IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 00383

BETWEEN	**JEFFREY JOHNSON**	**CLAIMANT**
A N D	**RYAN REID**	**DEFENDANT**

Sean Kinghorn and Danielle Archer instructed by Kinghorn & Kinghorn for the Claimant.

Leslie Campbell instructed by Campbell & Campbell for the Defendant.

Heard: October 27th, 2011 & January 25, 2012

Coram: Anderson, K. (J.)

[1] This matter pertains to a traffic collision which occurred as between a truck which was admittedly being driven by the Defendant at the material time and a pedal cycle which the Claimant was riding on, at the material time. That collision took place on July 6th, 2008, somewhere on the Ewarton Main Road, heading in the direction of Mount Rosser. Both the truck and the bicycle involved had been heading in the same direction, when the collision occurred.

[2] The Claimant has contended in his Particulars of Claim as filed, as follows – "I was riding on the left hand side heading towards Mount Rosser. As I was riding, when I got to the Post Office, I saw two (2) trucks in front of me. At that time the traffic came to a stop as there were two (2) trucks coming down from Mount Rosser. There were cars parked on the right hand side of the road and so there was some obstruction on that side maneuvered my bicycle between the lines of traffic and I ended up in

front of the two trucks that were previously before me. The two (2) trucks that had been coming down had stopped because of the traffic. I stopped my bicycle to prepare myself to cross the road to get to the other side where the wholesale was. I was concentrating on the two (2) trucks that were coming from Mount Rosser so that I could get an opportunity to cross the road. At this time I was at the edge of the left hand side of the road, close to the banking waiting to go across. I was looking in both directions to prepare myself to cross. The truck that was immediately behind me went around me. I continued to observe that truck as it passed. By the time I was going to look to my right again. I felt a hit and I dropped on my belly. I then felt myself being pushed along the ground. I felt as though something was drawing me and I blocked out. When I woke up I found myself in a car…" (Paragraphs 3 -11 of Witness Statement of Jeffrey Johnson).

[3] The Defendant filed a Defence and in that Defence, it was admitted that there had, on the relevant day, been a collision involving the truck which was being driven by the Defendant at the material time and the pedal cycle which the Claimant had been riding at the material time. The Defence went on though, to suggest that it was solely as a consequence of the Claimant's negligence that the collision occurred. At this junction though, it must be noted that Trial of the matter, commenced and concluded on the same date, this being October 27th, 2011 and only one (1) witness was called, this being the Claimant himself. The Defence made a no case submission, but before such submission was made, to this Court at Trial, it was submitted by the defence counsel, that the Defendant wished to make the same without being put to his election. The Defendant's Counsel brought to this Court's attention, in support of the Defence's submission that the Court has a discretion as to whether or not to put the Defendant to an election, even when the defendant will

make a no-case submission, the Judgment of an English Court (Queen's Bench Division), in **Mullan v. Birmingham City Council** – The Times Law Reports, July 29th, 1999, p. 573. In that Judgment, it was held that it was permissible for a trial judge, exercising his wide powers of case management, to entertain a submission of no case to answer at the close of the Claimant's case, without requiring the Defendant to elect not to call evidence in the event that his submission failed. In its Judgment in that case, the Court stated that – "....if after a claimant gave evidence there were grounds for contending that he had no reasonable prospect of success, irrespective of whether evidence was given by the defendant or not, there was no reason why the Court should not consider that submission without putting the defendant to his election."

[4] I took the view that, since this case, as at the close of the Claimant's case and prior to the Defendant having been put to his election and thus, prior to the making of a no-case submission by the Defendant, was not then to be considered as concluded from an evidentiary standpoint, it would not be appropriate for me to have at that stage, assessed the credibility of the Claimant to the extent of making any final determination as to the credibility of his evidence, bearing in mind that credibility issues ought, as a general rule, to be decided upon a consideration of all of the evidence in a case and thus, after both parties (i.e.. Claimant and Defendant) have closed their respective cases. Thus, to make that determination before the Defendant has even been called upon to elect, is premature and not to my mind, in accordance with the over-riding objective – the interests of justice. My view instead, is that at the early stage of the case of the Claimant's case, if it is that the Claimant's case, considered at face value, thus meaning that without the credibility thereof having as yet been determined, has a reasonable prospect of success, then but only then, can this Court, in my view, properly allow for a defendant not to be put to his

election and yet make a no-case submission. This latter-type situation would, to my mind, accord with the over-riding objective, whereas the former would not. Furthermore, this approach would, I believe, be more in keeping with the general rule, as established in cases such as **Alexander v. Rayvon – (1936) 1 K B. 169 and Laurie v. Raglan Building Co. Ltd. – (1942) 1 K. B.152**, this being that the Defendant is to be put to his election, prior to making a no-case submission. It should be noted that these latter-two mentioned case Judgments, were in fact referred to by the Court in its Judgment in the Mullen case, but it was therein suggested by the Court in its Judgment, that whilst the Court had looked at these two (2) Judgments, no submissions had been made on these or any other authorities. The Court then stated – "However, given that the Civil Procedure Rules constitutes a "new procedural code" that might not have been appropriate in any event." I must state that I disagree with this suggestion. There are many cases in which Courts have adopted pre-Civil Procedure rule a practice as a guide to current practice. See in this regard:- **Nomura International plc. v. Grenada Group Ltd. – (2007) 2 All E.R. (Comm.) 878 and Adebon v. Associated Newspapers Ltd. – (2008)1 W.L.R.585.** These cases have been referred to along with others pertaining to this same point, at **paragraph 3.20, (pages 25 & 26) of the text – A Practical Approach to Civil Procedure – Stuart Simes**. The learned author in that text, at the end of paragraph 3.20 states that the applicability of these cases could be objected to, as they failed to apply the principle that the Civil Procedure Rules is a new procedural code. The author goes on to state though that these cases are probably better considered as practical law making in circumstances where the Courts are faced with situations not expressly covered by the Civil Procedure Rules. I agree with the author's suggestion in this regard and wish to adopt the same. Thus, as was typically done prior to the introduction into law of the Civil Procedure

Rules, as a matter of course, whenever a party chooses to make a no-case submission, that party must elect. As such, the Defendant was put to his election and through counsel, elected to make the no-case submission and thus, not to call any evidence in the event that, as would have been unknown to him as at the time when such election was made, this Court is of the view that it should not uphold the no-case submission as has been made. Thus, it now falls to this Court to firstly, decide on the no-case submission and thereafter, in the event that the no-case submission is decided on in a manner adverse to the Defendant, this Court would then have to go on to consider whether or not the Claimant has proven his case on a balance of probabilities .

If though, the no-case submission is decided on by the Court in a manner which is favourable to the Defendant, then the matter will go no further. Thus, I will first address the no-case submission immediately below.

The No-Case Submission

[5] It has been argued before me, by counsel for the Defendant, that the Claimant has failed to make out a prima facie case as to liability of the Defendant, on the evidence which he presented to this Court as the sole witness. The Claimant's evidence-in-chief as set out in his Witness Statement was virtually the same in terms of alleged facts as have been referred to in paragraphs 1 and 2 of this Judgment and as set out in the Claimant's Particulars of Claim, at paragraphs 1 – 10. There are seven (7) Particulars of Negligence that have been particularized in paragraph 3 of the Claimant's Particulars of Negligence. The same are as follows:-

(i) Driving at or into the Claimant.

(ii) Causing motor vehicle registration No. CD 4925 to collide with the Claimant while the Claimant was riding his bicycle along the said road:

(iii) Failing to see the Claimant within sufficient time or at all.

(iv) Failing to apply his brake within sufficient time or at all.

(v) Driving at too fast a rate of speed in all the circumstances.

(vi) Failing to maintain sufficient control over the said motor vehicle.

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

[6] The Claimant, while giving evidence under cross-examination, stated that he had rode past the two trucks that had, immediately prior thereto, been ahead of him, on the road. He testified that after passing those trucks, he remained on the left side of the road, where he stopped his bicycle, because, as he said – "Having passed the two trucks, I moved to the left side of the road and I stopped there, because the traffic start move and so I had to stop. The trucks started going around me and so I had to stop." At one point during cross-examination the Claimant used a measuring tape which was made available to him at trial, by his counsel, with the Court's permission and stated that from where he stopped on the left side to the middle of the road, is seven (7) feet. Immediately thereafter, it is this Court's record, that the witness said – "I was two feet away from the middle of the road, which was about 7 feet." Thus, there exists inconsistency in the witness' evidence, as to exactly where on the left side of the road he was positioned, when he stopped, then waiting to go across to the other side of the road. The witness went on to testify that while he was stationary, a truck passed him about 2 – 3 feet to the right and then he started moving and then he felt the hit. He also stated that he did not see the truck hit him and he also did not see the truck do anything wrong before the collision.

[7] Arising from that evidence as given and other inconsistencies in the Claimant's evidence, as will be referred to in this Judgment (below), the Defendant's counsel submitted that there is no case for the Defendant to answer to, as the Claimant had failed to make out a prima facie case. The

Claimant's counsel argued to the contrary, suggesting that the Claimant was relying on the principle of 'res ipsa loquitur' (the facts speak for themselves) and the fact that, as is undisputed on the respective pleadings of the parties, the Defendant, while driving a truck at the material time had collided with the Claimant. It should be noted that the Defendant had, in his Defence, put forward a different version of events leading up to the collision and in that regard, set out a version which, if accepted by this Court, would have rendered the Defendant completely blameless for the collision. The Defendant chose to lead no evidence in support of that different version of events and that being so, this Court has taken no cognizance of the same for the purposes of this Judgment, other than to the very limited extent that this Court has noted that the same was set out in the Defendant's Defence. What is not disputed though, is, as aforementioned, that the Defendant's truck had collided with the Claimant. It is the circumstances immediately leading up to that collision which the Defendant has challenged the Claimant on, by means of cross-examination of the Claimant's testimony. It is for this Court now to decide therefore, whether the Claimant has made out a prima facie case based on his evidence and if so, whether or not his case has been proven on a balance of probabilities.

[8] I am satisfied that the Claimant has made out a prima facie case as to liability and by this I mean that, without having assessed the credibility of the Claimant's evidence, but instead, taking the Claimant's evidence only, 'at face value,' I am of the view that, the Claimant has made out a case, albeit with some difficulty, for the Defendant to answer to. This is so to my mind because, if the evidence is taken, 'at face value,' and if the Claimant's statement of case, to the extent as undisputed by the Defendant's statement of case is taken into account, it was the Defendant's truck, which was being driven by the Defendant at the

material time, that collided into the Claimant, who was shortly prior to the collision and even up until the time of the collision, riding on a small bicycle, on the left hand side of the road, heading in the direction of Mount Rosser. At the time of the collision, both the relevant truck and the bicycle had been heading in the same direction and the collision occurred on the left hand side of the road, whilst the truck was in the process of overtaking the Claimant who was then on the bicycle, either stationary and close to the 'banking' of the furthest left hand side of the road (as was stated during the Claimant's evidence-in-chief [paragraph 9 of his Witness Statement]), or about 2 – 3 feet to the left of the middle of the road and riding with the flow of the traffic (as was stated by the Claimant while testifying under cross-examination). Whether or not either of these versions of the Claimant's evidence, or any version at all of his evidence either on that particular point, or on any other particular point for that matter, is to be believed or not, is not a matter for this Court to determine upon the making of a no-case submission. As the learned author, Peter Murphy, has stated in his textbook entitled – "Murphy on Evidence," at paragraph 4.3 (p. 76), **'A prima facie case is established when there is enough evidence to entitle, though not compel the tribunal of fact to find in favour of the Claimant, if there were to be no further evidence given.'** In **Jayasena v. R** (1970) A.C. 618, 624, Lord Devlin described the requirement as being for 'such evidence as, if believed and left uncontradicted and unexplained, could be accepted by the jury as proof.' Whether or not the Claimant (or the prosecution in a criminal case) has established a prima facie case is a question of law for the judge. The judge should not ask himself what the tribunal of fact will decide, which would obviously be premature and speculative, but what the tribunal of fact would be entitled as a matter of law to decide; whether, if the case were to stop at this point, the tribunal of fact could find for the Claimant without being reversed on appeal for legal

insufficiency of the evidence. The discharge of the evidential burden of proof means, then, that the Claimant has adduced enough evidence of evidential facts to establish a prima facie case as to the facts in issue and thereby defeat a submission of no case to answer.

[9] I am of the view that the Claimant has met, albeit marginally at best, his evidentiary burden and that the Defendant therefore had a case to answer to. The Defendant not having chosen to answer that case however, does not to my mind, entitle the Claimant, as a matter of automatic consequence arising therefrom, to a Judgment on the Claim, in his favour.

[10] On this latter-mentioned point in the last paragraph, it is to be noted that both counsel in this matter who represented the respective parties had stated, in answer to a question first posed to the Defendant's counsel by the Court, whilst the Defendant's counsel was presenting his client's no-case submission, that if this Court were to decide on the no-case submission in a manner adverse to the Defendant, then this Court would be bound as a matter of law, to also render Judgment on the Claim, in the Claimant's favour. Counsel for the Claimant – Mr. Kinghorn, suggested to the Court, in the course of his response to the no-case submission, that this would have to be the inevitable consequence, arising from the fact that the Defendant, having been put to his election, chose not to adduce any evidence before this Court in support of his Defence as filed. This was done before the no-case submission was made. Thus, the Claimant contends, through his counsel, that there being only one evidentiary version of events about the collision in question, this being the Claimant's version, it follows as a matter of inexorable logic, that the Defendant, having been determined by this Court as having had a case to answer to and having failed to answer the same, insofar as the placing of evidence on his behalf, before this Court is concerned, must fail insofar as his Defence of the Claim is concerned, as the Court has, in a circumstance

such as this, only one version of events before it, this being the Claimant's version and a fortiori, as this is a civil case wherein the standard of proof is on a balance of probabilities, it follows, that this Court would, in that context, be bound, to rule on this Claim, in the Claimant's favour.

[11] With the greatest of respect to both counsel, I must disagree with this proposition. The Claimant in this case, bears the legal burden of proof vis-à-vis his Claim for damages for negligence. In that regard, the Claimant is required to prove each of the following elements, to the required standard of proof (i.e. balance of probabilities), namely:- (1) That the Defendant owed the Claimant a duty of care; (2) That the Defendant, by some act or omission, was in breach of that duty of care; and (3) That as a result of that breach, the Claimant suffered injury or damage, for which the law permits recovery. These are the facts in issue in this case. The burden of proving the facts in issue as set out above, to the required standard of proof lay, in this case, on the Claimant, from the beginning, until the end of trial. Thus, the legal burden is sometimes also stated as being, 'the persuasive burden,' because, it is essentially, the burden of proving the facts in issue to the required standard of proof.

[12] The distinction between the evidential burden and the legal burden of proof is that the former pertains to the leading of sufficient evidence to enable findings of fact on each fact in issue to be made in favour of the party who bears that burden, which is in this case, the Claimant. The leading of sufficient evidence to enable findings of fact to be made in a party's favour, on the facts in issue though, does not end the matter. This will only entitle, the party who met that burden, if such party also bears the legal burden, to move beyond a no-case submission (if such be made) or to require the Court trying the matter, to call upon the opposing party to answer to the case of the party who has not the evidentiary burden. The meeting of an evidentiary burden, in other words, ought not

to be equated with the meeting of a legal burden of proof. Leading enough evidence to enable the Court to issue Judgment in one's favour at trial, does not mean that the trial Court is obliged to accept that evidence and/or find that your case has been proven to the requisite standard. Even where the Defendant has called no evidence, as in a case such as this one, this does not and cannot be taken as automatically entitling the Claimant to Judgment in his favour. See:- **Industrial Chemicals v. Ellis** – (1986) 35 W.I.R. 216, esp. at p. 310, per Lord Oliver of Alymerton.

[13] In order to decide on whether the Claimant has met the required standard of proof in terms of his evidence as given, the credibility of his evidence must be carefully considered. Thus, this is the next issue addressed in this Judgment.

[14] As stated above, there was only one witness that testified throughout this entire case, this being the Claimant. During cross-examination, his credibility was challenged from the very onset. The cross-examination began with questioning as to that which, it seems to this Court should have been an uncontroversial issue – this being, the way in which the Claimant signs his name. The Claimant stated that he usually signs his name in the way that he did on his witness statement and that – 'J. Johnson' is the only way that he signs his name. Yet surprisingly, when he was shown the Claim Form the witness had to admit that the name 'Jeffrey Johnson' is what he wrote as his signature on the Claim Form. Also, when shown the Particulars of Claim which he signed, the Claimant again had to admit that he signed the same, but with an incorrect spelling of his name. Thus, he signed that document using the following name – "Jeffery Johnson." Mr. Johnson while still under cross-examination, even though not specifically asked by the cross-examiner, for any explanation in this regard, stated that he had signed the Claim Form and Particulars of Claim incorrectly. He stated that his name is spelt, "Jeffery" but on his

national identification, his name is spelt incorrectly as, “Jeffrey,” and on his T.R.N., his name is spelt, “Jeffery”. He said it was just a mistake that caused him to spell his name incorrectly on those documents. Thereafter the witness was also shown the Application which he made to the Court for an interim payment, as well as the Affidavit in Support of that Application and admitted that he had signed both such documents. When then asked by the Defendant’s counsel, if he would accept that he signed four different signatures on those four different documents (Claim Form, Particulars of Claim, Application for Interim Payment and Affidavit in Support of Application for Interim Payment), the witness, to this Court’s astonishment and surprise, stated that – “they are all the same.” This Court from that juncture onwards recognized that the Claimant was, in all likelihood, not likely to be truthful, even when confronted with incontrovertible facts.

[15] The Claimant then went on to give evidence of the collision as between he and the bicycle which he was then allegedly on and riding and the Defendant’s truck which was admittedly (per the Defence as filed), being driven by the Defendant at the material time. The Claimant testified, under cross-examination, that he had, at the material time, been riding a small bicycle. However, he disagreed with the suggestion as was made to him by defence counsel, that he had been riding a child’s bicycle. He stated that the bicycle in question was about 3½ feet high from the ground to where the seat is. This Court does not accept this evidence as to the height of the seat of the bike, from the ground, since if it were correct, or even close to correct as a matter of approximation, it is really difficult to understand how or why the Claimant would describe the same as being a ‘small bike’. The Claimant was, as this Court noticed, not a particularly tall person. In fact he appeared of medium height, i.e. 5 feet 5 inches or so. In the circumstances, if the bike seat were approximately

three and a half feet in height from the ground, how could same properly or truthfully be described as a 'small bike?' Once again therefore, this was another issue which went against the credibility of the Claimant. The bicycle in question, it should be noted, was never produced to this Court for the purposes of the trial, nor apparently, were any photographs of same taken for the purposes of the trial.

[16] Other testimony of the Claimant during cross-examination, must, of necessity, be referred to at this juncture. The Claimant's testimony was that he had been riding in the direction of Mount Rosser, on the left hand side of the road and had 'manoeuvred and went around'. In his examination-in-chief evidence, as is set out at paragraphs 2 – 5 of his Witness Statement, the Claimant stated the following:- "The collision of which I spoke happened on the 6th day of July 2007. I was riding my bicycle along Ewarton main road. I was riding in the vicinity of the police station heading towards Mount Rosser direction. I was heading to the Wholesale that was nearby on the right hand side of the road (paragraph 2). I was riding on the left hand side of the road heading towards Mount Rosser. As I was riding, when I got to the Post Office, I saw 2 trucks in front of me. At that time, the traffic came to a stop as there were two trucks coming down from Mount Rosser (paragraph 3). There were cars parked on the right hand side of the road and so there was some obstruction on that side (paragraph 4). I manoeuvred my bicycle between the lines of traffic and I ended up in front of the two trucks that were previously before me."

[17] What this testimony, which was given in chief, by the Claimant, has made clear to this Court, is that the Claimant was, while riding his bicycle on the relevant road on that fateful day, riding same in a manner which was oblivious of the rules of the road. Thus, for example, even though it

clearly would have been unsafe to do so, as the way ahead, if overtaking, would not have been clear, since there were cars parked on the right hand side of the road and additionally, there were two trucks then being driven from the opposite direction towards the Claimant and the bicycle which he was then on, nonetheless, the Claimant chose at that time to manoeuvre in and out of the vehicles, these including two trucks, which were then in front of him on the left hand side of the road.

[18] Furthermore, during his testimony while under cross-examination, the Claimant stated that after he had 'manoeuvred' to the front of the vehicles which prior thereto, been in front of him, he went over to the left edge of the road which was approximately 7 feet away from the middle of the road. When he went over to the left edge of the road, he stopped there and waited for about five minutes. In another portion of his testimony under cross-examination though, the Claimant also testified that from where he stopped on the left side to the middle of the road, is seven feet. The witness used a tape measure handed to him at Court, by the Claimant's counsel, to measure this. The Claimant then said – "I was two feet away from the middle of the road, which was about 7 feet." What would account for this obvious discrepancy, in terms of whether the Claimant, after having 'manoeuvred', stopped at the left edge of the road, which was 7 feet away from the middle of the road, as against that which was also his testimony – that he was then 2 feet away from the middle of the road? This Court is of the view that this significant discrepancy arose because this witness – the Claimant, was not telling the whole truth to this Court, either in his evidence-in-chief, or during his evidence while under cross examination.

[19] The Claimant was also challenged as to whether, in his witness statement, he had ever stated that he had stopped at the left edge of the road after he had manoeuvred and come to a point which was ahead of the other

vehicles, including the two trucks that had previously been ahead of him, in the left lane. The Claimant when challenged on this, stated categorically – "In my witness statement, I said that I was on the left edge of the road." Of course though, this is not correct. Is this a mere error, or yet another example of a lack of credibility on the Claimant's part? This Court believes it to be the latter.

[20] Yet another example of the Claimant's lack of credibility was, to this Court's mind, evidenced as follows:-

The Claimant testified under cross-examination, as follows:-

> "While I was on the left edge of the road, I was stationary. I was stationary for about 5 minutes. While I was stationary, a truck passed me about 2 – 3 feet to the right and then I started moving and then I felt the hit."

When then challenged as to whether he had stated in his witness statement, that he had been waiting for about 5 minutes, the Claimant stated that he was not sure. After then having been asked to read over his entire statement to see whether that evidence was in there, the Claimant looked through his witness statement and perforce, had to admit that the same is not in there, i.e. that he had started moving after he had been waiting for about 5 minutes. All of these things weighed heavily against the Claimant's credibility, this even though there was no alternative version of events put before this Court for consideration.

If those credibility issues were not weighty enough, there was also factored into my consideration for the purpose of rendering Judgment herein, yet another point which again shows, not only the lack of credibility, but also, the Claimant's obliviousness to his legal duty as a bicycle rider on a road. Whilst in his examination-in-chief evidence, the Claimant had stated that after he had manoeuvred in and out of the vehicles and thus reached to the front of the line of traffic, including the

two trucks which had previously been ahead of him in that line, he had then remained stationary on the bicycle, preparing himself at that point, to cross the road to get to the other side where the wholesale was, when he then felt a hit (this being the truck's collision with him and his bicycle), as the truck was then moving around him whilst he was still stationary. The Claimant though, under cross-examination, testified to something of importance that he did, immediately prior to the collision having occurred. This is that after the traffic in front of him, prior thereto, had come to a halt, he had manoeuvred around. At that time, this no doubt being after he had reached to the front of the line of traffic, he then waited stationary on his bicycle for about five minutes. He stated – "when the first truck was passing me, I was observing it. It passed a good distance, about two (2) feet to my right. Then when I saw the traffic start flow, that's when I continue, that's when I felt the hit." The Claimant repeated this evidence shortly thereafter, whilst still testifying under cross-examination.

[21] What seems apparent from this evidence, insofar as this Court is concerned, is not only the lack of credibility which it evidences, this being a point which I have made in paragraphs 14, 15, 18, 19 and 20 of this Judgment, but also that the Claimant may have endured the collision with the Defendant's truck at the material time, because he, rather than having remained stationary whilst being overtaken by the truck behind him, as he ought to have, so as to have enabled the truck to have had free and unimpeded access to overtake him safely, did not do that. Instead, what he did at that juncture was that he started to flow with the flow of the traffic which was then clearly in the process of seeking to overtake him. At the very least, he was seeking to, 'flow with the traffic' just at the time when, as he clearly realized, the Defendant's truck was in the process of overtaking him. It is also important to note at this juncture, that the wholesale shop which the Claimant was then heading to, was apparently,

before he started moving off again, across the road from him and his bicycle and where he had previously been stationary on his bicycle. It is also clear that when he had stopped his bicycle at the front of the line of traffic, he had done so, in preparation to go across the road. In fact, the Claimant explicitly so stated whilst under cross-examination. Thus, when he was asked the question by cross-examining counsel: – Q – "Did you stop in preparation to go across?" A – "I stopped, but due to the small bicycle I couldn't get no bligh to go across." This being so, it is all the more reason for this Court to believe that even if the Claimant's evidence were to be accepted by this Court as being wholly truthful, even so, the Claimant's own negligence would have been the sole cause of the collision which occurred between the bicycle which he was then on and the Defendant's truck. This Court though, does not accept as being truthful, any of the significant aspects of the Claimant's evidence insofar as the Particulars of Claim as pleaded, is concerned.

[22] I need to make the point that Jamaica's Road Traffic Act and Road Code, make no reference whatsoever to the rules of the road being applicable to pedal cyclists. The road rules are specifically stated therein, as being applicable to motor cyclists and drivers of various categories of motor vehicles. Nonetheless, I do not believe that pedal cyclists can ride bicycles on the road, in a manner which is oblivious to those rules. Why is this? It is because, even though those rules do not specifically apply to pedal cyclists, riding bicycles along Jamaica's roadways, it is nonetheless clear, that such a pedal cyclist has a duty of care owed to other road users. As such, a pedal cyclist needs to know and understand the signals used by other road users – as are specified in the road code and needs to understand the rules of the road as are applicable to other road users, so as to ensure that other road users are not either harmed or unduly inconvenienced by the manner in which the pedal cyclist rides his bicycle

along the roadways. The Road Code and the Road Traffic Act respectively, specify particular things that must be done in particular circumstances, with a view to ensuring that drivers of motor vehicles and motor cyclists do not cause road accidents. This is part and parcel of the general duty of care owed by one road user to another. Accordingly, even though neither the Road Code nor the Road Traffic Act are specifically stated as being applicable to pedal cyclists, it must follow that pedal cyclists ought to pay careful regard to those rules, since otherwise, whenever pedal cyclists are on the road, chaos will prevail, since drivers of motor vehicles will be expected to comply with the applicable road rules and laws and no doubt, would have every reason to expect that other road users would comply with same, whereas if this is not to be expected, then clearly, serious accidents will inevitably result. This is for example, why pedestrians need to know that they should only cross a roadway where a pedestrian crossing exists, since the road rules provide that once a pedestrian has stepped on a pedestrian crossing, he or she then must be given the opportunity by drivers of motor vehicle and by motor cyclists, to cross the road safely. It is not only drivers of vehicles that must know and apply this. Pedestrians must know and apply it as well. Pedestrians must know that if they choose to cross the road at a point other than at a pedestrian crossing there must make certain that the way left and right of them are completely clear before doing so. Otherwise, they cross at their own risk. The same principle would be applicable to the pedal cyclist, this being the Claimant, in this particular case now at hand, insofar as a pedal cyclist's general duty of care to other road users, is concerned. In my view, the Claimant failed in his duty of care to the driver of the truck which was overtaking him at the material time, when at the same time, he not only decided, as he has stated, "to go with the flow," but also it seems to me, to move towards the right hand side of the road, so as to reach the shop which he had then been heading to.

[23] Having completed a review of my reasons for not accepting the Claimant's evidence as being credible and for finding that in any event, it was the Claimant's carelessness which resulted in the collision, there remains an issue to be dealt with, which was raised by the Claimant's counsel in support of the Claimant's contention that Judgment should be awarded in the Claimant's favour, this being, "Res Ipsa Loquitur" – "The facts speak for themselves." It was accepted by this Court at trial, that there is no need to plead this maxim specifically, in order to rely on the same at trial. See on this point, **Bennett v Chemical Construction (G.B.) Ltd. – (1971) 1 W.L.R. 1571**. In order to rely on the doctrine of res ipsa loquitur, the Claimant must establish two things:-

(1) That the thing causing the damage was under the management and control of the Defendant or his servants; and

(2) That the accident was of such a kind as would not, in the ordinary course of things, have happened without negligence on the Defendant's part.

[24] Where res ipsa loquitur applies, the effect is:- (a) to afford prima facie evidence of negligence, so that the defendant cannot succeed in a submission of 'no case to answer', and (b) to shift the onus' on to the defendant to show either that the accident was due to a specific cause which did not involve negligence on his part, or that he had used reasonable care in the matter.

[25] Thus, this Court is very much aware, that should this maxim/doctrine be applicable to this particular case, then the Claimant must, of necessity, succeed in proving his case as to the alleged liability of the Defendant. Insofar as the rejection of the Defendant's no-case submission is concerned, the application of the maxim/doctrine, would also defeat the same. However, although the Defendant's no-case submission as made in this case, was not accepted by this Court, that lack of acceptance was not

at all due to the application by this Court of the res ipsa loquitur maxim/doctrine. My reasons for doing so were instead, only as I have set out in paragraph 8 of this Judgment.

[26] I do not accept that, on the Claimant's evidence as given, I can properly accept that the Claimant has proven to my satisfaction, on a balance of probabilities, that the accident was of such a kind as would not, in the ordinary course of things, have happened without negligence on the Defendant's part. My reason for so stating is as has been set out in paragraphs 21 & 22 of this Judgment. As has been made clear by McGaw L.J. in **Lloyde v West Midlands Gas Board – (1971) 2 All E.R. 1240, at p. 1246**, whilst res ipsa loquitur is a useful evidential aid to a Claimant who is unable to establish precisely how an accident occurred, this does not mean that the Claimant is entirely relieved from the burden of proof. The Claimant must still bring before the Trial Court, sufficient evidence to require rebuttal evidence to be given by the Defendant. In deciding on whether the fact of the accident itself, justifies the inference of negligence, not only must the Court consider all the circumstances of the case, but must also consider the same in the light of common experience and knowledge. I am not of the view that on the facts as proven by the Claimant in this case – these being only the undisputed facts as expressly agreed to by the Defendant in his statement of case, that the traffic collision in dispute was one which is more consistent with it being caused by negligence for which the Defendant is responsible, than by other causes. The facts in this case are therefore entirely distinguishable from the facts in the case of **Clifford Baker v. Attorney General & D/Cpl. Lewis – Suit No. C. L. B274 of 1883.** Accordingly, unlike as was done by the Court in that case, where res ipsa loquitur was applied, the same ought not, in my view, to be done in this case.

[27] In my considered opinion, res ipsa loquitur cannot apply in a situation wherein this Court does not accept the truthfulness of the Claimant's evidence as to the events which immediately preceded the occurrence of the collision in question. This is because, from that evidence, I am not satisfied that it is more probable than not that the collision would not have occurred without the negligence of the Defendant. This is also so because, as I have earlier stated, even if the Claimant's evidence were to be accepted as being truthful, there still remains the issue of the Claimant's failure to comply with his duty of care to the driver of the truck, who is the Defendant herein, and in the circumstances, the Claimant has essentially, by his own evidence, rebutted any evidence of negligence on the Defendant's part. All in all therefore, I am unable to accept the applicability of res ipsa loquitur to the particular facts of this particular case.

[28] There remains one final thing to be said on the applicability of res ipsa loquitur to this case and it is that, it is also now an accepted legal principle that the maxim/doctrine has no applicability where the facts of the occurrence giving rise to the Claim, are known. This is because there is then no need to do more then to decide whether on those facts, negligence has been proved or not. See:- **Barkway v S. Wales Transport Co. – (1950) A.C. 185, on this point**. Presumably with this in mind, the counsel for the Claimant sought to rely on this maxim/doctrine, since, during cross-examination, the Claimant testified that he didn't see the truck hit him, nor did he see the truck do anything wrong before the collision. However, the Claimant testified, albeit giving varying accounts in this regard, as to the alleged facts leading up to the collision. Thus, it is not as though there did not exist any evidence led by the Claimant as to why the collision had occurred. If I understood the Claimant's case as pleaded correctly, the collision would have occurred,

because the Claimant while stationary on the bicycle, was in the process of being overtaken in an unsafe manner by the Defendant, thus resulting in the collision.

[29] Even if I am wrong on this last point however, for the other reasons adumbrated above, I do not believe it appropriate to apply the res ipsa loquitur maxim in the particular circumstances of this particular case.

[30] Various points have been placed before me in writing, by the Claimant's counsel, as Closing Submissions herein. Whilst I have already addressed some of these, there are a few others that need to be addressed. I will do so now. Firstly, reliance has been placed by the Claimant's counsel, in Submissions, on Section 51 of the Road Traffic Act and the alleged failure of the Defendant to comply therewith, in the particular circumstances of this particular case. I cannot accept this contention however, as this was never set out in the Claimant's statement of case, as being a matter that he was relying on. A failure by the Defendant to comply with the provisions of Section 51 of the Road Traffic Act, has not been set out, at all, in either the Claimant's Claim Form or Particulars of Claim. Thus, other than with this Court's permission, the Claimant cannot now rely on this contention. In that regard note that Rule 8.9 (1) of the Civil Procedure Rules provides that – "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." That rule was amended by the insertion into the Rules of the Court, in September of 2006, the following Rule, as Rule 8.9 A – "The Claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission." In this case, no such permission was ever sought on the Claimant's behalf. Of course, if such permission had been sought and obtained, the situation would then be

different as the Claimant could then have properly relied on this assertion. However, in this case, no such permission was sought and therefore none was given. Accordingly, the Defendant had been given no opportunity, either in his Defence or even in Closing Submissions, to respond to this assertion being made on the Claimant's behalf. In the circumstances, I find myself unable to consider the applicability or otherwise, of Section 51 of the Road Traffic Act, insofar as the Defendant's actions at the relevant time, are concerned.

[31] The Claimant, through his counsel, in the extensive written Closing Submissions which have been provided to this Court and for which this Court is thankful, has suggested that this Court must draw an adverse inference in respect of the Defendant's case, in light of the, "Defendant's mind-boggling election not to call any evidence in this matter. It is further submitted that this adverse inference that the Court must draw, strengthens the evidence adduced by the Claimant and assists with proving the negligence of the Defendant on a balance of probabilities." Two authorities have been referred to by the Claimant's counsel in support of this proposition, these being – **Benham Limited v. Kythira Investments Ltd. (2003) EWCA Civ. 1794 and Clifford Baker v. Attorney General (op.cit.).** I do not at all demur from the proposition of law as set out in either of these cases. However, I do not believe that they can assist the Claimant in the particular circumstances of this particular case. This is because, in the case at hand, I do not accept that the Claimant was a credible witness and he was the only person called upon to establish the Defendant's liability. In the circumstances, the Defendant's failure to respond to evidence put forward by a Claimant, which in this Court's view, entirely lacks credibility, cannot and ought not to be held against the Defendant. Again, I wish to point out that when this Court decided that the Defendant had a case to answer to, this Court

was not then considering the important matter of credibility of witnesses. That is a matter which can only properly be decided upon, after all of the evidence of both parties has been placed before the Court, or at least, in a situation, such as this one, after the Claimant's case has been closed and the Defendant has made a no-case submission, if that submission has been rejected by the Court, then once the Defendant has elected to call no evidence and therefore, then and there close his case. It is only at that stage when all of the evidence is before the Court, that the Court ought properly to assess matters of credibility. Thus, it follows from this, that even though I did not uphold the Defendant's no-case submission it cannot mean that I accept the Claimant's evidence either as being credible, or that I must take it that the Claimant had proven his case on a balance of probabilities. Establishing a prima facie case and establishing a case on a balance of probabilities are two different things in law. The Claimant succeeded in the former, but utterly failed, for the various and sundry reasons which I have adumbrated above, in establishing the latter. In the circumstances, I will not draw an adverse inference from the Defendant's failure to lead any evidence on his behalf at trial. If the Claimant's evidence had been credible and if the Claimant's case, as advanced by the evidence presented to this Court was more consistent with there being negligence on the Defendant's part insofar as the cause of the collision is concerned, than any other possibilities, then the circumstances, legally, could have been decidedly different and I would, had such been the case, have been inclined to draw an adverse inference from the Defendant's failure to place before this Court any evidence on his behalf. That however, is not the case here.

[32] I mean no disrespect to the Claimant's counsel, by not addressing any further, or perhaps addressing at all, any of the other points that have been advanced on the written Closing Submissions on the Claimant's

behalf, but I really do not believe that any of those points can assist the Claimant any further.

CONCLUSION

[33] In the circumstances, I award Judgment to the Defendant and Order that the costs of the Claim are awarded to the Defendant, with such costs to be taxed, if not agreed upon.

Hon. Kirk Anderson (J.)