[2013] JMSC Civ 142

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2001 C.L.W00074

BETWEEN	**ANNETTA WILLIAMS**	**CLAIMANT**
AND	**M & M JAMAICA LTD.**	**FIRST DEFENDANT**
AND	**LORENZO DALEY**	**SECOND DEFENDANT**
AND	**KEVIN DESOUZA**	**THIRD DEFENDANT**
AND	**THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDREA HENRY, DECEASED**	**FOURTH DEFENDANT**

Nesta Clare-Hunter and Marsha Smith, instructed by Ernest A. Smith and Company for the Claimant.

John Givans, instructed by Nicosie Dummett for the First and Second Defendant.

Roy Tomlinson is present in court as the representative of the First Defendant.

Heard: January 9, 10, 2013 and October 4, 2013

NEGLIGENCE - VICARIOUS LIABILITY - NEED TO ALLEGE PERSONAL LIABILITY - *RES IPSA LOQUITUR* - VEHICLE ACCIDENT BETWEEN CAR AND PARKED TRUCK - IMPACT FROM BEHIND PARKED TRUCK – SPEEDING VEHICLE – FAILURE OF VEHICLE DRIVER TO EXERCISE DUE CARE AND ATTENTION – NEED TO PROVE NEGLIGENCE IN A CONTEXT – CAUSATION

Anderson, K., J.

[1] In this claim, the claimant has sought redress, in the form of damages (monetary compensation), arising from a motor vehicle accident which resulted in her having been

injured and suffered financial loss. The claimant is presently forty-three (43) years of age and is a businesswoman.

[2] It is undisputed that on January 9, 2000, whilst the claimant was then travelling as a passenger in a Toyota Corolla motor car with licence number 9061BY, with that car then being driven by the third defendant as the servant or agent of Andrea Henry (deceased), whose personal representative is actually named as the fourth defendant, there was a collision between said car and a Mack truck with licence plate number – CA9352. The car collided into the rear right hand side of that Mack truck, which was then unoccupied and stationary, having earlier been parked in the location where the collision occurred. The second defendant was, at the time when the said truck was parked, the driver thereof and the servant or agent of the first defendant. The first defendant was, at all material times, the owner of the said Mack truck.

[3] The fourth defendant was never, as it transpired, served with any court process pertaining to this claim and as was made known to this court during the claimant's evidence as given while under cross-examination, a settlement was reached as between the claimant and the third and fourth defendants, whereby the claimant obtained the sum of $1.5 million as compensation.

[4] From the claimant's statement of claim, wherein, as aforementioned, it is alleged that at all material times, the second defendant was the servant or agent of the first defendant, it follows inexorably from this, that the second defendant cannot be held personally liable, arising from this claim. It is alleged that the second defendant was not acting on his own behalf as the driver of the said Mack truck, but rather, as the servant or agent of the first defendant. As such, this allegation enables vicarious liability to attach to the first defendant, in the event that this court determines that Lorenzo Daley, whilst acting as the first defendant's servant or agent, acted negligently in relation to said Mack truck and that such negligence on his part, either caused or contributed to the occurrence of the accident which resulted in injury and financial loss to the claimant. In order for vicarious liability to attach to the first defendant though, it was not necessary to have added the second defendant, as a defendant in respect of this claim.

[5] As a matter of law, the second defendant could only be held personally liable, arising from this claim, if, in the first instance, it was alleged either exclusively or in the alternative, that he acted on his own behalf and/or solely for his personal purposes when he parked the said truck, where it remained until the relevant accident involving the claimant, occurred. Following on the making of such an allegation, it could only be that if this court were to find such allegation that the second defendant acted on his own personal behalf in that respect, proven to the requisite standard, that the second defendant could then he held liable by this court personally liable in respect of this claim. Of course, if this court were to draw that conclusion, it would then mean that the first defendant could not then, properly be determined by this court, as being vicariously liable, since vicarious liability is comprised of a situation wherein an individual acts on behalf of another, or on behalf of a legally recognized entity, such as, for example, a limited company, in the capacity as an employee ('servant') or agent of another. As such, it is in general, routine practice in a case such as this, to allege that the driver of the relevant Mack truck, was acting either on his own personal behalf, or as servant or agent of the first defendant, when he parked the said truck, as, where, when and how he did. In the present claim however, the claimant has only alleged that at all material times, the second defendant was acting as the servant or agent of the first defendant.
In the first and second defendants' joint and singular defence as filed, this has been admitted. In the circumstances, the claimant's claim against the second defendant has failed in its entirety and judgment on the claim is entered in favour of the second defendant.

[6] As regards the first defendant's alleged liability though, issues of fact have to be determined by this court and the evidence as given by respective persons has had to be carefully examined by this court, for the purpose of assessing whether or not the first defendant should be held liable to the claimant, arising from her injuries and economic loss and even if so, the exact extent of such liability must also be determined by this court.

[7] It is alleged by this claimant herein, that the collision between the car in which she was being driven at the material time and the then stationary Mack truck, was caused and/or contributed to, by the negligence of the second and/or third defendant. Of course, as already set out in this judgment, if the second defendant was at all negligent in the specific respects as alleged, and therefore, either wholly caused or contributed to the occurrence of the relevant accident, as a consequence of such negligence, then the first defendant will be vicariously liable for his negligent actions and as such the claimant would thereby have succeeded in proving her claim against the first defendant to such extent (i.e. to the extent of negligence as alleged and proven in relation to the second defendant).

[8] The extent to which, if at all, the third defendant may be concluded by this court as having been careless (negligent) as alleged, in the cause of the relevant motor vehicle collision, whilst not relevant at this juncture, for the purpose of assessing the extent (if to any extent at all) of the third defendant's liability in respect of this claim, is of great relevance, for the purpose of assessing the extent, if any at all, to which the second defendant's negligence may have either caused or contributed to the relevant accident's occurrence. By extension, the assessment of that extent (if any at all), will be of critical importance for the purpose of determining whether the first defendant should be held liable to the claimant at all, in respect of her claim against them and if so, to what extent.

[9] Interestingly enough, neither the second nor the third defendant, have provided any testimony to this court in respect of this claim. This is a bit surprising to this court, especially since they would have been the best persons to tell the court exactly what they did or did not do, insofar as any such information would be pertinent to the matter at hand. Nonetheless, the claimant testified, as did Mr. Roy Tomlinson – the first defendant's equipment manager and this court has carefully considered their respective testimonies, for the purpose of rendering judgment herein.

[10] The first and second defendants are denying that they were negligent at all and in addition, are contending that it was the third defendant's negligence, which at the

very least, contributed to the relevant collision's occurrence. The very essence of the defence is that the relevant accident's occurrence, was either exclusively caused, or at least, contributed to, by the negligence of the third defendant who, as it may be recalled, was, at the material time, the driver of the car in which the claimant was then travelling as a passenger and then seated to the right side, on the back seat thereof.

[11] The precise nature of the negligence upon which the claimant's claim as against the first and second defendants is founded, has been set out in the claimant's statement of claim, which was filed on June 13, 2001 – prior to the introduction into law of Jamaica's Civil Procedure Rules. Equally too, the precise nature of the negligence on the part of the third defendant upon which the first and second defendants' defence is founded has been set out in their filed defence, which was also filed prior to the introduction into law, of Jamaica's Civil Procedure Rules, this insofar as same was filed on August 20, 2001.

[12] The first and second defendants' defence is, insofar as it alleges negligence on the part of the third defendant, as having exclusively caused and/or contributed to the relevant accident's occurrence, equivalent to what would constitute under the Civil Procedure Rules (CPR) as presently exist, an ancillary claim, seeking from the third defendant, a contribution or indemnity. The third defendant has not chosen to defend such allegations of negligence as have been made against him by the first and second defendants. As such, the first defendant's claim against the third defendant, alleging negligence on his part, in the causing of the relevant accident, if the claimant establishes liability on their part, for her loss, must succeed and then be taken as proven by default, this because, as this court was informed by the first and second defendants' counsel, during his oral closing submissions as presented to the court, their defence/ 'ancillary claim' had been served on the third defendant. It should be noted also, that, in her statement of claim, the claimant had expressly contended that at all material times, the third defendant was the driver of the aforementioned Toyota Corolla motor car and the servant or agent of the fourth defendant. In their defence though, understandably, the first and second defendants have made no admission as to same.

[13] It should be noted that the second defendant's 'ancillary claim' against the third defendant cannot succeed, even though said 'ancillary claim' was served on the third defendant. This is so because, as the same is an 'ancillary claim', it can only succeed if the claim brought by the claimant against the second defendant has succeeded to the extent whereby this court has adjudicated that said claim has been duly proven. As such, since the claimant's claim against the second defendant has, for reasons earlier provided herein, been unsuccessful, it follows, that the second defendant's 'ancillary claim' against the third defendant, must fail. The failure of same though, will carry with it, no negative consequence for the second defendant, since he had only been seeking, via that 'ancillary claim' an indemnity from the third defendant, in the event that the claimant's claim against him, had succeeded.

[14] At trial, whilst there was evidence expressly given to the court, by the claimant, as regards the third defendant having been driving the said Toyota Corolla in which the claimant was a passenger at the material time, there was no evidence given from which it could, at all, be deduced by this court, that at that time, the third defendant was driving as the servant or agent of the fourth defendant. There does not even exist, for the purposes of this claim, evidence as to the ownership of the said Toyota Corolla car.
In any event, even if such evidence had existed, it is now the law, that the mere driving of a vehicle belonging to another person, is not sufficient in law, to enable a court to affix vicarious liability upon the owner of said vehicle, arising from the negligence of the driver, which results in injury and/or financial loss. See in this regard: **Morgans v Launchbury** (H.L.) – [1973] A.C. 127. As such, it is now only for this court, to determine the extent to which the first defendant may be liable, in respect of the claimant's claim for damages for negligence, as brought against them and further, the extent to which the third defendant should be held liable to indemnify the first defendant for any loss suffered by that defendant, in the event that this court holds that defendant liable to the claimant to any extent.

[15] This court also carefully bears in mind, that the claimant has already been compensated by the third and fourth defendants, to the extent of $1.5 million, arising from a settlement agreed upon by them in that regard. This is very important because

the claimant ought not, even if the first defendant is held liable to the claimant, for damages for negligence, arising from this claim to be over compensated arising from her claim. If therefore, she (the claimant) has already received from the third and fourth defendants, the maximum sum of compensation which the court could and thus, would award to her in respect of this claim – which is now being pursued only against the first and second defendants, then no further sum can or ought to be awarded to her. This court must always be astute to ensure that its processes are not abused for the purpose of enabling a party to be over-compensated for any legally recognized wrong done to such party by another.

[16] What then, are the respective particulars of negligence as alleged by the claimant as against the second defendant and in response, by the defendants, against the third defendant? The particulars of negligence as alleged against the second defendant by the claimant are as follows:

a) Failing to keep any, or any proper look-out for other users of the road;

b) Parking without due care and attention;

c) Parking without park lights;

d) Failing to give any or any adequate warning of the presence of the unlit parked Mack truck.

[17] The first and second defendants have adopted all of the particulars of negligence as set out by the claimant in her claim, in relation to the third defendant. In addition, the first and second defendants have separately set out, in their defence, their alleged particulars of negligence on the third defendant's part. Such respective particulars are summarized below:

a) Driving at a speed which was excessive in the circumstance; and

b) Failing to keep any or any proper lookout or to have any, or any sufficient regard for others users of the said road; and

c) Failing to see Mack truck registered CA9352 in sufficient time to avoid the collision or at all; and

d) Failing to have or keep any proper control of the said motor car; and

e) Failing to stop, to slow down, to swerve, or in any other way, so to control the said motor car, so as to avoid the collision; and

f) Failing to heed and observe the presence of the Mack truck with licence plate number – CA9352 on said road; and

g) Failing to observe and/or heed the presence of the first defendant's Mack truck with licence plate number CA9352 properly parked close to its left on the said road with lights and reflectors thereon; and

h) Colliding with the first named defendant's said parked motor truck.

[18] It is solely in the context of the particulars of negligence as alleged by and against the relevant parties, that this court must determine this claim. This court also has borne in mind that the burden of proof rested on the claimant throughout the trial of this claim. There are though, circumstances in which an evidentiary burden rests on a defendant to a claim for damages for negligence, this even where such defendant is doing no more than denying the negligence as alleged against him/her, or them. This would or could only arise though, in circumstances wherein, from the facts surrounding a particular accident, as determined by a court, this court concludes that those facts raise a presumption of negligence on the part of the defendant. If that presumption is not sufficiently answered by evidence brought in response to same, by the relevant defendant, then that defendant ought properly to be held liable by the court, for damages for negligence. This court takes the view in the claim now at hand, that such a presumption applies in respect of the first defendant's claim seeking what, in essence, is an indemnity from the third defendant, arising from the relevant accident having occurred and thereby having caused injury and financial loss, to the claimant. This is therefore, an appropriate claim, in this court's mind wherein the aforementioned presumption, which is more commonly known in legal circles, as '*res ipsa loquitur*,' should be applied as between the first and second defendants and the third defendant.

The legal principles established in relation to this now long recognized doctrine of '*res ipsa loquitur'* are therefore set out, in a little more detail, further on this judgment.

[19] The evidence of the relevant parties as provided at trial, both orally and in respective witness statements has significantly narrowed down the factual issues in dispute between the parties. Thus, there exists no dispute as to when or where the accident occurred, nor even as to whether the first defendant's truck was, 'properly parked' when the vehicle crash occurred, involving said truck and the car which was then being driven by the third defendant, nor as to the fact that said truck was impacted with, by the vehicle then being driven by the third defendant, on a straight road, with no other vehicle then even in close vicinity to where the said crash occurred, either then being driven on said road, or parked anywhere nearby. It is also not disputed that the precise area of the roadway where the Toyota Corolla crashed into the rear of the first defendant's then parked Mack truck, is wide enough so that two trucks could have passed by each other, side by side. The claimant herself, during cross-examination testified to all of these things. She was the person who also testified that she is a licensed driver and that at the relevant time, the truck was, 'properly parked.' That relevant time of the occurrence of the relevant vehicle crash, was testified to by the claimant, during cross-examination, as being 4:00 a.m. Also, under cross-examination, the claimant agreed with the suggestion which was made to her by defence counsel – Mr. Givans, that at the time of the crash, the third defendant was then driving the Toyota Corolla motor car, in which the claimant had then been a passenger, at a speed in excess of 50 miles per hour (hereinafter described by the acronym – 'mph') but less than 70 miles per hour. The claimant also testified though, while under cross-examination, that the third defendant was not 'speeding' at the time when the relevant crash occurred. During cross-examination, the claimant further testified that after the crash, the car in which she was then travelling, spun one time into the bushes which were located to the rear of the relevant Mack truck. As a result of the relevant vehicle crash, according to the claimant's evidence given while under cross-examination, the car door slammed inwards and thereby caused injury to her arm. That injury and other injuries suffered by the claimant have been accepted by the first and second

defendants, as confirmed by various medical reports which were admitted into evidence at trial, as agreed documents. Those injuries are as follows – fractured arm; pain in left chest; mild localized tenderness in the upper left chest region; and pain and swelling in the lateral aspect of the right foot. At the material time, the claimant was seated in the backseat of the Toyota Corolla motor car and in the front passenger seat in front of her, was one Andrea Henry. This court heard no evidence from anyone though, at any time during the trial, as to whether that car is a left hand or right hand drive vehicle. This court therefore, has been unable to draw any conclusion in that specific respect.

[20] The claimant agreed with defence counsel's suggestion as made to her during cross-examination, that at the material time, the Mack truck was parked touching the bushes to the left hand side of the road. This court has concluded from this evidence, combined with the claimant's evidence that at said time, the Mack truck was, 'properly parked,' in that, at that time, the said truck was parked to the farthest left hand side of the road, alongside the bushes. This court is unable to conclude, from the evidence as presented before it at trial, that it was either unsafe to other road users for the said truck to have been parked at that specific location, or that it was unreasonable for the first defendant's then employee – the second defendant, to have parked the said truck, at that specific location. Clearly, from the evidence as provided to this court by the claimant, there can be no doubt that there was more than sufficient space available to the third defendant – whilst driving the said Toyota Corolla car, to have safely passed by the said truck, this especially since there were no other vehicles then either oncoming towards the car which he was driving, or parked in the immediate vicinity of where the relevant crash occurred. Also, this court accepts the claimant's evidence, that at the material time, the car then being driven by the third defendant, had on its vehicle lights, albeit that she did not know whether it then had on its high or low beam lights. That particular roadway, where the relevant crash occurred, had no lighting at that time. As such, to this court's mind, a reasonable car driver who was driving a car in that locale, at 4:00 a.m., would have ensured that such car's high beam lights were then on. If there had been an oncoming vehicle, such high beam lights could easily have been changed to low beam, so as not to either inconvenience, or temporarily blind the oncoming

vehicle's driver. That, however, was not the factual scenario with which the third defendant was faced when the car which he was then driving, crashed into the rear of the first defendant's then parked truck. No evidence has been given to this court by anyone to even remotely suggest that any vehicle was oncoming when the relevant crash occurred. Why then, could the third defendant, with reasonable care and exercise of reasonable skill as a driver, not have entirely avoided having the car which he was then driving, crash into the rear of the first defendant's then parked truck? This court will address its mind to this critical issue, further on in this judgment.

[21] There were other important aspects of evidence, provided to this court by the claimant, in response to questions asked of her by the court itself, for the purpose of clarification. During her answers to questions asked of her by the court, the claimant demonstrated by pointing out within the trial court-room, the width of the roadway where the relevant vehicle accident occurred. From that demonstration, it was agreed upon by all counsel and the court, that the distance pointed out was between fifteen (15) and twenty (20) feet. From that evidence alone, this court accepts that at the material time, the car being driven by the claimant had every means to and should have been able to have easily overtaken the first defendant's Mack truck which was then parked properly as per the claimant's own testimony. Further testimony was provided to this court, as to the exact location where the relevant truck was parked at the material time, particularly in relation to the roadway. That testimony was provided to this court by the only witness who testified on behalf of the first and second defendants, namely, Roy Tomlinson, who is the first defendant's equipment manager. The further testimony as provided to this court in that respect is considered more closely, further on in this judgment.

[22] As may be recalled, it was earlier set out in this judgment that the claimant had testified under cross-examination that after the car which was then being driven by the third defendant had impacted into the right rear of the Mack truck, it (that car), had then spun into the bushes to the back of the truck. When asked by the court what she meant when she said that the said car had spun into the bushes to the back of the truck, the claimant's response was – 'The side farthest from the side that the vehicle which I was travelling in, had hit into.' The evidence clearly indicates that not only was the third

defendant driving the Toyota Corolla motor car at the material time, at a fast speed on a completely unlit by street lights, segment of the roadway, but was doing so to the extent that, after having impacted that car into the car into the right rear of the Mack truck, the said car could not even be controlled by the third defendant and as a consequence, it then spun into the bushes to the left rear side of the said truck.

[23] The claimant was asked the following question by the court – 'What is speeding?' Her response was – 'It is when you are driving 80 miles per hour and over.' The court then asked her –'When you answered the suggestion earlier that the vehicle you were travelling in that morning was speeding, was it in the context of your understanding that 'speeding' is when one is when one is driving 80 miles per hour and over?' The claimant's answer to that question which was asked of her by the court was – 'yes.' This court must state firstly, that it was very surprised by these last two-mentioned answers of the claimant, to questions posed by the court, since the claimant is, according to her own evidence, a licensed driver. Clearly, her answers to both of the last two-mentioned questions, as were posed to her by the court, are both incorrect as a matter of law. 'Speeding' in law, arises in situations wherein a person is driving at a speed which is faster than the speed limit prescribed by law for a particular location. There is, to this court's knowledge, no single speed limit applicable to all locations within Jamaica, at all times of day or night. Speed limits vary, depending on where one is driving and also, depending on what type of vehicle is being driven by someone, at a particular date and time. Thus, for instance, the speed limit for cars is not the same as for trucks. Also, the speed limit on highways is not the same as on a road within a rural district. In the matter at hand, according to the claimant's evidence also as given in response to questions posed to her by this court, stated that the relevant accident had taken place on Dawkins Pen Road, which is located in the Lionel Town district. This of course then, is an accident which occurred on Dawkins Pen main road in the parish of Clarendon – as was alleged by the claimant in her statement of Claim. This court has regrettably, not been made aware by counsel for either the claimants or the first and second defendants, as to what was the speed limit for that road, at the material time. This court has thus, not drawn any conclusion in that regard. This court does not

believe that it is necessary to conclude as regards same, to make a final adjudication upon this claim.

[24] This court must, at this juncture though, make it pellucid that speeding is not, in and of itself, in all cases, tantamount to negligence, or even evidence of negligence. Whether speeding is to be taken as either constituting negligence in and of itself, or as even so much as constituting evidence of negligence, must always depend on the precise circumstances in which such vehicle speeding took place. See: **King v Scott** [1965] 2 All ER 588. (This being a criminal case, but the legal principles emanating from which, can and ought to be applied in a civil claim for damages for negligence, wherein vehicle speeding is an important factor to be considered). Insofar as the law surrounding the tort of negligence is concerned, this court is required to consider the relevant facts as determined by the court, contextually and entirely from an objective viewpoint, considering in that regard, what would or would not have been done by a 'reasonable man' whilst in a situation such as that which was faced by the third defendant, whilst he was driving the Toyota Corolla car along the Dawkins Pen main road in Lionel Town, Clarendon, at approximately, 4:00 a.m., this being up until just before the said impact between that car and the right rear side of the Mack truck occurred.

[25] The only witness, who testified in respect of this claim on the defendant's behalf was a 'supervisor' employed by the first defendant (see his occupation as was stated in the first paragraph of his witness statement). When he provided oral testimony to the court in respect of this claim, however, that witness – Mr. Roy Tomlinson, specifically then described his present occupation as being the equipment manager of the first defendant. It is unknown by this court though, what his occupation description was, when the relevant accident occurred on January 9, 2000. What is not in dispute though, is that on that date, Mr. Tomlinson was employed by the first defendant. This court can and does infer from his oral evidence as was provided to this court during trial, that as at the date of the relevant accident, Mr. Tomlinson was employed by the first defendant in a supervisory role.

[26] Mr. Tomlinson was not driving in, nor it seems, anywhere in the immediate vicinity of where the first defendant's Mack truck was left parked, during the night of January 8, 2000 (the night before the relevant accident occurred). He gave testimony-in-chief, that on or about January 8, 2000 at around 7:00 p.m., he had received a call from Lorenzo Daley who was then employed as a driver, by of the first defendant. The second defendant then informed him that one of the first defendant's trucks, this being the Mack truck, which has been referred to throughout this judgment, was having mechanical difficulties and that he was going to park it to the left side of the road, as it could not be driven any further. It should be noted that the aforementioned evidence as to what Mr. Tomlinson was informed of by the second defendant, was admitted as original evidence and thus, is not being relied on by this court, as proving, or even going towards proving, the truth of that which Mr. Tomlinson was then allegedly told by the second defendant. The evidence as provided to this court in that respect, by Mr. Tomlinson, is relevant for contextual purposes only. This court accepts this evidence and indeed, all other aspects of Mr. Tomlinson's evidence, as were admitted into evidence at trial, as being true. There are though very few other aspects of Mr. Tomlinson's witness statement, which were actually admitted into evidence at trial. Thus, this court has not at all considered the portions of paragraphs 4, 6, 7 and 13 of Mr. Tomlinson's witness statement, which were deleted therefrom, on the ground of inadmissibility. Those portions relate to the time of the accident. What time Mr. Tomlinson arrived at the location where the said Mack truck was parked, in relation to the time when the relevant accident occurred and also, whether there was anything that could have been earlier done, to fix the said truck.

[27] Mr. Tomlinson's evidence was only useful in enabling this court to resolve the pertinent factual issues surrounding this claim, in a few respects. His evidence as given makes it clear as to where the truck was parked when the relevant accident occurred. This court so concludes based on inferences drawn from his evidence. According to Mr. Tomlinson, when he arrived at the scene where the said truck was parked, the truck could not then be removed from there, as it needed a part to be put on it. He further testified that it was unsafe to try to remove it using a wrecker, since, when the truck was

left parked; it was filled with aggregate, or in other words, sand and different sizes of gravel. As such, the said truck was not removed, according to his testimony, 'until the Monday morning, following the relevant accident.' Of course, this court carefully notes that Mr. Tomlinson does not have first-hand knowledge, which this court could possibly accept, as to when the said accident occurred. This court nonetheless, accepts Mr. Tomlinson's evidence that said truck was removed at some time after the accident with it had occurred and that it was removed only after the first defendant had managed to obtain the vehicle part that was needed for it and thereafter placed that vehicle part in the said truck. Mr. Tomlinson gave evidence that said vehicle part was obtained on January 9, 2000, which this court takes judicial notice of, as being a Monday. Clearly, if that truck could have been driven away from where it had been left parked, why then would a part have been needed to have been obtained and placed in it, before it could have been and was in fact driven away from there? This court therefore concludes, as a matter of reasonable inference drawn from the proven facts, that said truck had been unable to be driven any further, at the time when it was left parked on the farthest left side of the Dawkins Pen main road. This court also accepts that said truck must have broken down unexpectedly, since, if its breaking down ought to have been expected, why would it then would have been loaded with aggregates and been driven with same?

[28] Mr. Tomlinson's evidence as given of photographs which he took of the said truck, which led to those photographs having been admitted into evidence pursuant to a Notice of Intention to tender same as hearsay evidence – this having been a notice in respect of which, no objection was filed on the claimant's behalf, albeit that at trial, oral objection was then made and overruled by the court, is of some value. Those photographs show that the said truck, when left parked, had reflectors at its rear. In fact, when pressed by defence counsel, on the issue as to whether the said truck had reflectors on it when it was left parked, although she initially denied that it had any reflectors on it that night, the claimant did, after having been shown one of those said photographs, concede that on the back of the said truck, there were at least nine reflectors. In re-examination though, the claimant gave evidence that those nine reflectors were not lit up at the time of the accident.

[29] There exists no evidence that when left parked, or even that when Mr. Tomlinson arrived at the location where the truck was parked, the truck's engine was then running and that its hazard lights were then on. Could the truck's engine have been left on and the truck's hazard lights left on until the next morning, at which time, no doubt, appropriate arrangements could have been made to remove the said truck from the location where it had been left parked? No evidence has been led to prove that the truck's hazard lights could have been left on until the following morning. Who had the burden of proof in that regard? Undoubtedly it was the claimant. The failure therefore, on the claimant's part, to have led any evidence at trial which was even remotely capable of proving the same, is detrimental to the claimant's claim. It is detrimental because this court is not entitled to conclude, that because its hazard lights were, as can be and is properly inferred by this court, not on at the time when the relevant accident occurred, that such means that is reasonable to expect that said hazard lights could and should have been left on at the time when the truck was last parked, prior to the occurrence of the relevant collision.

[30] As stated earlier, in assessing whether or not there was negligence in that respect, everything must always be viewed in the context of what ought reasonably to have been done, or not done (as the case may be), in the context of the particular circumstances which obtained at the particular moment in time. Accordingly, in order to determine whether the first defendant's employee – the second defendant, was negligent at the material time, in having failed to have on at the material time, the relevant truck's hazard lights, this court would have needed to know whether, notwithstanding the mechanical difficulties which this court has inferred were being experienced by the said truck at the material time and which caused the said truck to have been left parked as, where and when it so was, the hazard lights could have been left on and properly functioned. This may very well not be so, if the vehicle was having engine problems which would have made it unreasonable to have left the vehicle engine running. Equally too, it may not be so, if the said truck had then been experiencing serious electrical difficulties.

[31] The claimant has also alleged that the second defendant was negligent in having failed to give any, or any adequate warning of the presence of the unlit parked truck. The failure of the second defendant to have left on the said truck's hazard lights at the material time, although undoubtedly resulting in less warning of the then parked presence on the relevant roadway, of the said truck, is not, in the circumstances as have been disclosed to this court, proven by the claimant, on a balance of probabilities, as having been negligence which led to the occurrence of the relevant collision. It is not even proven as having been negligent at all. It has not been so proven, because, no evidence was led at trial, from which it can even be so inferred that the, hazard lights were not left on, because of carelessness on the part of anyone, much less, the second defendant. Furthermore though, not only did the claimant fail to prove any negligence at all, on the part of the second defendant and by extension, the first defendant, in respect of the failure to leave the truck's hazard lights on, but also, because she failed to prove that such failure, even if negligent, was what caused the relevant vehicle collision to have occurred. In order to prove a negligence claim, not only does that claimant need to prove that the defendant was negligent in the manner alleged, but also, that that defendant's negligence, caused the claimant physical injury or financial loss, or both, or perhaps, emotional injury coupled with personal injury and/or financial loss. See: **Blundell v Rimmer** – [1971] 1 W.L.R. 123 and 'The White Book', volume 1 [2000], at para. 14.3.4.

[32] It has also been alleged as a particular of the second defendant's negligence by the claimant that the said truck was parked without park lights on. For the same reason as earlier provided in this judgment, in relation to the failure to leave its hazard lights on, this court is unable to conclude that such failure constitutes negligence, or that any such negligence (if this court had so concluded), caused the relevant motor vehicle collision.

[33] What of the said truck's reflectors? Were they working at the material time? These are questions which this court must now seek to answer as issues of fact yet to be resolved and heavily disputed during trial. According to the evidence as given by Mr. Tomlinson, when he arrived at the location where the truck was parked, the truck was then seen by him, as having had several reflectors at the rear thereof and from what he

could then see, there was nothing hiding those reflectors. (See paragraph 8 of Mr. Tomlinson's witness statement). The claimant, interestingly enough, in her testimony-in-chief, had stated categorically at paragraph 7 of her witness statement, that there were no cones, hazard lights, or reflectors on the parked truck. As earlier mentioned in this judgment though, she conceded while giving evidence during cross-examination, that 'there were at least nine (9) reflectors on the back of the first defendant's then parked Mack truck on that night' (which this court has inferred as being the 'night' when the relevant vehicle collision occurred). The claimant also gave evidence during cross-examination though, that she never saw any light from those reflectors, or anywhere on the parked truck for that matter, at that time.

[34] The claimant also gave evidence during cross-examination, that at around the time when the relevant collision occurred, she did not see the truck before the car crashed into it. In fact, she only, according to her own evidence, saw said truck after the car had crashed into it. By then, that car would have been in the nearby bushes and no light would have been shining on the truck's back reflectors. Equally too, with there being no street lights in that location, it is entirely understandable that the claimant would not have seen any lights on the reflectors that night. This would undoubtedly have then been because, there were, at that time, no lights reflecting on those reflectors. 'Reflectors' are, as the name suggests and as is undoubtedly well known by most persons, useful in reflecting light. As such if no light is shone on a reflector, on a dark road during pre-dawn hours, it is perfectly understandable that no light would then have been seen on those reflectors. Reflectors do not operate electrically, or even with the use of an electric bulb or bulbs. They are used to reflect light and therefore, if no light is shining on a reflector, no light will be seen from any reflector. In any event, the claimant was clearly not seeing exactly what was being done in relation to the driving of the car in which she was then travelling, in the period of time immediately leading up to the exact time when the relevant collision occurred. Added to that, it is entirely understandable that the claimant would not have been particularly alert as to all pertinent matter for the purposes of this claim, in the immediate aftermath of that accident. After all, she did, as a consequence of that accident, suffer a broken arm and

well as other injuries and then began to experience pain and suffering. This must have significantly disconcerted her. There were other passengers in that car, in which the claimant was then also travelling as a passenger, who, according to the claimant's testimony-in-chief, as per paragraph 4 of her witness statement, appeared to be unconscious. Undoubtedly, the claimant was also then concerned as regards their fate. In all the circumstances, whilst his court accepts the claimant's evidence that she did not see any lights on the truck's back reflectors in the aftermath of the relevant accident, this court does not conclude from this, that this means that such reflectors were not able to or were not actually, performing their required functions at the required time. The primary functions of those reflectors would, of course, have been to warn/notify oncoming vehicle drivers on the roadway where the said truck was left parked, that such truck was then left parked there, at the material time.

[35] In all the circumstances, the claimant has failed to prove that there was any negligence on the part of the second defendant and by extension, through vicarious liability, the first defendant, which led to the causing of the relevant motor vehicle collision. In that regard, not only has the claimant failed to prove that there was any negligence on the second defendant's part in this particular case, but furthermore, has failed to prove that any act of negligence as specifically alleged in relation to the second defendant, actually caused the occurrence of the relevant accident. As earlier specified, the claimant, in order to have proven her claim, was not only required to prove that the second and thus, the first defendant, were careless, but furthermore, that such carelessness caused the relevant collision. In terms of the specifics of the negligence/'carelessness' alleged, the claimant has failed to prove either of those two required elements of her claim, those being:

i) Negligence as particularized; and

ii That such negligence as particularized, caused the relevant accident to have occurred.

This court received, during trial, no evidence from anyone, to suggest that the said Mack truck was either parked without due care and attention or that the second defendant failed to have any, or any sufficient regard for other users of the relevant

roadway. The evidence as given by the claimant, that said Mack truck was properly parked, coupled with the evidence of Mr. Tomlinson showing, by photographs taken by him, exactly where the said truck was parked, leads to this court entirely rejecting these only other two alleged particulars of negligence on the part of the second defendant.

[36] Only one other thing is worthy of mention as regards the alleged negligence of the second defendant and it is that, the claimant testified while under cross-examination that the first time, she saw the truck that 'night' - the 'night' being referred to there, no doubt, as the 'night' when the relevant collision occurred, was at around 7:00 p.m. Clearly therefore, she first saw that truck during the night, at a time when it would have been, at least, fairly dark. She further testified that she had passed that same truck 'there' (no doubt then referring to the location where it was left parked), three to four times that 'night.' She testified that she was driven past it and also, drove past it. On those occasions when she was driven past the truck, her husband was then driving her. As such, from that evidence, this court is entitled to and does conclude that said truck was not only clearly visible while parked to the farthest left side of the road, just adjoining the bushes located there at night, but also, that the said truck could comfortably have been passed by an oncoming car driver, especially in circumstances wherein no traffic was then travelling towards the direction that the car was then coming from. This all the more points to the third defendant's negligence as having been the exclusive cause of the relevant accident, but this issue is more fulsomely addressed in this judgment, in the next few paragraphs.

[37] In the case of ***Sibbles v Jamaica Omnibus Services Ltd*** –(1965) 9 WIR 56, it was held by Jamaica's Court of Appeal, that if a moving vehicle strikes a stationary vehicle which is properly parked, that in itself is *prima facie* evidence of negligence and the doctrine of '*res ipsa loquitur'* applies.

[38] '*Res ipsa loquitur'* when used on a claimant's behalf, is, as was stated by Morris LJ, in the renowned case **– Roe v Minister of Health** – [1954] 2QB 66, at p. 88, no more than a convenient way of saying that the claimant submits that the facts and circumstances which he has proven, establish a *prima facie* case against the defendant.

In other words, there are certain happenings that do not typically occur, without negligence on the part of someone. Once therefore, as in the case at hand, the Toyota Corolla car was, at the material time, under the control of the third defendant and the impact into the rear of the Mack truck, which was then properly parked, by that car, is such as could not, in the ordinary course, have occurred without negligence, then in such a case, as is the one now under consideration by this court, a presumption of negligence on the part of the third defendant, can properly be drawn by this court. Thus, once the court has drawn such a presumption, an explanation for the occurrence which forms the basis for the claim, is required from the relevant defendant. In the case at hand therefore, the failure of the third defendant to provide any evidence, coupled with the failure of the claimant to prove that any negligence on the part of the second defendant caused the relevant collision, must lead this court to conclude that it was exclusively the third defendant's negligence that caused that collision. The inference of negligence that exists against the third defendant has not, at all been displaced by him. See **Henderson v Henry E**. **Jenkins & Sons** [1970] AC 282 at p. 301, per Lord Pearson. See also **Randall v Tarrant** [1955] 1 All ER 600.

[39] This really does, on the whole, on this court's view of the facts, appear to undoubtedly be a claim which has arisen as a consequence of a motor vehicle collision which occurred solely due to the negligence of the third defendant. His negligence in that regard, was not merely that he was likely speeding, but instead, that he was, in this court's view, likely speeding on a dark road at a time when the atmosphere would undoubtedly have been dark and furthermore, at a time when he was clearly not paying careful attention while so doing. At the very least, the third defendant was surely not paying due care and attention to the relevant roadway at the segment thereof, where the relevant collision occurred. It is either that alone, or that coupled with speeding, which caused the relevant vehicle collision. This is a presumption which this court has drawn and was entitled to have drawn, in the particular circumstances of this particular case. That presumption has not at all been displaced by the third defendant nor has the claimant proven her claim against the first and second defendants.

[40] This court therefore awards judgment entirely in favour of both the first and second defendants. The costs of the claim are awarded to those defendants and such costs shall be taxed if not sooner agreed. The first and second defendants shall file and serve the required court order as regards this adjudication.

.....
Hon. Kirk Anderson, J.