[2017] JMSC Civ.144

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. CLAIM 2005HCV5472

BETWEEN	**CLAUDIA HENLON**	**CLAIMANT**
AND	**SHARON MARTIN PINK**	**1ST DEFENDANT**
AND	**JEREMY DAVY**	**2ND DEFENDANT**
AND	**WENDEL ABRAHAMS**	**3RD DEFENDANT**
AND	**RICHARD WILLIAMS**	**4TH DEFENDANT**

IN CHAMBERS

Messrs. Norman Hill, QC and Raymond Samuels instructed by Norman Samuels & Co. for Claimant

Mr. Ramon Clayton instructed by Samuda & Johnson for the 3rd and 4th Defendants

HEARD: September 26, 2017 and October 17, 2017

Negligence – Personal Injury – Res ipsa loquitur – Rules of the road - Road Traffic Act

WINT-BLAIR, J (Ag.)

[1] In prior proceedings, involving the named parties, judgment had been entered against both first and second defendant. In addition, an ancillary claim brought by the third defendant had been struck out. This trial proceeded only against the third and fourth defendants on the claim and has been decided on a balance of

probabilities. Most assuredly, due and mature consideration has been given to all the evidence and submissions of counsel.

[2] Rule 8.3 of the Civil Procedure Rules ("CPR"), allows a claimant to *"use a single claim form to include all, or any other claims which can be conveniently disposed of in the same proceedings".* The claimant may, join as many defendants as she desires (Rule 8.4 of the CPR).

[3] In this case, the claimant pleaded negligence against both drivers. It is for the claimant to prove facts from which liability could properly be inferred absent any explanation.

[4] This trial concerned a simple fact situation in that, the claimant had been a passenger in a minibus owned by the third defendant and driven by the fourth defendant. On March 10, 2005, that minibus registered PP251B and a motorcar registered 3788DN, owned by the first defendant and driven by the second defendant were involved in a collision. The claimant was injured. She lay blame for her injuries at the feet of both drivers, claiming that they both caused her injuries, therefore each was liable. Mr. Hill, QC asked that the court apportion liability with 60% to the second defendant and 40% to the fourth defendant. Counsel for the claimant also argued that the court should find that res ipsa loquitur applied to the case at bar.

The evidence

[5] The claimant gave evidence at trial that she had been seated behind the fourth defendant's driver's seat. That seat was raised and had a headrest but neither obstructed her view. In the vicinity of Bull Point main road in the parish of St. Ann, she could see the oncoming vehicle being driven by the second defendant. That vehicle hit the right side of the minibus behind the driver's seat where she was seated. The fourth defendant had been driving safely and had come to a stop to avoid the danger.

[6] She admitted that she set out with regards to the manner of driving of the second defendant at paragraph (c) of her amended particulars of claim the following:

> *(c) "driving along the Bull Point Main Rd. in the parish of St. Ann and operating motor vehicle lettered and numbered 3788 DN so negligently that he lost control of the said motor vehicle and collided with the motor vehicle in which the Claimant was a passenger thereby injuring her.*
>
> *(d) "failing to slow down to swerve to stop or to so control the said motor vehicle as avoid hitting the motor vehicle the Claimant was seated in."*

It is settled law that pleadings are not evidence and the claimant gave no evidence to reflect this position as stated in her pleadings either in her witness statement or at trial.

[7] The fourth defendant gave evidence in his witness statement filed on April 18, 2012, which stood as his evidence in chief that on March 10, 2005, he was driving the third defendant's vehicle towards Ocho Rios:

> *"…in the vicinity of the pier approaching a corner, the second defendant's motorcar suddenly and without any prior warning or indication, turned right across the path of the vehicle in which I was driving and on seeing the sudden manoeuvre of the said vehicle, I immediately swerved left, in an attempt to avoid a collision but I could not avoid it as the vehicles were too close. The left side of the motorcar collided into the front of my vehicle, the point of impact was on my side of the road."*

[8] In cross-examination the claimant was asked:

> *Q: When the other vehicle collided into the front of that vehicle (referring to the vehicle in which the claimant was a passenger) he (fourth defendant) was on the correct side?*
>
> *A: Yes, he came to a complete stop to avoid the danger.*

[9] These two bits of evidence would seem to indicate that Mr. Williams either swerved or stopped to avoid the collision. In the claimant's witness statement filed on April 12, 2012, which stood as her evidence in chief, she said that the second defendant collided with the motor vehicle in which she was a passenger *"whose driver failed to take any evasive action to prevent the said collision."* The

Claimant's evidence has agreed essentially with that evidence given by the fourth defendant.

[10] In cross-examination, the fourth defendant gave the distance at which the other vehicle made the sudden turn as at 60 feet away. It was suggested to him that the accident happened in the vicinity of Dolphin Cove where there is a place for parking on the left side of the road as one travels towards Ocho Rios. The witness in response said*, "I did pull off to the left and there was nowhere to park."* It was also suggested to him that the second defendant's vehicle some distance down the road had been overtaking and came onto the witness' side of the road, a suggestion with which the fourth defendant disagreed. The claimant's statement of case does not allege overtaking by the second defendant nor did she give evidence of overtaking in her witness statement or in evidence at trial.

[11] The fourth defendant in giving evidence of the manner of driving of the second defendant said:

"It came around a corner right across the road."

[12] The claimant gave no evidence of a point of impact, she was unable to situate the collision in terms of the location on the main road, gave no evidence of speeding, conditions of the road, weather, or flow of traffic. She ought to have been able to answer those questions as her evidence was that she could see clearly, however her recall and observation were not tested with these questions.

[13] The claimant did not give the specific location of the collision. Mr. Hill Q.C. in his submissions for the claimant indicated that as there was no police report in evidence the location of the accident was not a fact with which he took issue. He had however, suggested to the fourth defendant, that there was a place on the road near to Dolphin Cove onto which he could have swerved to avoid the accident. The fourth defendant agreed that he had in fact done so. The inference the claimant asked the court to draw was that the collision happened

about that area from the fact that the fourth defendant swerved left. This is an inference I am unable to draw.

[14] The claimant asserted in her statement of case that the second defendant's vehicle was out of control. The fourth defendant implicitly affirmed this position when he gave evidence that there was a bend in the road and that the second defendant's vehicle when it was some 60 feet away from his vehicle made a sudden turn across the road and into his path. His evidence was that at that time his minibus had been travelling at 40mph. Interestingly, it was suggested to the fourth defendant in cross-examination that the overall braking distance for a motorcar travelling at 40 mph would be 100 feet and indeed a longer distance for a larger vehicle such as a minibus. This would mean that a sudden, unexpected manoeuvre of the second defendant into the path of the fourth defendant's vehicle would have left no room for the fourth defendant to avoid the collision by the mere application of his brakes

[15] The claimant's evidence was that the second defendant's vehicle collided with the side of the fourth defendant's vehicle on its correct side of the road. For this collision to have taken place evidently, the second defendant had to have left his driving lane and crossed over into that of the fourth defendant.

[16] The claimant raised the issue of whether there was any action taken by the fourth defendant to avoid the collision. The evidence disclosed that the fourth defendant either swerved according to the fourth defendant or stopped according to the claimant. In any event, the claimant invited the court to attribute liability to the defendant if he did ***not*** take evasive action, namely, "failing to slow down to stop to swerve or so to take such action as to avoid the collision." The fourth defendant could be said to have taken evasive action if he stopped which the claimant agrees that he did. I find that the 4th defendant did both, he swerved left and stopped, he stopped as there was nowhere for him to park. This would account for the point of impact being behind the driver's seat as said in evidence by the claimant.

Issue

[17] Whether the collision was caused by the negligence of the second defendant and/or fourth defendant.

Agreed facts

[18] That the third defendant was at all material times, the owner of motor vehicle registered PP251B and driven by the fourth defendant. This vehicle was involved in a collision with motor vehicle registered 3788 DN driven by the second defendant and owned by the first defendant on March 10, 2005. The issue of agency is not in dispute.

The Submissions on Liability

[19] Counsel Mr. Hill QC in his oral and written submissions argued that the issue for the court was whether or not the fourth defendant was negligent in that he failed to take adequate evasive action on seeing motorcar registered 3788DN.

[20] He argued that the court had to determine liability and credibility in order to resolve the primary issue. Road users must take account of other road users, those who do not always use reasonable care, careless motorists and possibly negligent and or mistaken road users. It is for the court to consider the nature, extent, duration and consequences of those mistakes when assessing blameworthiness or causation. The fourth defendant had time to observe the make, model and colour of the approaching vehicle therefore he had time to take evasive action or any precautions to avoid the collision but failed to do so. This amounted to negligence in the operation of the motor vehicle registered PP251B. In addition, the fourth defendant drove too fast in the circumstances as the thinking and braking distance at 40mph is 100 feet. He drove carelessly, he failed to keep a proper look out, took no evasive action, failed to stop or swerve and thereby acted negligently. In so doing he caused or contributed to the collision and as such is jointly and severally liable and equally to be blamed.

[21] Counsel Mr. Clayton for the third and fourth defendant's in his written and oral submissions abandoned any issue of contributory negligence on the part of the claimant. In his written submissions he argued that the second defendant breached his duty to take reasonable care for all other road users when he negligently crossed into the opposite lane causing his vehicle to collide with the vehicle being driven by the fourth defendant and in which the claimant was a passenger.

[22] He argued that the second defendant could have reasonably foreseen that his actions at the material time could injure his neighbour as set out **in Donoghue v Stevenson**.[1] The duty to take care on the roadway is not only to the driver but to his passengers and all other road users. A driver has a duty to observe and obey the rules of the road as set out in the Road Traffic Act. Any failure to do so may be relied upon at trial pursuant to section 95(3) of the Act. The second defendant should bear sole liability for creating a position of extreme danger for the claimant and causing the collision which resulted in her injuries. It was he who drove into the path of the fourth defendant's vehicle at high speed without warning or prior indication while that vehicle was on its lawful left side. At the point of impact, the fourth defendant's vehicle was still on the left side of the road. The claimant's pleadings are consistent with the third and fourth defendant's version of events as at paragraph two of her claim she blames the second defendant for his negligent operation of his vehicle such that he collided with that of the fourth defendant.

The law

[23] *"To prove negligence there are four requirements namely:*

1. *The existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question*

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[1] [1932] A.C. 562, per Lord Atkin

on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.

2. *Breach of the duty of care by the defendant, i.e. that he failed to measure up to the standard set by law;*

3. *A causal connection between the defendant's careless conduct and the damage.*

4. *That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.*

When these four requirements are satisfied, the defendant is liable in negligence.[2]*"*

[24] The test of whether a duty of care exists in a particular case is, set out by Lord Bridge of Harwich, in the leading case of **Caparo Industries plc v Dickman** [1990] 1 All ER 568, 573-574:

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."*

[25] In the case of **Shtern v Villa Mora, Cottages Limited and Another** [2012] JMCA Civ. 20. Morrison, J.A. (as he then was) discussed the burden of proof as follows:

> *"As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof, on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case (see Clerk & Lindsell, op. cit., para. 8-149; see also, Ng Chun Pui v Lee Chuen Tat [1988] RTR 298, per Lord Griffiths at page 300). But the actual proof of carelessness may often be problematic and the question in every case must be "what is a reasonable inference from the known facts?" (Clerk & Lindsell, op. cit., para. 8-150)."*

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[2] Clerk & Lindsell on Torts, 19th edn, 2006, p.383

The rules of the road

The Road Traffic Act

[26] The Road Traffic Act places certain duties on users of the road. The sections of particular importance which are self-explanatory are section 51(1)(a), (d), (e) (f) and section 95 (3). Section 57 speaks to the duty of a driver when turning or changing direction.

[27] Sections 51(1) and (2) of the Road Traffic Act provide:

> *"51 (1) The driver of a motor vehicle shall observe the following rules - a motor vehicle*
>
> *(d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;*
>
> *(e) proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road;*
>
> *(f) proceeding from a place which is not a road into a road or from a road into a place which is not a road, shall not be driven so as to obstruct any traffic on the road."*
>
> *51(2) Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an collision, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."*
>
> *"57(1) The driver of a motor vehicle constructed to be steered on the right or off-side thereof, shall, before commencing to turn to, or change direction towards, the right, give the appropriate signal so as to indicate that direction."*
>
> *"95(3) The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."*

[28] The old common law rule is that when two vehicles are approaching each other from opposite directions, each must go on the left or near side of the road for the purpose of allowing the other to pass. Failure to observe this rule is prima facie evidence of negligence.[3] This common law rule has been preserved by section 51(1)(a) of the Road Traffic Act which provides:

> *51(1) "The driver of a motor vehicle shall observe the following rules – a motor vehicle:*
>
> *(a) meeting or being overtaken by other traffic shall be kept to the near side of the road."*

[29] While he is driving elsewhere on the road other than on his near side, should traffic approach, a driver put in the position of having to act quickly in an emergency, as a result of which, a collision occurs will be liable. This is because of his negligence in driving on the wrong side of the road.[4]

Speed

[30] It is the duty of the driver of a vehicle to travel at a speed which is lawful under the circumstances as prescribed in the Regulations made pursuant to the Road Traffic Act. Section 26 of the Act provides:

> ***"**26.-(1) It shall not be lawful for any person to drive a motor vehicle of any class or description on a prescribed road or on a road within a prescribed area at a speed greater than the speed prescribed as the maximum speed in relation to a vehicle of that class or description and if any person acts in contravention of this section he shall be guilty of an offence and shall be liable on conviction to the following penalties- …"*

[31] The claimant's statement of case alleges speeding on the part of the second defendant and none on the part of the fourth defendant. She gave no evidence of speeding on the part of either driver. The speed limit is the maximum speed allowable on the prescribed road. This means that some consideration has to be given to what is a reasonable rate of speed. In order to determine what is

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[3] Charlesworth & Percy on Negligence, 10th edn, 2001, p. 653
[4] Supra

reasonable, the driver is expected to account for the nature, condition and use of the road, the amount of traffic at the material time, or which might reasonably be expected to be on it. [5] There was no evidence from which to conclude whether the rate of speed of the second defendant could be considered a reasonable rate or whether he had been speeding. There was also no challenge to the fact that the fourth defendant said he was travelling at a speed of 40mph.

[32] While there was no evidence of the posted speed limit in the area of Dolphin Cove and its environs, the evidence was that there was a parking area for cars just beyond its entrance which suggest that there would be the movement of pedestrians and slower moving vehicles.

A good look out

[33] It is the duty of the driver or rider of a vehicle to keep a good look out. A driver who fails to notice in time that the actions of another person have created a potential danger is usually held to be negligent. (See **Foskett v Mistry** [1984] R.T.R. 1, CA.) He must look out for other traffic which is or may be expected to be on the road, whether in front of him, behind him or alongside him, especially at crossroads, junctions and bends.[6] In the instant case I accept that there was a bend in the road which the second defendant drove around before the collision.

[34] In **James Mitchell and Aaron Gordon v Leviene McKenzie and Dorrell Gordon** SCCA 104/91 delivered on October 21, 1992, a decision of the Court of Appeal decision delivered by Wolfe J.A. (Ag.), as he then was, stated as follows:

> *"He* [the trial judge] *concluded that the cause of the accident was due to the 4th defendant/appellant attempting to cross the northern section of the highway without stopping, at a speed of 5 mph when it was unsafe to do so and adjudged the 4th defendant/appellant to be the sole cause of the accident.*

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[5] supra p. 657
[6] supra 660

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The question remains what was the cause of the accident. The learned judge accepted the evidence of the bus driver, the plaintiff and Miss Farquharson that the truck driver came across the main road from the soft shoulder without any indication that he intended so to do and afforded the bus driver no opportunity of avoiding the collision. That was the manoeuvre which caused the collision. In the absence of any evidence that he was acting as an automaton, then clearly he must be adjudged negligent and solely to blame for the resultant collision, since in the circumstances, the other driver did nothing to contribute to the accident."

[35] On the issue of whether or not the failure to swerve left to avoid the accident was consonant with negligence on the part of the second defendant, the Court had this to say:

"We will assume for the purpose of argument that the speed of the bus driver exceeded the speed at which one would reasonably expect a vehicle to be driven in an area where a warning sign is sited, the question arises – was that the effective cause of the accident? The answer must, of course, be in the negative. Had the truck continued along the soft shoulder towards Kingston rather than suddenly turning across the road into the path of the oncoming vehicle, the accident would never have occurred, or alternatively, had the truck waited until it was safe to traverse the carriage-way the accident would have been avoided. Failure to swerve left is in no way indicative of negligence. The evidence was that the driver swung right. He took such action as he thought best in the agony of the moment. For this, he could not properly be faulted."

[36] The case of **James Mitchell** is instructive on the facts and law and I adopt the above statements of the law enunciated by the Court of Appeal and apply them to the facts of the case at bar.

[37] It was submitted that it has been long established that the driver of a vehicle who is changing direction bears the greater duty of care before undertaking his manoeuvre. Support for this principle was found in the case of **Pratt v Bloom** (1958) Times 21 October, Div Ct[7]: Per Streatfield J: *"The duty of a driver changing direction is (1) to signal and (2) to see that no one was incommoded by*

Bingham and Berrymans' Personal Injury and Motor Claims Cases,1994, 10th edn., p.85

his change of direction and the duty is greater if he first gives a wrong signal and then changes it."

Analysis

[38] I find that both the claimant and fourth defendant agreed that he had been driving safely. Both witnesses agree that he had taken these actions in a bid to avoid the accident. The driver would clearly have had the better vantage point seated on a raised platform as he then was. The claimant was seated behind him and did not agree that the second defendant's vehicle turned suddenly across the path of the fourth defendant's driving lane causing the accident. If she had been able to observe as she said did, then she ought to have been able to see what the manoeuvre made by the second defendant without signal and across the road and into lane of the fourth defendant's vehicle. Her evidence was limited to the fact that there was an approaching motorcar which collided with the bus in which she was a passenger.

[39] The claimant having certified that her amended claim was true pleaded in her particulars of claim that the second defendant had failed to keep a proper look out and failed to steer a straight and proper course inter alia. At trial she denied that the second defendant's vehicle made a sudden turn across the vehicle in which she was a passenger. In fact it was the claimant's evidence that the fourth defendant was driving safely, was driving on his correct side of the road and *"came to a complete stop to avoid the danger."*

[40] The fourth defendant was said not to have kept a proper look out while he was also said being said to have had sufficient time to both observe and register the make, model and colour of the oncoming vehicle. In my view, these submissions are inconsistent as regards his attention to the road and the traffic thereon.

[41] It was the claimant's evidence that the fourth defendant had been driving safely that day and she gave no evidence that there was nothing unusual in the manner

in which the second defendant was approaching, however, the claimant clearly appreciated that there was danger when she said:

"Yes he came to a complete stop to avoid the danger."

Mr. Hill QC, argued in his submissions that the fourth defendant should have been able to brake, swerve or stop. The claimant's evidence was that the fourth defendant who was driving safely was able to come to a stop and that he did so to avoid the danger. If the claimant's evidence was that she did not see the oncoming vehicle come across the road and into the fourth defendant's vehicle, this evidence begs the question what danger she would have been describing.

[42] The inference can be drawn that it was this event, namely, the oncoming vehicle travelling in its lawful lane making a sudden turn without indication or warning into the right of way and lawful path of the fourth defendant's oncoming larger vehicle which was considered subjectively by the claimant and described as dangerous.

[43] The claimant gave no evidence of seeing the oncoming vehicle overtaking a line of traffic and this is not in her pleadings, the suggestion to the fourth defendant that this occurred and led to the vehicle driven by the second defendant being in the lane of the fourth defendant was without foundation.

[44] The suggestion made to the fourth defendant that he should have swerved into the parking bay off the road in the vicinity of Dolphin Cove to avoid the collision was made in light of the absence of a police report and with no evidence to physically site the collision. It was never put to the fourth defendant where the collision actually took place.

[45] It was the evidence of the fourth defendant which I accept that both vehicles were 60 feet apart when the second defendant made his sudden and unanticipated manoeuvre into the path of the minibus. In so doing, I find that the second defendant's vehicle created an obstruction to that of the fourth defendant. The fourth defendant faced with an obstruction and in order to avoid an imminent

collision applied his brakes and swerved to his left, he was able to stop on the evidence of the claimant. It is open on the facts to find that the fourth defendant's vehicle remained in his driving lane as it was the evidence of the fourth defendant that there was no place on the left to park and that of the claimant that the fourth defendant was in his correct lane.

[46] Where there is divergence between the evidence of the parties in a civil action for negligence involving a collision, the court is often urged to look at any independent physical evidence. In the Court of Appeal decision of **Calvin Grant v Pareedon and Pareedon** Suit no. C.L. 1983/G. 108 delivered by Theobalds J on April 18,1986 it was held that:

> *"Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass which may be left on the driving surface and so on. This physical evidence may well be of crucial importance in assisting a tribunal of fact in determining which side is speaking the truth."*

In the instant case, the extrinsic physical evidence would have been of assistance to the court however there was none.

[47] There is no doubt that in the circumstances of this case there was a duty of care owed by the second defendant to other road users, particularly, the fourth defendant and the claimant, whilst undertaking the manoeuvre which led him to cross into the driving lane of the fourth defendant's vehicle.

Res ipsa loquitur

[48] *"The maxim is not a rule of law, it merely describes a state of the evidence from which it is possible to draw an inference of negligence. It is based on common sense, its purpose being to enable justice to be done when the facts bearing on causation and the standard of care exercised are unknown to the claimant but*

ought to be within the knowledge of the defendant. It will not assist where there is no evidence to support an inference of negligence and a possible non-negligent cause of the injury exists.[8]*"*

[49] The requirements of the maxim are:

> "i. That the thing causing the damage was under the management or control of the defendant or his servants, and
>
> ii. That the accident was of such a kind as would not in the ordinary course of things have happened without negligence on the part of the defendants. An essential element for the doctrine to be applicable is the fact that the claimant does not know how he came to be injured."

[50] In **Shtern v Villa Mora Cottages Ltd and Another** [2012] JMCA Civ 20, Morrison JA, assessed the application of the doctrine of res ipsa loquitur. He cited the leading cases on the doctrine and, at paragraph [57], summarised the relevant principles as follows:

> *"[57] Res ipsa loquitur therefore applies where (i) the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Lindsell, [19 Ed], para. 8-152 provide an illustrative short-list from the decided cases: 'bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns'); (ii) the thing that inflicted the damage was under the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place.*
>
> *As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on* ***Henderson v Jenkins & Sons*** *[1970] RTR 70, 81 – 82], that 'Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine'." (Emphasis supplied)*

[51] As I cannot hope to improve upon the dictum of Morrison, J.A.(as he then was) I will quote extensively from the decision of the Court of Appeal commencing with paragraph 51:

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[8] Charlesworth & Percy on Negligence, 10th edn, 2001 p. 351

"The court may also infer carelessness in cases covered by the so-called "doctrine" of res ipsa loquitur. In the seminal case of ***Scott v The London and St Katherine Docks Co.*** *(1865) 3 H & C 596, 601, in which bags of sugar being lowered by a crane from a warehouse by the defendants' servants fell and struck the plaintiff, Erle CJ said this:*

"But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care.

In ***Ng Chun Pui v Lee Chuen Tat****, Lord Griffiths considered (at page 300) that the phrase res ipsa loquitur was "no more than the use of a latin maxim to describe a state of the evidence from which it is proper to draw an inference of negligence". While the operation of the rule does not displace or lessen the claimant's burden of proving negligence in any way, its effect is that –*

"...in an appropriate case the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident."

Lord Bridge then went on to adopt dicta from two earlier cases as to the true meaning and effect of the maxim. The first is ***Henderson v Henry E Jenkins & Sons*** *[1970] RTR 70, 81 – 82, in which Lord Pearson observed that "...if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference". The second is* ***Lloyde v West Midlands Gas Board*** *[1971] 1 WLR 749, 755, in which Megaw LJ said that the maxim does no more than describe a "common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances...a plaintiff prima facie establishes negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety".*

The principle was applied in ***Ward v Tesco Stores Ltd****. While shopping in the defendant's supermarket, the plaintiff slipped on some yoghurt, which had been spilt on the floor, and was injured. In the plaintiff's action for negligence against the defendant, evidence was given that spillages occurred about 10 times per week and that the staff of the supermarket*

had been instructed that, if they saw any spillages on the floor, they were to stay where the spill had taken place and call someone to clean it up. In addition, the floor of the supermarket was given a "general clean-up" daily, it was polished twice per week and it was brushed five or six times per day. However, the defendant called no evidence as to when the store floor had last been brushed before the plaintiff's accident and there was therefore no evidence before the court as to whether the floor had been brushed a few moments before the accident, or an hour, or possibly an hour and a half.

The trial judge found the defendant liable and it was contended on its behalf on appeal that he had erred, because it had been for the plaintiff to prove that the spillage had been on the floor for an unduly long time and that there had been opportunities for the management to clean it up, which they had not taken. In a judgment with which Megaw LJ agreed, Lawton LJ referred (at page 222) to the relevant principles as enunciated in what he described as "the classical judgment" of Erle CJ in ***Scott v The London and St Katherine Docks Co****., and then went on to apply it to the case before him in this way:*

> *"In this case the floor of this supermarket was under the management of the defendants and their servants. The accident was such as in the ordinary course of things does not happen if floors are kept clean and spillages are dealt with as soon as they occur. If an accident does happen because the floors are covered with spillage, then in my judgment some explanation should be forthcoming from the defendants to show that the accident did not arise from any want of care on their part; and in the absence of any explanation the judge may give judgment for the plaintiff."*

Such burden of proof as there is on defendants in such circumstances is evidential, not probative. The trial judge thought that prima facie this accident would not have happened had the defendants taken reasonable care. In my judgment he was justified in taking that view because the probabilities were that the spillage had been on the floor long enough for it to have been cleaned up by a member of the staff."

[56] However, in ***Hall v Holker Estate Co Ltd****,* ***Sir Mark Potter P*** *(with whom Arden and Hughes LJJ agreed) issued the following cautionary note (at para. [33]):*

> *"The judgments in Ward v Tesco do not of course relieve the claimant of the overall burden of proof. He must show that the occurrence of the accident is prima facie evidence of a lack of care on the part of the defendant in failing to provide or implement a system designed to protect the claimant from risk of accident or injury."*

[52] The case at bar is not one in which there is no evidence as to how the collision came about. The claimant both pleaded in her particulars of claim and gave evidence as to what occurred. Res ipsa loquitur, therefore, does not apply.

Prima facie case

> *A case which calls for some answer from the defendant will arise upon proof of (1) the happening of some unexplained occurrence; (2) which would not have happened in the ordinary course of things without negligence on the part of somebody other than the claimant and (3) the circumstances point to the negligence in question being that of the defendant, rather than that of any other person.*[9]

[53] In the instant case, it is for the court to determine the issue of credibility as between the claimant and fourth defendant. In fact, if the claimant is in a position to advance the circumstances surrounding the accident and to give responses regarding her vantage point, ability to see and assess the manner of the driving of the fourth defendant describing it as safe, it illustrates a sufficiency of knowledge and a theory of the occurrence.

[54] In other words, if the "facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether on the facts as established, negligence is to be inferred or not."[10] The more credible and probable of the facts raised is a matter for the court.

[55] The court was urged to determine what caused the accident and in so doing must consider the question – would the collision between the second and fourth defendant's vehicles have occurred if the second defendant had not turned right across the fourth defendant's path. The answer must clearly be no, as it was the

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[9] Supra

[10] (See Barkway v South Wales Transport Co. Ltd [1950] 1 All E.R. 392 at 395 per Lord Porter.)

act of the second defendant that precipitated the chain of events that ultimately led to the collision between both vehicles. There was no issue that the fourth defendant had the right of way on the main road and that it was the second defendant who was changing direction. In the face of this situation, the second defendant had the greater duty of care to wait until the way was clear before crossing into the lane occupied by the fourth defendant

[56] The only logical conclusion in the instant case is that the cause of the accident was due to the second defendant attempting to cross over to the the right section of the highway without signalling and stopping and when it was unsafe to do so. It is adjudged that the second defendant is the sole cause of the accident. I accepted the evidence of the fourth defendant that the second defendant drove across the main road without any indication that he intended so to do. That was the manoeuvre which caused the collision and that this afforded the fourth defendant no opportunity of avoiding the collision. In so doing the second defendant must be adjudged negligent and solely to blame for the resultant collision, since in the circumstances, the fourth defendant did nothing to contribute to the accident.

[57] I will adopt and apply the words of the Court of Appeal delivered by Wolfe, JA (Ag.) (as he then was) in **James Mitchell** which are applicable to the issue of liability in this case, substituting the vehicle and direction. I find the conclusion reached by the learned judge to be directly on point and I affirm these words from the decision:

> *"Had the truck continued along the soft shoulder towards Kingston* [motor car continued in its left lane from Ocho Rios] *rather than suddenly turning across the road into the path of the oncoming vehicle, the accident would never have occurred, or alternatively, had the truck* [motorcar] *waited until it was safe to traverse the carriage-way the accident would have been avoided. Failure to swerve left is in no way indicative of negligence. The evidence was that the driver swung* [left*] right. He took such action as he thought best in the agony of the moment. For this, he could not properly be faulted."*

[58] The claimant has failed to satisfy the court on a balance of probabilities that the fourth defendant breached his duty of care such that he should be held liable for her injuries. This conclusion applies equally to the third defendant.

[59] As a consequence of the foregoing, the court makes the following orders.

1. Judgment for the third and fourth defendants.

2. Costs to the third and fourth defendants to be agreed or taxed.