IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005/HCV 2258

BETWEEN	ADASSA BOLTON	CLAIMANT
AND	MAIZIE HENRY	1ST DEFENDANT
AND	DWAYNE HENRY	2ND DEFENDANT
AND	ROHAN CLARKE	3RD DEFENDANT
AND	CHRISTOPHER WILSON	4TH DEFENDANT

Mr. Ainsworth Campbell for the claimant.

Mrs. Andrea Walters-Isaacs for the defendant.

Heard: 21st and 23rd September 2010 and 1st March 2012

Negligence – Motor Vehicle Collision – Inevitable Accident – No Need for Specific Pleading Definition – Apportionment of Liability

Campbell J.

[1] The claimant, Adassa Bolton, was on the 15th March 2005 a passenger in a public passenger vehicle travelling along Passage Fort Drive, in St. Catherine. She was seated in the left front passenger seat of the 1st defendant's vehicle, which was driven by the 2nd defendant. The vehicle was headed towards Spanish Town. There was a collision with a Toyota Hiace owned by the 3rd defendant and driven by the 4th defendant.

[2] On the 22nd May 2006, judgment in default of defence was entered against the 3rd and 4th defendants, with damages to be assessed. The court heard from two witnesses at this trial, the claimant and the driver of the bus in which she travelled. It is common ground that road construction work was being done along Passage Fort Drive. The evidence from the witnesses shared much in common,

however, there were areas of great divergence. The crux of the defendant's case was "inevitable accident." In his witness statement, he had said at paragraph 4:

> "4) I was maintaining a straight course along the road, when I saw a grey and white Toyota Hiace motor truck suddenly swerving violently to his left. At this point it looked as if it was going to collide directly in a building on the left and it was apparent that the driver had lost control of the vehicle.
>
> 5) On seeing this I slowed down with the intention of assisting the wounded from his vehicle because I was sure it was going to crash.
>
> 6) All of a sudden, the driver of the bus swerved over onto my side of the road into the path of the vehicle. I tried to avoid a head-on collision by swerving to my right.
>
> 7) He then went back on to his left side of the road whereupon I swerved back to my left.
>
> 8) He collided with the front left section of my vehicle, down to the middle."

[3] Counsel who appeared for all defendants advised the court that some of the representations in the witness statement was as a result of her "misconstruing my instructions."

The corrected statement at paragraphs 6 and 7 should be;

> "The driver of the bus then swerved back to the left, when he swerved he was on a slant position across the road in front of my vehicle. It was apparent the vehicle was still out of control.
>
> 7) I tried to get out of his way by swerving to my right, rather than my left, because vehicles were parked on the soft shoulder to my left. The entire area was built-up."

The collision left him unconscious, and the vehicle was "written-off".

[4] In cross-examination, the 2nd defendant testified that he had not made a claim on the owner of Toyota Hiace. He said it was a straight road and he had first seen the vehicle with which he collided, about 4 to 5 chains away. It was coming from

the opposite direction and not in his lane. There was a line of traffic approaching him. There was no vehicle ahead of him in his line. He was trying to avoid the collision.

Claimant's Case

[5] The claimant's version was, the traffic on the roadway was regulated by two flagmen, both bearing red and green flags. The flagmen, according to the claimant, were about 10 chains apart. One line of traffic would stop to allow the other to proceed in the limited space caused by the road construction. The left hand side of the road was dug up. The vehicle she was in stopped on two occasions on the direction of the flagman. There was traffic ahead of them in their line. On each stop, the vehicles in the opposite lane would proceed. On the third stop, they were then at the front of the line. The signal to proceed was given to the line of traffic she was in and the bus started.

[6] She testified that she then noticed that there was a bus approaching. It was the only vehicle moving from the opposite line of traffic. After the signal, the claimant's driver did not drive off immediately. The approaching bus started to "zig-zag." The claimant said she did not see the cause for the bus getting out of control. The vehicle she was in had not driven off at the time she observed the vehicle out of control. According to the claimant, after waiting for a while he drove out towards the bus. The claimant's bus swung to the left, then to the right. It appeared to the witness that the buses were trying to avoid each other.

Defendants' Case

[7] On this evidence, counsel for the defendants mounted a defence of, inevitable accident in respect of the 2nd defendant. She argued it was a judgment call made, because he was placed in a dilemma. Mr. Ainsworth Campbell argued that if the 2nd defendant had not acted in the manner he did, the accident would not have occurred. Additionally, Mr. Campbell argued that inevitable accident was not pleaded.

Analysis

[8] In an ordinary case of negligence such as this, it is for the plaintiff to prove the want of care by the defendant, not for the defendant to disprove it, the defence of inevitable accident is therefore irrelevant. As the learned authors of Salmond on Torts, Fifteenth Edition, page 41, states;

> "Finally, a point of pleading should be noted-in action of trespass, inevitable accident must be specifically pleaded; but in an action of negligence, evidence of inevitable accident; or the negligence of a third party, may be given when a general denial is pleaded. It is then in substance not a separate defence but merely a denial of negligence."

[9] In **Rumbold v London County Council** (1909) 25 TlR 541, 53 SOL LO. 502, CA., where it was held in an action for negligence, the defendant denies negligence, the defendant may give evidence that the accident was caused by inevitable accident. In such a case the defence of inevitable accident need not be specifically pleaded.

[10] What constitutes "inevitable accident? " The authors of Winfield and Jolowicz on Tort, Twelfth Edition, at page 717, adopts Sir Fredrick Pollocks definition, in Torts, 15 Edn. 97, that it is an accident, "not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to take."

[11] Bingham Motor Claims Cases, Ninth Edition, at page 35 quotes a report of **McBride v Stitt**, (1944) N1 7 where Andrews CJ says:

> "Inevitable accident, was defined by Dr. Lushington in the Admiralty case of The Vigil (1843) 2 Wm Rob 201 in terms which have since received general acceptance – that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. The authors advised that omitting the word 'maritime' the definition is as applicable to the Courts of Common Law as to the Courts of Admiralty."

[12] The essence of the defence is whether the failed actions or precautions taken to prevent or avoid the accident were reasonable in all the circumstances of the case. It is clear that the definition excludes a circumstance where the cause of the accident originates with the defendant, or where he invites or volunteers himself in the unfolding circumstances. Were the actions of the defendant those that a reasonable man would have taken to avoid the accident?

[13] In his witness statement the 2nd defendant states that, having observed the bus swerve violently to his left and looked as if it was gong "to collide directly into the building," he slowed in order to tend those passengers whom he anticipated would be injured as a result of the impending crash. The vehicle did not crash into the building as he had anticipated. He did not feel threatened or placed in danger as a result of what he had observed. He took the decision to slow down and intervene. He volunteered into what was unfolding.

[14] The claimant's version is in tandem with what the defendant has raised. She testified that the bus she was in, having arrived at the top of the line, after getting the signal from the flagman, waited and then drove towards the on-coming bus. Clearly it could not be said of the defendant that his actions were directed to avoiding or preventing the accident; he volunteered into the accident on the evidence of the claimant and himself. Not only were his actions not directed at avoiding or preventing the accident, they were not reasonable in the circumstances. He testified that he "tried to avoid a head-on collision by swerving right. This would have brought him in the lane of the on-coming bus, which had corrected its position by going to its left. His reason for swerving right, according to the 2nd defendant, was due to built-up area on his correct left-side.

[15] I find for the claimant on the claim that the 1st and 2nd defendants contributed to the claimant's damage. The claimant has not contributed to the accident, but the damages are to be apportioned between the 2nd and 4th defendants. The

apportionment involves an interaction of factors, acts and omissions to be considered. This court was told that the roadway was unsatisfactory, which may have been a factor in this accident. Another factor is that the 4th defendant appeared to have acted in violation of the flagman's orders. I find that the 4th defendant was seventy percent responsible for the accident; the 2nd defendant is thirty percent responsible.

Damages

[16] The claimant's injuries included fracture of the left humerus, fracture of the olecranon process, deformity of the left elbow and forearm, undisplaced fracture of left ankle, she suffered a permanent partial disability of the left upper extremity at 33% or 20% of the whole person. Mrs. Walter-Issacs relied on **Sydney Fearon v Fred Brown**, Suit No. C.L. 1991 F132 (unreported) Khans Vol.5 pg. 9. The doctor noted the following injuries, compound transverse fracture of right olecranon, (2) fracture of acetabulum and central dislocation of head of femur (3) fracture of superior pubic ramus of right pubic bone. Laceration of 2 cm long of right elbow, (5) small abrasions to right eyelid. On the 27th April 1999, Mr. Justice Reid assessed damages at $1,250,000.00 updated it represents $4,106.415.30.

[17] Another case was **Donald Russell v Bruce Bryan**, Alder Ellis et al, on 2nd June 1999, claimant suffered fracture of left and right humerus, fracture of left patella, fracture of left pubic ramus. Damages were assessed on the 2nd June 1999 at $1,200,000, updated that represents $3,857,313. Counsel submitted that an award of $2,500,000 would be adequate.

[18] Mr. Campbell relied on **Thomas Crandall v Jamaica Folly Resorts Ltd**. The injuries were noted (1) Acute biceps tendon avulsion from left radius (2) Severe pain. Tourist, 56 years old, obese-250 lbs, he had surgery and suffered "a crushing substernal pain," a myocardial infraction. He had a permanent disability of 20%. The court found that the heart attack that he suffered was not remote.

The court assessed damages at $1,750,000.00 updated to $5,750,000.00. Mr. Campbell argued that Thomas Crandall's case was relied upon in the case of **Vivolyn Taylor v Richard Sinclair**, and according to Mr. Campbell, the award in that case was low, should have been twice as high, he invites to correct that error. Can't accede to that application because I consider the matter of Thomas Crandall in a different class of case from the instant matter. We have no serious heart issues in the instant case, and are reluctant to consider it.

I think Sydney Fearon is applicable, although more serious, and would make an award of $4,000,000.00 for pain and suffering.

[19] Loss of Earnings, in the pleadings, the claimant had alleged loss of earnings at $5,500.00 per week from the 8th April 2005 to the 17th May 2005 for a total of $77,000.00. The pleadings were not amended to support the claim for 286 weeks which was made for the first time in the claimant's written submission. That was made after the closing submissions were made by defence attorneys. An award of $77,000 is made for Loss of Earnings. For extra help, an award of $31,000. Travel of $54,000.00. Total Special damages, $189,830.00, Handicap on the Labour market, $1,000,000.00.

[20] The court orders as follows:

General Damages

Pain and Suffering $4,500,000.00
Handicap on the Labour Market 1,000,000.00

Special Damages $189,830.00

Costs to the claimant to be agreed or taxed.