



[2020] JMSC Civ 77

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

**CIVIL DIVISION**

**CLAIM NO. 2012HCV03918**

<b>BETWEEN</b>	<b>RYAN FEARON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DESMOND WILLIAMS</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>FLOYD MAITLAND</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN OPEN COURT**

Mr Everol McLeod and Mrs Myoka Hudson-Buchanan instructed by Kinghorn and Kinghorn for the Claimant

Ms Suzette Campbell and Mrs Claudeen Stewart-Linton instructed by Burton Campbell & Associates for the Defendants

Heard: March 11 and 18, and May 15, 2020

**Negligence – motor vehicle accident – pedestrian – credibility of parties – no independent eye witness**

**LINDO, J.**

**The Claim**

[1] This is a claim in negligence to recover damages for personal injuries, loss and damage arising out of a collision between the Claimant, a pedestrian, and the 1<sup>st</sup> Defendant, the driver of motor vehicle registered PE 4653, owned by the 2<sup>nd</sup> Defendant. The accident which occurred at about 3:30 pm on December 19,

2011, took place along George Lee Boulevard in Portmore, in the parish of Saint Catherine.

[2] On July 12, 2012, the Claimant, Ryan Fearon, a bus conductor, filed a Claim Form and Particulars of Claim in which he seeks damages for negligence against the Defendants Desmond Williams and Floyd Maitland. He alleges that on December 19, 2011, he was “lawfully standing along Passagefort Drive when the 1<sup>st</sup> Defendant, the servant and/or agent of the 2<sup>nd</sup> Defendant, so negligently drove and/or operated and/or managed motor vehicle registration number PE 4653, the property of the 2<sup>nd</sup> Defendant that he caused and/or permitted the said motor vehicle to come violently into collision with the Claimant.”

[3] In the Particulars of Claim, the Claimant states, “particularly, ... lawfully standing along Passagefort Drive, Portmore, Saint Catherine ... in the vicinity of Mega Mart gas station, when the 1<sup>st</sup> Defendant caused motor vehicle registration number PE 4653 to collide into his left side...”

[4] He sets out the particulars of negligence of the 1<sup>st</sup> Defendant as follows:

*i. Driving at too fast a rate of speed in all the circumstances*

*ii. Failing to maintain control over motor vehicle registration number PE4653*

*iii. Failing to apply brake within sufficient time or at all*

*iv. Causing motor vehicle registration number PE4653 to collide into the left side of the Claimant*

*v. Failing to see the Claimant within sufficient time or at all*

*vi. Driving along the said road in a careless manner*

*vii. Failing to stop, slow down, swerve or otherwise conduct the operation of the said motor vehicle so as to avoid the accident*

[5] He also states an intention to rely on the doctrine *Res Ipsa Loquitur* at the hearing.

## The Defence

- [6] The Defence of both Defendants was filed out of time on March 12, 2013. It was permitted to stand at the commencement of the trial after the court heard and considered an application for extension of time to file the Defence and for the Defence filed to stand.
- [7] In their Defence, the Defendants admit that an accident took place, state that it took place along George Lee Boulevard, Portmore, Saint Catherine, but deny that the 1<sup>st</sup> Defendant was negligent.
- [8] They claim that the accident was caused and/or contributed to by the negligence of the Claimant. The particulars of negligence of the Claimant are stated as follows:

*“1. Failing to keep any or any proper lookout.*

*2. Failing to see or heed the presence and approach of the Defendants’ motor car*

*3. Running from between two stationary vehicles into the roadway when it was unsafe to do so by reason of the approach of the Defendants’ motor car.*

*4. Running into the path of the Defendants’ moving motor car.*

*5. Failing to ensure it was safe before entering the roadway*

*6. Failing to have any, or any due regard for his own safety*

*7. Using the roadway in a reckless and dangerous manner”*

## The Trial

- [9] At the trial which took place on March 11, 2020, Mr Fearon gave evidence on his own behalf and Mr Williams gave evidence on behalf of the Defendants. They called no independent witnesses.

## **The Claimant's Case**

- [10] The Claimant's evidence is contained in his witness statement dated November 14, 2019 which stood as his evidence in chief after he was sworn and the statement was identified by him.
- [11] His evidence is that he was walking along George Lee Boulevard in the vicinity of the Petcom gas station when he felt an impact to the right side of his body and he fell to the ground. He adds that he looked up and realized that it was a motor car and the 1<sup>st</sup> Defendant identified himself as the driver. He states further that he was assisted into the said motor car and was taken to the Spanish Town Hospital where he was treated, having sustained a fracture to his left ankle.
- [12] When cross examined by Ms Campbell, Mr Fearon said that as a conductor, he collected fares and would seek to get passengers by standing at a bus stop and ask persons if they were travelling in that direction and if they had bags he would help by taking them inside the bus. He admitted that sometimes he had to compete to get passengers and would have to 'run around' and that the accident took place on George Lee Boulevard, a 'one way' road which take you towards Waterford.
- [13] He denied that on the right was a concrete pavement where people would stand, indicating that it was dirt, but indicated that persons looking for a bus would stand there. He said the bus he was working on was stationary and was on the left side, as he was looking passengers, and that no part of the bus was on the asphalted part of the road, but it was about as close as "3 inches" to the asphalt. He said another bus was parked behind his bus and he did not know if they were looking passengers as well.
- [14] When confronted with his evidence in chief where he said he was walking...., he said he just came off the bus and went around the back to cross, and that is when the accident happened he was not crossing, but went to look, to go across. He said he saw a passenger 'over the next side' and asked her if she was going

to Spanish Town, she had more than one bag and asked him to help her, and as he was about to look, he 'get the lick on my hand and fall on my left side'.

- [15] He said when he was hit he was behind the bus, walking to help the person. He indicated that the bus, which he said was behind his bus, was about 5 yards from it (points out approx. 20 ft) and said 'is judge me a judge the distance'. He disagreed that the buses were closer than he was saying, agreed that he went between the two buses, but said he did not reach onto the roadway when he got hit. He said when he looked, his body was still behind the bus and he was facing the road towards the right side. He explained that he was between the back light and the right hand side of the bus and that the first time he saw the car which hit him was when he got the hit.

### **The Defendants' Case**

- [16] Mr Desmond Williams identified his witness statement which was filed on November 26, 2019 after declaring and affirming that he would speak the truth. The witness statement stood as his evidence in chief and he was cross examined.

- [17] He states that he was working as a taxi driver for Mr Floyd Maitland, the 2<sup>nd</sup> Defendant, and was driving along George Lee Boulevard at less than 25 kmph. He says he passed the bus stop, was travelling in the 'one way' and noticed two Hiace buses parked along the soft shoulder to his left, a few yards from the bus stop and there were persons standing on the median to his right and as he was about to pass the first bus, a man ran from between the two buses into the road and into the path of his car. He states that he immediately applied his brake to avoid him, but the left indicator side light of the car hit him and he fell to the ground. He states further that he stopped and was assisted to put him in the car and he took him to the Spanish Town Hospital.

- [18] In cross examination by Mr McLeod, he said he has been operating a 'chartered' taxi from 'roughly 2003' and was very familiar with George Lee Boulevard. He

said at that time there were about three or four people in that area and there was no bus stop there, but that bus stops were “around 120 feet”.

[19] He said he was about 25 feet from the persons he saw on the median which was to his right, and he noticed two Hiace buses on the left. He stated that he was driving very slow, as a form of precaution, as parts of the two buses parked on the side, were in the road and it gave him a smaller passage to go through. He said that the first time he saw Mr Fearon was when he “stepped in the indicator of my car” and that his taxi was very close to the first Hiace bus and he was not able to see Mr Fearon before the collision. He disagreed that he was travelling faster than 25kph.

[20] He stated that when he stopped, Mr Fearon was on the ground and he got assistance to put him in his car and he took him to the Spanish Town Hospital. He disagreed that travelling at 25 kph could have resulted in a fracture and he denied knowing that persons often cross the road in the area where the accident took place.

### **Submissions**

[21] At the close of the trial, Counsel for the parties were ordered to file written closing submissions on or before March 18, 2020. Submissions were filed on behalf of the Defendants on March 23, 2020 and up to the time of writing, no submissions were received from the Claimant.

### **Issues**

[22] It falls to be determined whether the collision was caused by the 1<sup>st</sup> Defendant; whether the Claimant caused the injuries or contributed to them and the nature and extent of the injuries suffered by the Claimant and the quantum of damages, if any, to be awarded to the Claimant.

[23] The issue of liability is primarily one of the credibility of the parties and rests in the plausibility of the accounts of the accident given by them.

## The Law and Analysis

[24] It is well settled that in a claim for negligence, in order for the Claimant to succeed, he must provide evidence to satisfy the court, on a balance of probabilities, that the Defendant owed him a duty of care at the material time which was breached resulting in damage to him.

[25] In **Glenford Anderson v George Welch** [2018] JMCA Civ 43, Harris JA stated the relevant principles applicable in a negligence claim. At paragraph 26 of the judgment, she had this to say:

*“It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a Claimant by a Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty. It is also well settled that where a Claimant alleges that he or she had suffered damage resulting from an object or thing under the Defendant’s care or control, a burden of proof is cast on him or her to prove his case on a balance of probabilities.”*

[26] All road users have a duty to exercise reasonable care for themselves and others and motorists have a statutory duty to take such action as may be necessary to avoid an accident. (**Road Traffic Act** Sec 51 (2) ) This includes travelling at a speed within the established limits, keeping a lookout for other road users and swerving.

[27] A pedestrian should not enter a roadway or seek to go across a road without first looking in both directions to ensure there is no approaching vehicle and it is safe to do so.

[28] The Defendants have specifically pleaded that the Claimant caused or contributed to the injuries sustained by him and as such they have the burden of proving, on a balance of probabilities, that the injuries complained of by the Claimant resulted from the particular risk which he exposed himself to by his own negligence.

- [29]** In arriving at my decision, I placed reliance on my assessment of the parties having examined their demeanour while they gave evidence and were cross examined. The Claimant was far from convincing. He gave evidence that he was on George Lee Boulevard at the time of the accident and was looking to step out from behind the bus when he was hit.
- [30]** On the other hand, I was impressed by the clarity with which Mr Williams gave his evidence. I found his evidence to be consistent, cogent and credible and he was not shaken in cross examination. Mr Williams said he only saw the Claimant when he stepped from between the buses and that in the circumstances, he did what was reasonable, which is to brake up and stop. I therefore find as a fact that Mr Williams was exercising the necessary skill and care required of him in the circumstances. His explanation in relation to the reason he was driving slowly is noteworthy and I have no reason to doubt him as I accept that he is an experienced driver who is familiar with the area.
- [31]** I note that Mr Fearon, in his statement of case, states that he was lawfully standing along Passagefort Drive in the vicinity of Mega Mart gas station. In his evidence in chief he said he was lawfully walking along George Lee Boulevard in the vicinity of Petcom gas station and felt an impact to his right side. He also gave evidence that he was behind the bus and was looking to cross. If that were so, the motor vehicle driven by Mr Williams would have had to collide into one or both of the parked buses.
- [32]** From my assessment of the case on a whole, I find that it is more believable that Mr Fearon ran from behind the parked bus to assist a potential passenger who was coming from the other side of the road. The material contradictions in his pleadings and his evidence in chief and the evidence elicited on cross examination, have negatively impacted his credibility. The inconsistencies are material to the issues in the case.

[33] It is the Claimant who has a duty to prove his case on a balance of probabilities and his evidence has been discredited. His evidence in chief, as well as his answers given in cross examination, demonstrate that his version of what transpired on that day cannot be relied upon, and especially in view of the fact that his evidence was not consistent with his pleadings.

[34] I find on a balance of probabilities that the Claimant is the author of his own misfortune. He had a duty to take care and to keep a proper look out and ensure the road was clear before attempting to cross. He failed to have any, or any due regard for his own safety. I came to the conclusion that his attention was taken up with getting passengers to his bus and that without due care and attention, he came out from behind the bus on which he was working and in the roadway, into the path of the vehicle Mr Williams was driving without looking to ensure that the roadway was clear. In fact, he gave evidence that he did not see the motor vehicle before it hit him.

[35] I therefore find that the Claimant is wholly to blame for the accident.

### **Res Ipsa Loquitur**

[36] The Claimant has claimed in the alternative that the doctrine *res ipsa loquitur* applies. For the sake of completeness, I note that the Claimant, in his Particulars of Claim set out particulars of negligence of the 1<sup>st</sup> Defendant and sought to give evidence as to how the accident happened, although he gave evidence which was inconsistent with his case as pleaded. *Res ipsa loquitur* therefore does not apply in this case.

### **Conclusion and Disposition**

[37] In my judgment, the conclusion that the accident was wholly caused by the Claimant's own negligence is inescapable.

There will therefore be judgment for the Defendants with costs to be taxed if not agreed.