[2025] JMSC Civ.97

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV00808

BETWEEN	**JASCINTH DAVIS**	**CLAIMANT**
A N D	**DELROY REID**	**1ST DEFENDANT**
A N D	**TOPENGA PROPERTIES (JAMAICA) LIMITED**	**2ND DEFENDANT**

IN OPEN COURT

Mr. Garnett Spencer instructed by Robinson, Phillips & Whitehorne for the Claimant

Mr. Glenford Mellish with Ms. Stacy Kirkland instructed by Byfield, Mellish & Campbell for the 1st Defendant

HEARD: July 16, 2025 and July 30, 2025

Tort – Negligence – Duty of Care – Breach of Duty – Nature of Duty of Care Owed – Whether Duty of Care Owed was Breached by the Defendant.

Civil Practice and Procedure – Pleadings – Particulars of Claim – Whether Claimant's Particulars of Claim Properly Set out the Nature of the Duty Owed and Properly Pleaded the Fact of Breach.

Civil Practice and Procedure – Civil Procedure Rules – Rule 8.9A – Whether Claimant set out the facts or factual allegations on which they intend to rely in their particulars of claim – Whether Evidence Presented at Court Is in accordance with the Pleaded Case – Whether Court can take cognizance of evidence of facts not pleaded.

D. STAPLE J

BACKGROUND

[1] The Claimant is a senior citizen who, based on her evidence, enjoyed taking walks in the early morning with her husband in her community. She claims that it was on one such occasion, on the 14th November 2020, that she injured herself whilst.

[2] She asserts that she was walking in the cul-de-sac in her community when she tripped and fell over some steel that was protruding in the roadway from the side of the road.

[3] In her Particulars of Claim, she claimed that the steel was negligently placed in the road by the 1st and/or 2nd Defendant and she fell as a consequence. She further asserted that she was seriously injured from the fall and incurred losses. She seeks compensation for her injuries.

[4] The 1st Defendant, in his amended defence, denies that it was he who placed the steel negligently and denies that he is liable to the Claimant for her injuries.

[5] During the course of the progress of the case to trial, the Claimant filed several witness statements to provide the evidence to support her claim. Crucially, there was no evidence from the Claimant that showed that the 1st Defendant placed the steel in such a manner which caused it to protrude. Instead, the evidence presented suggested that the Claimant's assertion now is that the 1st Defendant, essentially, knowingly caused the steel to remain as an obstruction in the roadway, resulting in her being injured.

[6] The Claimant has not, to date, amended her statement of claim or applied so to do. So, at the close of the evidence, the Claimant's case remains that it was the 1st Defendant that placed the steel in the road and his placement of the steel in the road was negligent.

[7] It is to be noted that whilst she sued the 2nd Defendant, the Claimant has not served the 2nd Defendant and so they are not a part of this claim.

[8] On July 22, 2025, the 1st Defendant filed and served an application to further amend their Defence by inserting the word "not" so that the second sentence reads, "The 1st Defendant did not place nor authorise the placing of steel on the roadway or in the bushes on the side of the road." The Court was minded to abridge time for the service and hearing of the application and I granted same. There was no prejudice to the Claimant as they did not, in my view, suffer any prejudice by the granting of the amendment. The paragraph clearly was meant to be a complete denial of the assertion as evidenced by the use of the word "nor" after place and the very first sentence which was a clear denial. They also indicated that it was a supplier that placed the steel in the road. Crucially, the evidence from the Claimant's own witness accords with this evidence.

THE LAW ON NEGLIGENCE

[9] I remind myself that it is the Claimant who must satisfy me that it was more likely than not that the 1st Defendant owed her a duty of care and that her fall and injury was the consequence of the 1st Defendant's breach of that duty to her.

[10] Lord Griffiths in the case of ***Ng Chun Pui and Ng Wang King v Lee Chuen Tat et al***[1] reminds us of the burden and standard of proof in a negligence matter. He stated at pages 3 and 4 of his judgment that:

> "*The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not*

[1] [198] UK PC 7

know in what particular respects the failure occurred…… it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established."

[11] Negligence is proven by establishing that the 1st Defendant owed the Claimant a duty of care; that the 1st Defendant breached that duty; and that the breach led to loss, injury or damage to the Claimant that was foreseeable[2].

[12] In establishing this duty of care, the damage to the Claimant caused by the Defendant's negligent act must have been foreseeable and there must exist a sufficient proximate relationship between the Claimant and the Defendant to make it just to impose this duty of care on the Defendant to the Claimant.

PLEADINGS – THEIR IMPORTANCE.

[13] It is exceedingly important for the Claimant to set out all the material facts upon which they rely to ground their claim.

[14] Rule 8.9 sets out the requirement for the Claimant to plead their case fully:

> *(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.*
>
> *(2) Such statement must be as short as practicable.*
>
> *(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.*
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> ….

[15] This is given further power by rule 8.9A which says that a Claimant cannot rely on any allegation or factual argument not set out in the particulars unless the Court gives permission.

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[2] See the case of *Glenford Anderson v George Welch* [2012] JMCA Civ 43 at para 26.

[16] The case of ***Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack***[3] is instructive. This was an appeal to the Privy Council from the Court of Appeal of Trinidad and Tobago, regarding the interpretation to be placed on provisions in the Civil Proceedings Rules of Trinidad and Tobago. That case held, speaking generally, that the claimant's duty in setting out his or her case to include a short statement of all facts relied on, meant that each head of loss the claimant was seeking to recover should be identified in the statement of case. Where that was not done, an amendment is required.

[17] The Privy Council had regard to the case of ***McPhilemy v Times Newspapers Ltd***[4] and Lord Woolf's observation that even in the new CPR era, the Witness Statement was no substitute for a properly pleaded case and that parties were required to set out a short statement of **all the facts** being relied on by the pleader.

[18] A pivotal case on this point is ***Rasheed Wilks v Donovan Williams***[5]. In that case, the Respondent (Defendant in the court below) failed to properly set out the facts in his defence that would show why the driver of his car, at the time of a fatal collision, was not acting as his servant and/or agent as asserted by the Claimant in her pleadings.

[19] However, the Defendant/Respondent, inserted in his witness statement, more detailed evidence to support his defence. Counsel for the Appellant/Claimant objected, at the trial, to the evidence on the basis that those facts were not present in the Defence. The trial judge overruled the objection and allowed the evidence to be presented and relied upon. The Claimant/Appellant appealed this decision.

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[3] [2010] UKPC 15
[4] [1999] 3 All ER 775
[5] [2023] JMCA Civ 15

[20] The Court of Appeal allowed the appeal and ordered that those aspects of the Claimant's evidence that purported to give evidence of facts not pleaded in the defence could not be relied upon and should be struck out.

[21] Edwards JA, delivering the judgment of the Court of Appeal, said as follows from paragraphs 38-40:

> "[*38] The case of McPhilemy v Times Newspapers Limited was also cited by the appellant. This case held that pleadings were not made superfluous because of the requirement for witness statements, but that pleadings were still necessary* ***"to mark out the parameters of the case being advanced by each party and to identify the issues and extent of the dispute between the parties"*** *(emphasis mine). In that regard, it said, no more than a concise statement is required. At page 793 of that case, it was said that:*
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> > *"What is important is that the pleadings should make clear the general nature of the case of the pleader."*
>
> *[39] It is clear, therefore, that although only a short statement of facts is required, a witness statement cannot be issued as a substitute for it. Although the authorities mostly deal with the inadequacies in a claimant's statement of case, the principles would, obviously hold true for a defendant's statement of case.*
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> *[40] I, therefore, agree with the appellant that the respondent having failed to plead facts or information in his defence to dispute that Mrs Williams was driving his car as his servant and/or agent at the relevant time, he cannot now seek to do so in a witness statement..."*

[22] Although the ***Wilks*** case had to do with the Defence, the same principles apply to the Particulars of Claim.

[23] A case which illustrates the application of the rule from the perspective of the Claimant is ***Vinnett White v Sandra Brown & Anor***[6]***.*** In this case, the Claimant

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[6] [2021] JMSC Civ. 151

did not plead that there was negligence on the part of the Defendant, due to failure to maintain the vehicle, and as such, she was not allowed to rely that evidence.

[24] While it was stated that one can only include in one's particulars of claim information which with reasonable diligence could have been available, the claimant would have been aware of the defendant's case as early as when the defence was filed. They could have applied for permission to amend their statement of case.

[25] In examining rule 8.9A, it was the court's view that this rule did not lay down any absolute position and left same to the discretion of the Judge. Pettigrew-Collins J went on to elaborate as set out below:

> *"[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* ***[and I would add should (emphasis mine)]*** *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*** *(emphasis mine). 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."

[26] The point from my sister is well made. In the event, she found that the Claimant had failed to establish her pleaded case and she entered judgment for the Defendants. It was the judge's findings that in addition to the fact that the Claimant did not prove her own particulars of negligence (as pleaded), she could not rely on the Defendant's servant and/or agent's own admitted negligence in failing to properly maintain the vehicle (which led to the incident) as she did not plead this as part of her case.

ANALYSIS AND APPLICATION TO CASE

What is the Claim Against the 1st Defendant?

[27] The Claimant's claim against the 1st Defendant sounds in negligence. She asserts as follows in her Particulars of Claim[7]:

"The Claimant's fall and injury resulted from the negligence of the first and/or second Defendant who placed steel in such a manner as to cause it to be present on the roadway causing the Claimant to trip and fall."

[28] So the factual assertion is that the 1st Defendant placed the steel in the road in such a manner as to cause it to be present on the roadway, causing the Claimant to trip and fall. It is asserted that the placement of the steel in the road by the 1st Defendant was negligent.

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[7] Paragraph 4 of the Particulars of Claim

[29] The particulars of this negligence of this act (the placing of the steel in the road) were set out as well:

(a) Failing to ensure that building materials were properly stored on its property.
(b) Failing to ensure that building materials did not protrude onto the roadway
(c) Failure to ensure that building materials did not pose a risk/hazard to persons who used the roadway.
(d) Placing no warning sign indicating that they had caused an unusual hazard to be on the roadway.

[30] In other words, the Claimant is saying that this act you did of placing the steel in the road, was negligent because of the things in the Particulars of Negligence.

The Actual Case Presented at Trial

[31] The case presented by the Claimant at trial is fundamentally different from their pleaded case. They have essentially asserted that the 1st Defendant should be held liable because he, knowing that the steel was dropped in a manner that would cause it to protrude in the road, did nothing to remove the steel from the road.

[32] The Claimant did not plead that the 1st Defendant did any other action or omitted to do any other thing. For example, it was never said in the particulars of claim that the Claimant's witness (Ramon Kelly) or anyone for that matter, told the 1st Defendant that the steel was dropped in such a manner as to cause a protrusion in the road but the 1st Defendant still allowed it to remain. No particulars of negligence to the effect that the 1st Defendant, "knew that the steel was dropped in a manner that caused a protrusion into the roadway, but did not instruct any or any person to remove same" was pleaded.

[33] In their further submissions, the Claimant's Attorneys-at-law, conceded that there was no evidence that the steel was placed in the roadway by the 1st Defendant personally[8].

[34] However, they sought to argue that the Particulars of Negligence was sufficient to provide the factual substratum for their claim. At paragraph 35 of the Further Submissions, they assert as follows:

> *"The "particulars" are designed to give the defendant fair notice of the case he has to meet. They provide the detailed factual basis for the claim of negligence. The overall "assertion" of negligence is the legal conclusion drawn from those facts. A claimant isn't strictly tied to proving every single "assertion" in isolation if the collective evidence establishes the elements of negligence.*

[35] The Defendant, on the other hand, asserted in his brief further submissions that the Claimant has not proven that it was he that put the steel in the road and so the entire claim must fail.

[36] The reason for this, they assert, is that the Claimant cannot rely on the factual averment that the 1st Defendant knew that the steel was dropped in a manner that caused it to protrude in the road, but did not take any or any sufficient step to remove same. He cannot rely on this averment, because this averment was not pleaded. They relied on CPR Rule 8.9A.

[37] An important corollary to this is that the Pleadings were never amended nor was there any application to amend the Claim.

[38] The Claimant submitted that the 1st Defendant admitted that he placed the steel in the roadway in his pleadings. But I reject this submission. The clear context of the paragraph in the Amended Defence was that the 1st Defendant was denying that he placed the steel in the road. The fact that the "not" was left out was not, in my

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[8] See paragraph 27.

view, fatal. Common sense and context would clearly demonstrate that the word "not" was left out in error. What is more, the Claimant did not apply for entry of judgment on admission; they also heavily cross-examined the Defendant on the issue. There would be no need to cross-examine if the admission was truly made. I find therefore that the claim of an admission on the part of the 1st Defendant to having placed the steel to be unmeritorious. There was no admission in the Defendant's pleading. In any event, they have cured this by their application to amend their defence to make the position pellucid. This application was granted.

Has the Claimant Made out their Case as Pleaded?

[39] On their pleaded case, the Claimant would have to satisfy me, on the balance of probabilities, that the 1st Defendant placed the steel in such a manner so as to cause the protrusion. They have conceded that they have not so done. Instead, they are relying on the other factual averments in the evidence from Mr. Kelly. It was Mr. Kelly that asserted that he called the 1st Defendant and told him that the vendors of the steel came to the site and dropped the steel. It was Mr. Kelly who asserted that he called the 1st Defendant and advised him that the steel was dropped and it was protruding into the road.

[40] But these facts were not pleaded and so the Claimant cannot rely on them to establish negligence. As such, I cannot and will not rely on these facts.

[41] In my view, the Particulars of Negligence is different from the pleading of facts. In other words, there are facts, and particulars of the facts. The particulars relate to the facts.

[42] The Claimant's submissions seek to put the Particulars of Negligence as separate from his pleaded fact[9]. In my view, this is incorrect. The Particulars of Negligence are connected and inextricably linked to the pleaded fact. It details why the action

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[9] See paragraph 36

pleaded was negligent. In other words, contrary to Mr. Spencer's assertion in his further submissions, the particulars of negligence are not independent facts to be proven outside of the context of the main factual assertion. They are to be proven as one.

[43] To elaborate, the Claimant is asking the court to find (among other things) (a) that the 1st Defendant placed the steel in the road and (b) that the 1st Defendant, **in the placing of the steel** (emphasis mine),

> (a) Failed to ensure that the building materials were properly stored on its property…etc

[44] In this case, the Claimant has not asserted, in the current pleadings, the facts which align with the evidence presented. Put another way, the evidence presented is at variance with their pleaded case. Consequently, they have not proven their pleaded case.

Absence of Amendment to the Pleadings

[45] According to Harrison JA in ***Medical and Immuniodiagnostic Laboratory Limited v Dorrett O'Meally Johnson***[10],

> *"…A "cause of action" has been defined as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court": Read v Brown [1888] 22 QBD 128, 131." (Emphasis mine)*

[46] "If traversed" suggests that the fact must first be pleaded. A fact cannot be traversed if not pleaded. As such the only cause of action set up in this case would be the fact of the 1st Defendant placing the steel. This fact, as I found earlier, was adequately traversed. So the issue has been joined.

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[10] [2010] JMCA Civ 42 at para 4

[47] It is important to note that the Particulars of Claim have not been amended to align with the evidence presented and there has been no application to amend the Particulars by the Claimant. The Claimant filed the witness statement of Mr. Kelly from October of 2024. Since that date they have known that there was no evidence to support their pleaded case, or they ought to have known.

[48] Since the filing of that witness statement, they have had at least 3 Pre-Trial Reviews. This presented them with more than sufficient opportunity to properly examine their pleaded case, compare it to their evidence, and determine if there was alignment, in order that they might address any issues prior to the trial.

[49] This is important as once the Particulars of Claim or Counterclaim are amended, the automatic consequence is that the Defendant (whether to the claim or counterclaim) has the right to file a defence to respond to the new case[11]. The matter would have to revert to case management so that the Defendant can reassess their case to determine if the evidence already presented is adequate for the new parameters or if they need additional evidence or if they should properly concede.

[50] As the pleading has not been amended, the case remains as it was at the close of the evidence and at the end of the second wave of submissions. We are too far down the wicket now. The cause of action remains now as it was then.

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[11] See CPR Rules 20.3(1) and 20.4(3)

CONCLUSION

[51] In all the circumstances of this case, I am satisfied that the Claimant has failed to establish her case as pleaded. There was no evidence that the 1st Defendant placed the steel in the road or elsewhere to cause it to protrude in the road. The Claimant has therefore failed to establish her cause of action against the 1st Defendant and the claim must fail.

DISPOSITION

1 The time for service of the application filed on the 22nd July 2025 is abridged.
2 Paragraph 3 of the Defendant's Defence is further amended to insert the word "not" before the word "place" in the second sentence.
3 The requirement for service of the further amended defence is waived.
4 Judgment for the 1st Defendant against the Claimant.
5 Costs to the 1st Defendant to be taxed if not agreed.
6 Defendant's Attorneys-at-Law are to prepare, file and serve this Order on or before the 29th August 2025 by 4:00 pm.

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Dale Staple
Puisne Judge