[2021] JMSC Civ. 151.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 01388

BETWEEN	**VINNETT WHITE**	**CLAIMANT**
AND	**SANDRA BROWN**	**1ST DEFENDANT**
AND	**PAUL STEPHEN GREY**	**2ND DEFENDANT**

IN OPEN COURT

Ms. Monique Thomas instructed by Bignall Law for the claimant

Ms. Raquel Dunbar instructed by Dunbar & Co for the first defendant

Heard: June 23 & 24, 2021 and September 21, 2021

Negligence – whether breach of duty of care- whether damage or injury to claimant – whether claimant can rely on particulars of negligence not pleaded – rule 8.9A of the Civil Procedure Rules – whether doctrine of res ipsa loquitur applicable – inevitable accident.

PETTIGREW-COLLINS J.

THE CLAIM

[1] The claimant filed her Claim Form and Particulars of Claim on the 19th of March 2014. She is seeking damages for negligence as a result of a motor vehicle accident which occurred on the 16th of April 2012 along the Eden Bower main road in the parish of St. Ann. She claims that she suffered injuries, loss and damage when the motor car she was travelling in collided into an embankment.

[2] The following matters are not in dispute:

- That the motor car in question was owned by the first defendant and driven by the second named defendant.
- That the claimant was a passenger in the motor car.
- That the second defendant was not served in the claim.
- That there was an incident on the day in question when the motor car was travelling up hill and then rolled backward down a steep hill and came to a stop into an embankment.

[3] The claimant particularized the negligence of the first defendant and also relies on the doctrine of res ipsa loquitur. The particulars of negligence will be set out at a more appropriate juncture.

THE DEFENCE

[4] The first defendant denied the particulars of negligence and stated that Mr Grey was driving the motor vehicle at a safe and reasonable pace uphill, and that the vehicle developed mechanical problems and lost power whilst travelling uphill. According to the first defendant, the vehicle ran backwards and the driver was forced to bank it into the right embankment. It was also averred that the vehicle was regularly serviced and maintained. The first defendant further alleged that the collision with the embankment was the most reasonable action that Mr Grey could undertake based on the circumstances in which he was placed, and he used all reasonable care and skill to stop the vehicle from continuing to roll downhill. Further, the defence continued, it was a minor collision and none of the occupants of the vehicle were injured. The medical report of Dr. Minott was objected to, and the particulars of injuries were denied.

[5] The second named defendant appeared as the witness of fact for the first defendant. The first defendant has not denied that he was her servant or agent who was acting in the course of his employment. The case will proceed on the assumption that he was her servant and he was acting in the course of his

employment. It is trite law that where an employer/employee relationship exists, the employer is liable for the tort of the employee where the tort is committed during the course of the employment. Therefore, since Mr Grey was acting in the course of his employment transporting passengers for hire, if he is found to be negligent, Ms Sandra Brown will be held liable for his negligence.

THE ISSUES

[6] The main issue is whether the claimant has established on her pleaded case that the first defendant was in breach of her duty of care towards her and whether there was any resulting damage or injury to her. There is also the question of whether the claimant may be permitted to rely on particulars of negligence not pleaded. The court must also consider whether the claimant's reliance on the doctrine of res ipsa loquitur is appropriate and whether the defence of inevitable accident is sustainable. There will be no separate discussion of the issues.

THE DECISION

[7] The claimant has failed to prove all the necessary elements of negligence against the defendant. Her reliance on the doctrine of res ipsa loquitur is not appropriate in this case.

THE CLAIMANT'S EVIDENCE IN CHIEF

[8] The claimant's evidence in chief is embodied in a witness statement filed on the 5th of February 2021. She stated that on the 16th of April 2012, she was a passenger in the rear of a motor car registered PE 2007 travelling from Ocho Rios to her home in Snow Hill in the parish of St. Ann. She said the vehicle drove along the Eden Bower main road and was travelling uphill when at a certain point, it stopped. According to her, there was a pause and then the vehicle started going backwards. She stated that the driver seemed to have lost control of the vehicle and could not stop. She said the vehicle continued in a backward direction and the right wheel of the vehicle fell into a cement 'carving out' or gutter along the

embankment. It then slammed along a stump which was right along the gutter and that is how the vehicle managed to come to a stop. She said when the vehicle hit the stump, she was thrust forward and slammed against the seat in front of her. She stated that she immediately felt discomfort. She stated that all the passengers exited the vehicle and there was a lot of commotion. She said further, that nobody called the police and the other passengers left the scene on their own.

[9] Ms White also stated that she was in significant pain by later in the evening and had problems sleeping. According to her, her back was tight and she experienced sharp pains and her neck was stiff and painful. She said the following day she went to the police station and made a report and while at the station, the driver of the vehicle came there.

[10] It was also Ms White's evidence that she was treated by Dr. Minott and given pain medication and muscle relaxant. She stated that at the time, she was self-employed operating a shop and that the back pain that she experienced resulted in her having difficulty standing for long periods. She said that as a result, she had to employ an assistant to help with the running of the shop. It was her evidence that she has been paying $7,000 weekly to that assistant.

[11] It was her further evidence that at the time, she had a 5-year-old son and she was unable to do the washing and cooking because on the occasions that she did, she experienced a lot of pain. She said bending, lifting and stooping resulted in pain. According to her, she eventually employed someone who came on a fortnightly basis to do the washing and cleaning. She said she paid $5,000 per fortnight for the service and that that arrangement continued until the time she gave her statement.

[12] Ms White said that Dr Lawson managed her pain and he referred her to physiotherapy which was done at Total Rehab. She stated that she did six sessions of physiotherapy but the pain returned after she did the sessions.

According to her, she took a taxi to each physiotherapy session which cost $1,600 per round-trip.

THE EVIDENCE IN CHIEF DEFENDANT'S WITNESSES

[13] Mr Paul Grey was the driver of the motor vehicle in question at the time of the incident. His evidence in chief is contained in a witness statement filed on the 4th of February 2021. He stated that the claimant was one of three individuals in the rear of the motor car and that she was seated in the left back seat of the car. He stated that while going uphill, the motor car suddenly shut off. It was his evidence that the brake immediately became 'tough' and that he experienced difficulty bringing the car to a stop. He said the car started rolling back down the hill and he had to 'bank' the car. By that I understood him to mean that he steered the car into the embankment in order to stop it. He said that if he had not done so, the car would have gone over either the precipice to the left or the precipice behind him. He stated that after the passengers left, he called his mechanic and he had to get a truck to move the car to the garage.

[14] Mr Grey stated that after the accident, he saw the claimant who is someone he knew quite well, walking around. He said that she lives about two miles from where the incident occurred. It was also his evidence that after the incident, he never saw the claimant's shop closed. He would see her frequently going about her business in the years after the accident. He said he observed that she "walked up and down like any normal person and showed no signs of pain or being unable to move around."

[15] Mr Marlon Miller also gave evidence on behalf of the first defendant. He stated in his witness statement that he is an auto mechanic who has been working on motor vehicles for over 14 years. It was his evidence that he has completed Level 1 NVQJ training with the Jamaica German Automotive School in 2006 and that he commenced the level 2 programme. He was employed to two different car

dealerships between 2007 and 2016. He went on to explain that he did not examine the vehicle that was being driven by Mr Grey at the time of the accident.

[16] According to Mr Miller, when servicing a vehicle, the timing belt is not something that is routinely checked at every service, as there is no need to do so. He went on to explain that the belt is made from rubber like material and is an internal engine component, located at the front of the engine, and it operates to rotate the engine cam and crankshaft in sync, in order to ensure that each cylinder fires at the appropriate time. He said that the heat from the engine will affect the belt overtime and when the belt breaks, the engine will cease to work and the vehicle will not be able to move. He continued that a timing belt can break without any prior warning or indication to the driver. He also stated that if a vehicle is being driven up a grade and the timing belt breaks, the vehicle could run backwards, as the engine would not be able to turn over or ignite and so would not be able to propel forward. He pointed out that once the engine shuts off, the brake would get very hard to depress.

THE LAW

[17] It is now trite law that in order to establish negligence, a claimant must show that a duty of care was owed to her by the defendant, the defendant has breached that duty and that breach has resulted in damage which is not too remote. I adopt Ms Dunbar's submission that in order to determine whether there is a breach of that duty of care, the court considers whether or not a reasonable man placed in the position of the defendant would have acted as the defendant did. The court looks at the risk factor, mainly the likelihood of harm, seriousness of injury that is risked, importance or utility of the defendant's conduct and the cost and practicability of measures to avoid the harm.

[18] It is also the law that all users of the road owe a duty of care to other users of the road. A driver is required to exercise reasonable care in order to avoid injury or damage to other road users. Reasonable care as it relates to driving, is the care

which an ordinary skilful driver would exercise in the circumstances. Such care of course includes, keeping a proper look out and observing all the rules of the road.

[19] The defendant relies on the defence of inevitable accident. In the case of **Administrator General for Jamaica (On behalf of the Near Relations and Dependents as Representative Claimant for the Estate of Mark Henry, Deceased) v Lloyd Lewis and Urline Lewis (also known and referred to as Eriene Lewis**, [2015] JMSC Civ. 116, F. Williams, J. examined the defence and its applicability to that particular case. He relied on the following excerpt *from* **Charlesworth & Percy on Negligence,** seventh ed. page 196 paragraph 3-84 to 3-85 for a definition of the concept:

> *"**Generally**, in an action, based on negligence, it is open to a defendant to establish that there was no negligence on his part, in which event he will then succeed in defeating the claim. Where the facts proved by the plaintiff raise a prima facie case of negligence against the defendant, the burden of proof is then thrown upon the defendant to establish facts, negativing his liability, and one way, in which he can do this is by proving inevitable accident.*
>
> ***Meaning of inevitable accident**. Inevitable accident is where a person does an act, which he lawfully may do, but causes damage, despite there having been neither negligence nor intention on his part."*

[20] In that particular case, F. Williams J. found that the second defendant's defence could not be ruled out as a viable defence and consequently he refused to make an order for interim payment. The defence relied on was that in the agony of the moment, in an attempt to avoid a head-on collision with a negligent motorist coming from the opposite direction who overtook a line of traffic and was on the defendant's side of the road, the defendant swerved, and the deceased was struck.

[21] F. Williams J. also referred to other cases in which the concept was explored. One of those cases was **Fawkes v Poulson & Son** (1892) 8 TLR 725. In that case, the plaintiff, a boiler maker, was injured in the hold of a ship whilst working. A bale had slipped from a crane whilst it was being lowered. On appeal, it was determined that the defendants would succeed because they had established the defence of

inevitable accident since it was proven that it was practically impossible to always prevent bales from slipping.

[22] Ms Dunbar also directed the court's attention to the case of **Ng Pui and Ng Wang King (Administrators of the Estate of Ng Wai Yee and Attornies of Choi Yuen Fun and Ng Wan Hoi and Others** Privy Council Appeal No. 1 of 1988, for the proposition that "a defendant placed in a position of peril and emergency must not be judged by too critical a standard when he acts on the spur of the moment to avoid an accident".

[23] The doctrine of res ipsa loquitur allows a court to infer negligence on the part of a defendant where the claimant is able to show that the nature of the accident is such that the defendant was negligent and bears responsibility for the conduct. It has been said that the label res ipsa loquitur represents a rule of evidence rather than a principle of law and that "it is only a convenient label to apply to a set of circumstances in which a claimant proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant." Further, that the claimant only needs to show the result and not any particular act or omission producing the result. The locus classicus is the case of **Scott v London and St Katherine Docks** (1865) 3 H.&C. 596, at 601. In that case Erle J postulated that the doctrine will apply where the occurrence is such that it would not have happened without negligence and the thing that inflicted the damage was under the sole management and control of the defendant or of someone for whom the defendant is responsible or whom he has a right to control. (See **Clerk and Lindsell on Torts,** twenty second edition, (8 – 95).

ANALYSIS AND FINDINGS

[24] I have chosen not to detail the evidence which emanated from the cross-examination of each witness but I will highlight the relevant aspects of the cross-examination of each in setting out the basis for accepting the defendant's account of the incident over and above that of the claimant.

[25] In cross-examination, the claimant accepted Mr Grey's account as to how the incident occurred with relatively few variations. She accepted that the car had come to a stop whilst going up a steep hill. She however denied that she was aware that the vehicle had developed mechanical problems. It was suggested to her that she had told the doctor that the car suddenly began to have mechanical problems but she denied doing so. She agreed that there was a hillside to the right side of the road and that there was a precipice to the left. Although she initially said there was only one precipice, she afterwards agreed that from where the car had stopped, if you looked directly behind the car, the road falls off into a precipice. She insisted that the car rolled backwards, the wheel fell into a gutter like feature and that the back right wheel of the car slammed on a stump and that is what allowed the car to come to a stop.

[26] Mr. Grey however denied that there was any gutter-like feature or there was any stump. The claimant maintained that the back of the car slammed against the hillside. She was asked to point out the distance between where the car initially came to a stop and where it finally rested. She pointed out a distance of approximately 10 ft. which is consistent with the estimate of 9-10 ft. stated by Mr. Grey. The claimant also admitted that Mr. Grey steered the car to its resting place but she refused to agree that he did not lose control of the car, insisting she would not know if he lost control. This final statement is not consistent with her evidence in chief which was that the driver seemed to have lost control over the vehicle and could not stop. She also agreed that the car was travelling slowly between when it came to a stop initially and when it rolled back to where it rested. She nevertheless maintained that the car hit the hillside with force. It was also her evidence that the back of the car where the light is located was hit and the light was broken. Mr. Grey denied that the light was broken.

[27] Asked if she had mentioned anything about the damage to the car in her witness statement, the claimant said she was never asked about it. She said she could not remember if there was a small dent in the bumper of the car. When asked if she agreed that when Mr. Grey banked the car in the hillside, if he did so to save

the lives of the persons in the car, the claimant responded "I would say that." The claimant stated she could not say whether the engine was running.

[28] Noteworthy, is the claimant's evidence that the day following the incident, Mr. Grey who was with his wife in the car, picked her up in the same car, and they went to the Police Station. She explained how she had contacted him and he told her to wait at a particular spot to take her to the doctor and that he did not come and she eventually went to the doctor by herself and that Mr. Grey eventually picked her up some three-quarters of an hour later than he had agreed to pick her up and that Mr. Grey and his wife disrespected her. This aspect of her evidence is in stark contrast with her evidence in chief as contained in paragraph 8 of her statement which I now reproduce in full:

> *"I went to the station the day after the accident to make a statement because the driver and his spouse had disrespected me and wanted to take no part in paying for my medical fees or accepting liability for my injuries. The police indicated to me that it hadn't been reported as yet. While at the station giving my report, the driver came as well."*

[29] The version in the claimant's witness statement that she saw Mr. Grey when she went to the Police Station is entirely consistent with Mr. Grey's account. The claimant was cross-examined at length as to her injuries and aspects of her statement relating to her claim for special damages, in particular, the claim for $5,000 paid to someone for assisting with washing and cleaning every other week and $7,000 weekly paid to a shop assistant. She was also cross-examined as to her alleged pain and suffering. She maintained her account as given in her evidence in chief.

[30] The claimant did not at all strike me as a truthful and honest witness. My view of her was largely influenced by the internal conflicts in her evidence. Many of her responses in cross examination supported the defendants case. Mr Grey on the other hand, struck me as a truthful individual. To the extent that her evidence with regard to how the incident occurred is at variance with that of Mr. Grey, Mr. Grey's evidence is accepted and that of the claimant is rejected. I find much of her

evidence regarding her claim for special damages as well as that in support of the claim for general damages to be contrived.

[31] Another question is whether the claimant's reliance on the doctrine of res ipsa loquitur is appropriate in the circumstances of this case. The doctrine of res ipsa loquitur cannot assist the claimant. It cannot be said that the nature of the accident was such that it could not have happened if there was no negligence on the part of Mr Grey and ultimately on the part of the first defendant. In any event, Mr Grey has offered an explanation which is entirely plausible.

[32] The next matter to decide is whether based on my findings, the particulars of negligence alleged against the first defendant have been established. Those particulars are that her servant Mr Grey:

- drove at an excessive and/or improper speed.
- failed to keep any or any proper look out.
- drove without any or any sufficient consideration for other users of the road.
- failed to maintain sufficient control over the said motor vehicle.
- failed to apply brake within sufficient time or at all so as to prevent the collision from occurring.
- failed to stop, slow down, swerve, turn aside or otherwise operate the said motor vehicle so as to avoid the said collision.
- failed to keep any or any proper and effective control of the motor vehicle lettered and numbered PE 2007 he was driving.
- failed to keep the motor vehicle on a safe path along the roadway.

- drove without due care, with excessive speed, loss control and collided into an embankment.

[33] Those assertions have been contradicted for the most part by the evidence of the claimant in cross examination. It is observed that some of those assertions may have been unfounded from the outset, even based on the claimant's witness statement, for example, the assertion that Mr Grey drove at an excessive and/or improper speed. Those assertions not negatived by the claimant's evidence were determined to be unsubstantiated based on my acceptance of Mr Grey's account. The upshot of my findings as to how the incident transpired leads to the inevitable conclusion that the claimant has not proven the particulars of negligence as alleged.

[34] A question which necessarily arises must be whether negligence is established on the case as put forward on behalf of the defendant; that is whether there was negligence on account of the vehicle not being adequately serviced and assuming negligence is established, whether the failure of the claimant to plead negligence on account of the failure of the defendant to maintain the motor car in good repair is fatal to the claimant's case.

[35] Amplification of Mr. Grey's evidence as well as cross-examination of him revealed the following relevant information:

- He was the one responsible for keep and care of the motor car.
- It was the timing belt of the vehicle that broke which resulted in the vehicle becoming disabled.
- Mr. Grey's taxi route was from Ocho Rios to Pimento Walk.
- The distance from Pimento Walk to Ocho Rios is about 4 miles. He operated the taxi 5 days weekly and he would also drive the car to church.

- He would on average make 7 trips per day between Ocho Rios and Pimento Walk.

- He had been driving that particular vehicle for approximately a year prior to the accident.

- Normal maintenance of the car included checking the brakes, changing engine oil and plugs, transmission oil and filters.

- On the occasions that the car was being serviced, he would instruct the mechanic what to do.

- He had not on any of the occasions that the vehicle was taken for servicing instructed the mechanic to check the timing belt.

- On no occasion that the vehicle had been serviced or otherwise, during the period of about a year, had the timing belt been changed.

- The vehicle had given no indication of there being a problem prior to it stopping.

- He did not check the mileage on the car when it was given to him by the owner to operate, nor did he at any time check the mileage on the car.

- The car was a 1997/1998 model.

[36] Cross-examination, re-examination and questions by the court of Mr. Marlon Miller revealed the following pertinent factors.

- The timing belt in a motor vehicle is something that continuously spins once the engine is in motion.

- When the vehicle gets to a certain mileage, the timing belt needs to be checked.

- The manufacturers' suggested mileage for changing the belt varies but it ranges between 50,000-100,000 kilometres, depending on the manufacturer.

- The owner or regular driver of a motor vehicle would have the responsibility to check the mileage and therefore cause checks to be made as to whether the timing belt may be worn.

- The timing belt should be checked once per year.

- Unless there is a manufacturer's defect or the belt is improperly installed, the belt will not burst unless it is worn.

- When a belt breaks because of wear and tear, it ordinarily means that it is overdue changing.

- When the timing belt breaks, and the hand break is pulled up, the vehicle may gradually come to a stop but it depends on how the hand break is adjusted and also if the vehicle is on a hill, the gradient of the hill.

- Once the timing belt breaks, the vehicle would immediately come to a stop.

- Based on where the timing belt is located, it is not readily seen. The front engine cover has to be removed in order to see and access it.

- There is no warning mechanism or alert or anything that happens which would indicate to a driver of a motor vehicle that the timing belt is worn or is about to burst.

[37] I accept Ms Dunbar's submission that in the "agony of the moment" as events unfolded, Mr Grey took what was in the circumstances a reasonable course of action in order to preserve the safety and possibly the lives of his passengers and himself. However, was it negligence that placed him in that predicament? The defendant is seeking to rely on the fact that the evidence disclosed that there is

usually no warning and there was in fact none in the instant case, of there being any mechanical problems. Ms Dunbar posed the question of whether the ordinary driver of a car would have any reason to check on a timing belt, and observed that the mechanic gave evidence about the time period within which the timing belt should be checked from a standpoint of having specialized knowledge. She posits that it is the mechanic who should have advised Mr Grey to check on a part that had given him absolutely no indication that it was defective.

[38] The simple answer to that question is that as he did with other areas of servicing, Mr Grey ought to have instructed the mechanic to check the timing belt. Mr Grey would or should have known that the timing belt, given its 'hidden' location within the engine of a motor vehicle has to be checked periodically. It is information known to the ordinary prudent driver that the various belts used in a motor vehicle are to be checked periodically. Mr Grey cannot stand behind a screen of ignorance to say that since he is not a mechanic and has no knowledge of the intricacies of an engine and because there was no warning that the belt was defective, it is unreasonable to impute negligence to him.

[39] Ms Dunbar submitted that in any event, the claimant cannot rely on particulars of negligence that she has not pleaded. She placed reliance on rules 8.9 and 8.9A of the Civil Procedure Rules to buttress this point. Rule 8.9 (1) dictates that a claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies. Rule 8.9A stipulates that the claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.

[40] Rule 8.9A does not lay down an absolute position. Built into that rule is a discretion that the judge is able to exercise. The court should consider whether the allegation or factual argument on which the claimant is seeking to rely and which was not set out in the particulars of claim, is a matter which could have been set out there. In deciding whether permission should be given to a claimant to rely on a particulars not pleaded, the court must consider the overriding objective.

[41] One can only include in one's particulars of claim information that is available or which with reasonable diligence, could have been available. Was it a matter that was within the knowledge of the claimant that the motor car was defective or was probably defective? There is no admissible evidence before this court that the claimant was aware that the vehicle had developed mechanical problems. She denied having said that much to the doctor. The doctor's report was not allowed in evidence. That the vehicle had developed mechanical problems was a matter put before the court on the defence's case as early as the time of the filing of the defence. The claimant could in those circumstances have sought permission to amend her statement of case accordingly.

[42] It would ordinarily, in my view, be absurd to say that in circumstances where evidence put forward by the defence in support of a particular defence demonstrates that the defence cannot be sustained, that the claimant should not be allowed to rely on that very evidence to conclude that the defendant was negligent. One conceivable reason for requiring that a claimant sets out any allegation or factual argument which is being relied on in the particulars of claim is so that the defendant is fully aware of the case that he or she is require to meet. The present circumstances do not lend to the defendant being taken by surprise. I note nevertheless, that even after the issue was raised towards the conclusion of the trial, no effort was made by the claimant to seek an amendment to meet the evidence. I do not in all the circumstances believe that she should be allowed to rely on the assertion that there was negligence by omission to maintain the vehicle, when that position was very clearly disclosed on the defendant's case and there was ample opportunity to seek an amendment to her statement of case, even at the very end.

[43] Even if it is a wrong exercise of my discretion not to allow the claimant to rely on particulars of negligence, which were not pleaded, the further question of whether there was damage resulting from the breach of duty cannot be answered in the claimant's favour. The claimant, as her Attorney at Law was constrained to admit, has proven to be an unreliable and untruthful witness whose credibility was

completely eroded during cross examination. The claimant's case as to how the accident occurred was completely destroyed. As earlier observed, I do not at all accept the claimant's evidence that the vehicle came to a stop with any degree of force that led to the type of injuries she complained of. I am in fact very doubtful that she was injured at all.

[44] This incident occurred in 2012. Very early in the day, the defendant notified the claimant that the medical report would not be agreed and that the doctor would be required for cross examination. The claimant attempted to have the medical report admitted in evidence without the need for cross examination of Dr Lawson. By an order made on the 8th of June 2021, the court certified Doctor Lawson's report as an expert report and directed that it be admitted into evidence without the need for cross examination, provided that the doctor answered questions put by the first defendant in writing, by or before 10th of June 2021. These questions were in fact filed on 11th of June 2021. The doctor was required to respond to those questions within seven days. No responses were forthcoming. Having regard to the provisions of rule 32.8 (4)(b)(i) of the CPR, and the doctor's failure to comply with the order of the court, the claimant was not permitted to rely on the medical report of Dr Lawson.

[45] Because of the claimant's lack of credibility and the length of time that had elapsed between the alleged injury and Dr Lawson's first examination of her, the court thought it necessary that the doctor's evidence be tested by cross examination in the absence of responses to the questions posed. The doctor failed to attend to be cross examined.

[46] This court recognizes that the defendant did not strictly comply with the court's order to put the questions by the 10th of June 2021. However, given the short period of time that the first defendant was allowed to put the questions to the doctor and the fact that compliance was only one day late, and further that there was no sanction stipulated for the non-compliance, this court took the view that rule 26.9(3) and (4) of the CPR could be applied to cure the late compliance.

[47] It may be noted that Dr Lawson was not the first doctor that the claimant saw subsequent to the accident. She had been seen prior by Dr Minott. Dr Minott's report was ruled inadmissible in earlier proceedings. A second attempt during the trial to admit the report of Dr Minott was refused.

[48] Ms Thomas cited the case of **Curvin Colaire v Attorney General of Commonwealth of Dominica and Sergeant Philsbert Bertrand** claim no. Dom HCV 2014/0079 where the case of **Greer v Alstons Engineering Sales and Services Ltd** was referenced. That case she submitted, is authority for this court to allow an award of nominal damages where the fact of a loss is shown but the necessary evidence as to the quantum was not given. Further, that nominal damages of this kind is to be distinguished from the usual case of nominal damages which is awarded where technically, there is liability but no loss.

[49] In the **Curvin Colaire** case, a decision of the Eastern Caribbean Supreme Court, the Master awarded special damages under the head of loss of earnings in circumstances where the claimant had made a claim for 75 days but had not placed before the court evidence to justify the claim for that number of days. The Master was in the circumstances satisfied that the claimant had suffered injury and would therefore have been unable to work for some time and consequently, she awarded him loss of earnings for 30 days in the absence of a medical certificate indicating the length of time during which he was incapacitated.

[50] The case at bar is distinguishable in that the claimant has not satisfied this court on a balance of probabilities that she suffered any injury or damage as a result of the very minor impact that this court accepted took place. Quite apart from the technicalities that prevented the claimant from putting into evidence her medical reports, as observed earlier, the claimant was an unreliable witness and this court on a balance of probabilities is unable to say that she received any injuries at all. The claimant is therefore not entitled to either special damages or general damages in this claim.

[51] Based on the foregoing, judgment is entered in favour of the defendant. Costs are also awarded to the defendant and are to be taxed if not sooner agreed.

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Pettigrew-Collins, J