any, of this witness. It was accordingly submitted that Mr. Barrett did not check the rear view mirror as it is inconceivable that he would not have seen the police vehicle behind him with, according to ACP Gardner, its flashing beacon lights flashing.

10. Counsel for the 1<sup>st</sup> Defendant/Ancillary Claimant submitted that Mr. Barrett should be believed when he says that he had put on his indicators but that the police car, in negligently overtaking the bus, collided with his right side. On the 1<sup>st</sup> Defendant's case it was a matter of credibility and the witness Davis should not be believed. Barrett, on the other hand should be believed in preference to both Davis and ACP Gardner.

#### 11. Court's Reasoning

The evidence on all three sides is far from convincing and I have wrestled with the implications of that fact. Insofar as the claimant is concerned the he is in the worst

position in so far as any evidential assistance to the court may be available. In any event, his case against the 1<sup>st</sup> Defendant has already been dismissed on the no case submission.

12. It must be remembered that the burden of proving on a balance of probabilities is on and remains with the Claimant. The question which is out standing as between the Claimant and the second defendant is whether he has established his case on a balance of probabilities against that defendant. Mr. Frankson, in his closing submissions, asked the court to draw certain inferences from the evidence of witnesses. He suggested that the police car was overtaking at a road junction and that this was in breach of duty and the Road Traffic Act. There was, however, no real evidence as to where precisely the overtaking took place. There was no evidence of any measurements by anyone, nor was any oral evidence given before me to determine where exactly the impact took place in relation to the intersection

13. The evidence of the witness, Assistant Commissioner of Police Gardner was probably the most convincing and leaves me in some doubt as to whether the Claimant has established a factual basis for his claim. He was firmly of the view that the driver of the police car, Constable Davis, was not speeding and that he had put on his indicator when he was going to overtake. He also gave evidence that the beacon lights on top of the service vehicle were on and that should have given notice to other road users of the presence of the police vehicle. It was his evidence that the Hiace bus made a sudden turn to the right to go into Downer Avenue and that Constable Davis was not driving too fast but could not avoid hitting the bus.

14. I regret that on the evidence before me I cannot say that on a balance of probabilities the claimant has established his case against the 2<sup>nd</sup> Defendant.

15. I still have to consider the case of the 1<sup>st</sup> Defendant/Ancillary Claimant against the 2<sup>nd</sup> Defendant/Ancillary Defendant. Given the very serious inconsistency between the statement which the driver of the Hiace bus gave to the police and his witness statement,

I do not feel able to hold that the ancillary claim against the 2<sup>nd</sup> Defendant/Ancillary Defendant should succeed on a balance of probabilities.

16. In the result, I also find for the 2<sup>nd</sup> Defendant/Ancillary in the ancillary claim.

17. As far as costs are concerned, I would order that each party bear its own costs.

18. Finally, I would strongly urge the 2<sup>nd</sup> Defendant/Ancillary Defendant to consider making an ex gratia payment to the Claimant who was injured while he was on duty in the service of the state. At the very least consideration should be given to defraying the cost of the medical and other expenses which he has borne out of his own resources.

ROY K. ANDERSON  
PUISNE JUDGE  
APRIL 3, 2009