



[2022] JMSC Civ 121

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2014 HCV 00645

BETWEEN ERLENE MELBOURNE CLAIMANT

(Administratrix in the Estate of the late
Osbourne Melbourne, Deceased)

**AND JAMAICAN INFRASTRUCTURE DEFENDANT/
OPERATOR LIMITED ANCILLARY CLAIMANT**

**AND THE ATTORNEY GENERAL ANCILLARY DEFENDANT
OF JAMAICA**

IN OPEN COURT

**Mr Aon Stewart instructed by Messrs. Knight, Junor & Samuels for the
Claimant**

**Mesdames M. Georgia Gibson Henlin Q.C. and Ronece Simpson instructed by
Henlin Gibson Henlin for the Defendant/Ancillary Claimant**

**Ms Faith Hall instructed by the Director of State Proceedings for the Ancillary
Defendant**

Heard: March 14 and 15 and July 28, 2022

**Tort – Breach of statutory duty – Whether a statutory duty of care is imposed
on the highway authority – Whether the highway authority breached the
statutory duty – Liability of highway authority**

Occupiers' liability – Common duty of care – Degree of care – Use of the highway – Motorist injured while using the highway – Unidentified object thrown by unidentified persons from overhead bridge along the highway – Object impacted motorist – Whether the highway is considered to be premises in accordance with the statute – Whether the highway authority is an occupier – Whether motorist is a visitor – Whether motorist is a visitor of the highway authority – Liability of highway authority

Negligence – The duty of care owed by the highway authority to the lawful users of the highway – Whether the highway authority breached the duty of care – Liability of the highway authority

Res ipsa loquitur – Doctrine of – Whether the doctrine of res ipsa loquitur applies

Contract – Whether contract created between the highway authority and a user of the highway – Whether the highway authority owes a duty of care to a user of the highway by virtue of contract – Whether the highway authority is in breach of contract – Liability of highway authority

The Toll Roads Act, 2001, section 16, The Occupiers' Liability Act, 1969, sections 2 and 3, Main Roads Act, sections 4(1) and 4(2), 5(1)(a) and 5(1)(b)

A. NEMBARD J

INTRODUCTION

[1] The afternoon of Sunday, 13 February 2011, is one that the Melbourne family will never forget. At approximately 12:30 p.m., that fateful afternoon, the patriarch of the family, Mr Osbourne Melbourne, was the driver of a Toyota Probox motor car, registered 2267FA (“the Toyota Probox”). He was accompanied by some of his family members, including his wife, Mrs Erlene Melbourne. His route lay along Highway 2000, Phase I, in the parish of St. Catherine.

- [2] As Mr Melbourne approached the Bernard Lodge Overhead Bridge (“the Bernard Lodge Bridge”), a missile was thrown from the Bernard Lodge Bridge by an unidentified person or persons. That object shattered the front windscreen of the Toyota Probox and directly impacted Mr Melbourne. As a consequence, Mr Melbourne sustained multiple injuries and ultimately, he lost control of the Toyota Probox.
- [3] Mr Melbourne was rushed to the Spanish Town Hospital where, tragically, he succumbed to his injuries.¹
- [4] It is in the context of these cataclysmic circumstances that the Claim Form was filed by Mrs Erlene Melbourne, the widow of the deceased, in her capacity as Administratrix of her late husband’s estate.² The Claim is against the Defendant, the Jamaican Infrastructure Operator Limited (“JIO”), the operator of the East-West Corridor of Highway 2000, Phase I (“the highway”).
- [5] By way of a Claim Form, which was filed on 7 February 2014, Mrs Melbourne alleges that, on 13 February 2011, as a result of JIO’s negligence, her late husband, who was at all material times, a lawful user of the roadway, crashed and suffered severe injuries, to which he later succumbed.
- [6] The Claim raises issues in relation to: -
- (i) Whether JIO owed a statutory duty of care to Mr Melbourne by virtue of The Toll Roads Act and/or The Occupiers’ Liability Act;
 - (ii) Whether JIO is liable in negligence; and
 - (iii) Whether JIO is liable in contract.
- [7] The Claim raises the specific issue of whether JIO can properly be held liable for the injuries suffered by and the subsequent death of, Mr Melbourne.

¹ See – The Post Mortem Examination Report numbered P.M.E. #342/11, which was received in evidence as exhibit 4 and which indicates that the cause of death was due to the following: - traumatic shock; fracture of left mandible, clavicle and ribs; crush laceration of carotid, jugular and subclavian vessel; and hard and blunt force.

² See – Letters of Administration, which was received in evidence as exhibit 1.

- [8] On 24 March 2014, JIO filed a Defence and an Ancillary Claim Form. By virtue of the Ancillary Claim Form, JIO seeks against the Ancillary Defendant, the Attorney General of Jamaica, an indemnity and/or contribution for any sums of money in respect of which it is held liable.

THE ISSUES

- [9] The following issues are determinative of the Claim: -
- (i) Whether JIO owed a duty of care to Mr Melbourne by virtue of The Toll Roads Act and/or The Occupiers' Liability Act;
 - (ii) Whether JIO is liable in negligence;
 - (iii) Whether the doctrine of res ipsa loquitur applies; and
 - (iv) Whether JIO is liable by contract.

THE LAW

The tort of breach of statutory duty

- [10] Breach of statutory duty is concerned with the duties created by statute. The tort of breach of statutory duty arises in circumstances where a statute, which has as its main objective the imposition of a regulatory or criminal law framework, also gives rise to duties in tort. A claimant must demonstrate that the defendant breached a statutory obligation which was intended to confer a right of action in private law upon a class to which he belongs, and that the breach caused relevant harm.
- [11] At almost every stage in the legal framework for establishing a claim for breach of statutory duty, it is necessary to consider the proper interpretation to be applied to the relevant statute; the wording and overall scheme of the relevant statute or regulation; and the basic principles of statutory interpretation.

The conceptual basis of the tort

- [12] The tort of breach of statutory duty is conceptually an entirely separate tort from other related torts, such as negligence. Nor should it be confused with claims in negligence which can arise from the careless exercise of a discretion associated with a statutory duty or from the inadequate exercise of a statutory power. The statutory right has its origin in the statute but the particular remedy of an action in damages is given by the common law, in order to make effective for the benefit of the injured party, his right to the performance by the defendant of the defendant's statutory duty. It is not a claim in negligence in the strict or ordinary sense. There is an important distinction between the tort of breach of statutory duty and the action for negligence which can arise as a result of the careless or inadequate exercise of a statutory power. It is also critical to distinguish between statutory duties and the implied discretions associated with them and statutory powers in situations involving public authorities.
- [13] The common law duties of public bodies are no more extensive than those of a private person in similar circumstances, irrespective of the extent of the body's public law power and duties. Liability for the negligent exercise of statutory powers is likely to arise only where the public body has assumed responsibility to the claimant or exposed him to risk by its creation of a danger.
- [14] It is now settled law that no liability will arise in negligence out of a mere failure, without more, by a public body to confer a benefit by its omission to fulfil a public statutory duty or to exercise a statutory power, however irrational such failure may turn out to have been.³ Similarly, as a general rule, the proximity created by a statutory relationship does not create a duty of care.⁴

³ See – **Furnell v Flaherty** [2013] EWHC 377 (QB)

⁴ See – **Home Office v Mohammed & Ors** [2011] EWCA Civ 351, at paragraph [14], per Sedley LJ (although Sedley LJ did not close off the possibility of future 'incremental change at the margins of common law liability': [27]).

The elements of the tort

[15] The following propositions must be proved, on a balance of probabilities, before a claimant can establish liability for breach of statutory duty: -

- (i) the statute must have been intended to create civil liability, so that a duty of care arises under the statute;
- (ii) the statutory duty must have been owed to the particular claimant;
- (iii) the statutory duty must have been imposed on the defendant;
- (iv) the defendant must have been in breach of the statutory duty;
- (v) the breach of the statutory duty must have resulted in damage of a type contemplated by the statute; and
- (vi) the breach of the statutory duty must have caused the damage of which the complainant complains.⁵

The claim in negligence

[16] It is trite law 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.

The burden and standard of proof

[17] It is equally well established by the authorities that, where a claimant alleges that he has suffered damage resulting from a defendant's negligence, a burden of proof is cast on him to prove his case on a balance of probabilities.⁶

[18] This principle was enunciated by Lord Griffiths in **Ng Chun Pi and Ng Wang King v Lee Chuen Tat and Another**.⁷ He stated at pages 3 and 4: -

⁵ See – Common Law Series: The Law of Tort, Chapter 15, at paragraph [15.15]

⁶ See – **Kimola Merritt (suing by her mother and Next Friend Charm Jackson) and the said Charm Jackson v Dr Ian Rodriguez and the Attorney General of Jamaica**, unreported, Suit No. CL1991/M036, judgment delivered on 21 July 2005

“The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant might have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred...”

...it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established.”

- [19] In **Miller v Minister of Pensions**,⁸ Denning J, speaking of the degree of cogency which evidence must reach in order that it may discharge the legal burden in a civil case, had the following to say: -

“That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged but if the probabilities are equal it is not.”

- [20] To establish a duty of care, there must be foreseeable damage, consequent upon the defendant’s negligent act.⁹ There must also exist sufficient proximate relationship between the parties, making it fair and reasonable to assign liability to the defendant.

- [21] Lord Bridge, in **Caparo Industries plc v Dickham**,¹⁰ spoke of the test in the duty of care, sufficient to ascribe negligence, in this way: -

“In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships, there has for long been a tension between two different approaches. Traditionally the law finds the existence of the

⁷ Privy Council Appeal No. 1/1988, judgment delivered on 24 May 1988

⁸ [1947] 2 All ER 372, at pages 373- 374

⁹ See – **Roe v Ministry of Health and Others. Woolley v Same** [1954] 2 All ER 138 B-C

¹⁰ [1990] 1 All ER 568, at page 572

duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified as wide variety of duty situations, also falling within the ambit of the test of negligence.”

[22] At pages 573 and 574, Lord Bridge went on to say: -

“What emerges, is that, in addition to the foreseeability of damage, [the] 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 characterized 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 on the one party for the benefit of the other.”

Causation

[23] A claimant is required to prove that the defendant’s breach of duty caused, or, at the very least, materially contributed to the damage or loss sustained by him. A claimant must establish, on a balance of probabilities, a causal link between his injury and the defendant’s negligent act.

The ‘but for’ test

[24] The authority of **Clements v Clements**,¹¹ McLachlin CJ provided a comprehensive analysis of the nature and application of the ‘but for’ test. He stated, as follows: -

“The test for showing causation is the ‘but for’ test. The plaintiff must show on a balance of probabilities that ‘but for’ the defendant’s negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant’s negligence was necessary to bring about the injury – in other words that the injury would not have occurred without the defendant’s negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

¹¹ [2012] 2 S.C.R., at paragraphs 8-10

The “but for” causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant’s negligence made to the injury. See Wilsher v. Essex Area Health Authority, [1988] A.C. 1074 (H.L.), at p. 1090, per Lord Bridge; Snell v. Farrell, [1990] 2 S.C.R. 311.

A common sense inference of “but for” causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant’s negligence probably caused the loss.”

Remoteness of damage

- [25] A defendant is only liable for the consequences of his negligent conduct which are foreseeable. He will not be liable for consequences which are too remote. In this regard, in **Roe v Ministry of Health and Others. Woolley v Same**,¹² Lord Denning posited as follows: -

“The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to a person when you could not reasonably foresee that he might be injured by your conduct: see Hay (or Bourhill) v Young and Woods v Duncan ([1946]) AC 426, per Lord Russell of Killowen, and ibid, 437 per Lord Porter). The second question is whether the neglect of duty was a “cause” of the injury in the proper sense of that term: and causation, as well as duty, often depends on what you should foresee.”

THE SUBMISSIONS

The Claimant’s submissions

- [26] Learned Counsel Mr Aon Stewart, in his concise written submissions on behalf of Mrs Melbourne, focused the Court’s attention on section 3 of the Occupier’s Liability Act. Mr Stewart asserts that the section establishes that the duty of an ‘occupier’, as contemplated by the statute, is that of the

¹² Supra, at page 138 A-C

common duty of care. This, he asserts, is to take such care as in all the circumstances of the case is reasonable, to see that the visitor will be reasonably safe in using the premises, for the purposes for which he is invited or permitted by the occupier to be there.¹³

- [27] Mr Stewart further submits that the Court is obliged to accept as a fact, Mrs Melbourne's contention that, on 13 February 2011, there was an object which emanated from persons unknown on the Bernard Lodge Bridge, in the vicinity of the highway. Mr Stewart contends that JIO has not sought to challenge this assertion.
- [28] Mr Stewart contends that there is equally no issue that, prior to 13 February 2011, there were multiple incidents of stone throwing from the Bernard Lodge Bridge.
- [29] In those circumstances, the question that arises, Mr Stewart contends, is whether JIO took any steps to alert or warn users of the highway to the potential hazard, having had prior knowledge of previous incidents.
- [30] Mr Stewart maintains that JIO breached the duty of care owed to Mr Melbourne, by its failure to implement any or any sufficient measure(s) to prevent the continued incidents of stone throwing or to warn or alert users of the highway to the potential risk of danger.
- [31] Mr Stewart asserts that there is no dispute that, on 13 February 2011, both Mr and Mrs Melbourne were in fact lawful users of the highway. Nor is there any dispute that, as such, JIO owed them a duty of care.
- [32] Finally, Mr Stewart submits that the highway satisfies the definition of 'premises' as contemplated by the Occupiers' Liability Act.¹⁴

¹³ The Court was referred to the authorities of **Marie Anatra v Ciboney Hotel Limited & Anor**, Suit No. C.L. A-196/1997, unreported, judgment delivered on 31 January 2001 and **Victoria Mutual Building Society v Barbara Berry**, SCCA No. 54/2007, unreported, judgment delivered on 31 July 2008

¹⁴ The Court was referred to the authority of **Danielle Archer v Jamaica Infrastructure Operator Limited** [2013] JMSC Civil 76

The Defendant/Ancillary Claimant's submissions

[33] For its part, JIO denies liability for the accident which occurred on 13 February 2011 as well as for the resulting death of Mr Melbourne.

[34] The Defence of JIO may be summarized as follows: -

- (a) The Occupiers' Liability Act is not applicable for the reason that the accident, as alleged, was not caused by the condition of the highway. In any event, JIO is neither the owner nor the occupier of the highway;
- (b) The doctrine of *res ipsa loquitur* is not applicable for the reason that the cause of the accident or incident is known. Accordingly, there is no basis on which the court can find that a *prima facie* case of negligence has been established;
- (c) JIO is neither the owner nor the occupier of the Bernard Lodge Bridge. The Bernard Lodge Bridge is a public thoroughfare under the responsibility of the National Works Agency ("NWA");
- (d) JIO is not in breach of contract.

Whether JIO owed a duty of care by virtue of The Toll Roads Act

[35] Learned Queen's Counsel Mrs M. Georgia Gibson Henlin, in her very thorough and comprehensive written submissions on JIO's behalf, asserts that no duty is created, under the Toll Roads Act, in relation to Mrs Melbourne. The duty created by virtue of the Toll Roads Act is a duty to maintain the toll road in good repair and condition and in accordance with sound engineering and operating practices.¹⁵

[36] Mrs Gibson Henlin QC maintains that the provisions of the section have not been engaged for the reason that there is no evidence that the failure to perform this duty resulted in the harm alleged. The harm, as alleged, emanated from a road or a bridge, that does not form part of the highway.

¹⁵ See – Section 16(a) of the Toll Roads Act

[37] It is submitted that JIO's duties in relation to Highway 2000 are governed by the Toll Roads Act, the Toll Roads Order of 2001 and 2006 as well as the Concession Agreement between NROCC and TransJamaican Highway Limited ("TJH"), dated 21 November 2001 and restated on 28 January 2011. Accordingly, the area of responsibility is circumscribed by the path comprising the toll road, Highway 2000, Phase I. Highway 2000 is a tolled highway and the path and areas over which the toll is charged are shown in the Toll Road Orders which are made pursuant to section 8 of The Toll Roads Act, 2001.¹⁶

[38] Mrs Gibson Henlin QC asserts that, a claimant alleging a breach of a statutory duty must establish the following: -

- (i) That the statute must have been intended to create civil liability so that a duty of care arises under the statute;
- (ii) That the statutory duty was owed to the claimant;
- (iii) That the duty was imposed on the defendant;
- (iv) That the defendant breached the statutory duty;
- (v) That the breach of the statutory duty resulted in damage of a type contemplated by the statute; and
- (vi) That the breach of the statutory duty caused the damage of which the claimant complains.¹⁷

[39] Mrs Gibson Henlin QC further contends that the scope of the duty is restricted to the natural and ordinary meaning of the word "maintain", as used in section 16 of The Toll Roads Act; that the breach of the duty is construed as nuisance; that nuisance in this context would be a public nuisance as there is no adjoining land and the duty is one that is owed to the users of the highway at large; that the absolute duty imposed is that of maintenance of the roadway which refers to the fabric or physical structure of the highway and not to transient obstructions on the surface of the road.

¹⁶ See – Section 8(1)(a) of the Toll Roads Act; The Toll Roads Order, 12 March 2002, First Schedule, which was received in evidence as Exhibit 17; and The Toll Roads Order, 7 July 2006, Schedule Parts A, B and C, which was received in evidence as Exhibit 18

¹⁷ The Court was referred to Common Law Series: The Law of Tort, page 9, paragraphs [15.15]

[40] Finally, Mrs Gibson Henlin QC asserts that the highway, as designated and demarcated, does not include the Bernard Lodge Bridge; to the extent that bridges or structures are mentioned as part of JIO's duty, it relates to the physical structure of the bridge and is restricted to a duty to repair.

[41] As a consequence, it has not been demonstrated that JIO is in breach of its duty to maintain under The Toll Roads Act and that that breach caused the accident which occurred on 13 February 2011 and the resulting death of Mr Melbourne. In any event, it is submitted, the event that caused the death of Mr Melbourne did not originate with the highway.

Whether JIO owed a duty of care by virtue of The Occupiers' Liability Act

[42] Mrs Gibson Henlin QC submits that The Occupiers' Liability Act does not apply to a highway. It was further submitted that a highway has certain features and is essentially a public right to pass over a defined route. The term 'highway' may be used to refer to the nature of the right but more usually relates to the physical feature over which the right is exercised. Once established, a highway may lawfully be used for purposes other than the right of passage.

[43] This description of a highway contains within it four (4) elements: -

- (i) The way must be open to the public at large;
- (ii) The public must have a right to use the way;
- (iii) The public right must be primarily for passage; and
- (iv) The public right of passage must follow a defined route.¹⁸

[44] Mrs Gibson Henlin QC maintains that the toll road was constructed and designated as such, for the benefit of the travelling public. A public right of way was created and it does not matter that it is a private highway.

[45] The Government of Jamaica entered into a concession agreement with TJH to construct, operate and maintain the highway and that the operation and

¹⁸ The Court was referred to Highway Law by Stephen Sauvain, QC

maintenance of the highway was delegated to JIO. The right, on the part of TJH, to undertake the construction of the highway included the right to collect a toll.¹⁹

- [46] The Toll Authority is responsible for the regulation of the payment and collection of tolls and the Minister is responsible for making Toll Orders. Mrs Gibson-Henlin QC asserts that this was not intended to place the users of the highway in a special class of persons nor was it intended to create a contract, for the reason that the purpose of the toll forms part of the funding mechanism for the highway.
- [47] Additionally, Mrs Gibson Henlin QC contends that the user of the highway is not a “licensee” or an “invitee”, as contemplated by The Occupiers’ Liability Act. This, she further contends, means that the user utilizes the highway, not because he is invited or forced so to do but because he has a right to do so, subject to the payment of a toll.²⁰
- [48] Mrs Gibson Henlin QC maintains that JIO’s duties, in relation to the highway, are governed by The Toll Roads Act; The Toll Roads Order, 2001 and 2006 as well as the Concession Agreement between NROCC and TJH, dated 21 November 2001 and which was restated on 28 January 2011.
- [49] The accident which occurred on 13 February 2011, does not concern the statutory or agreed obligations to maintain routine, corrective or rehabilitative repair of the highway.²¹
- [50] Further, Mrs Gibson Henlin QC asserts that the authority of **Danielle Archer v Jamaica Infrastructure Operator Limited**²² was wrongly decided or is distinguishable. Mrs Gibson Henlin QC maintains that the authority is distinguishable as no argument was raised before the court in relation to the character of the road, having been designated a highway. Neither the 2002

¹⁹ See – Section 8(1)(b) of the Toll Roads Act

²⁰ See – Paragraphs 4, 8, 10, 11 and 15 of The Highway 2000 (Part of Phase I) Toll Order, 2006, which was received in evidence as Exhibit 18

²¹ The Court was referred to the Witness Statement of Desmond Levy, which was filed on and which was permitted to stand as part of the evidence in chief of the witness, exhibits 10, 11 and 12, “JIO IMS Document – Emergency Preparedness and Response Procedure”; “JIO IMS Document – Patrol Officer Operating Manual (POM-03)”; and “JIO IMS Document – Operating and Signage Manual (OS-01)”

²² [2013] JMSC Civil 76

nor the 2006 Orders had been relied on or cited before the court. Mrs Gibson-Henlin QC also seeks to distinguish the authority of **Danielle Archer** on the basis that there, the accident occurred because of the presence of goats on the highway. Conversely, in the present instance, the allegation is that the act that caused the accident occurred from property that does not form part of the highway.

ANALYSIS AND FINDINGS

Whether JIO owed a duty of care to Mr Melbourne by virtue of The Toll Roads Act and/or The Occupiers' Liability Act

Liability under The Toll Roads Act, 2001

- [51] In seeking to determine whether JIO owed a duty of care to Mr Melbourne by virtue of The Toll Roads Act, 2001, the Court has regard to the general context of the statute; the precise nature of the statutory duty under consideration; and the basic rules of statutory interpretation.
- [52] Sir Rupert Cross, at page 15 of the text, Cross on Statutory Interpretation, 3rd ed., 1995, analysed the **Sussex Peerage Case**,²³ and enunciated the basic rules of statutory interpretation. He stated that where the words used in a statute are precise and unambiguous, the judge's duty is to give them their natural and ordinary meaning. It is only where the words used create doubt or ambiguity as to meaning, that judges should examine the background to the statute to determine its object or purpose, and the deficiency which the statute was introduced to address.
- [53] In **Dennis Meadows et al v Attorney General of Jamaica and The Jamaica Public Service Company Limited et al**,²⁴ in examining the aids to statutory interpretation, Sykes J (as he then was), at paragraph [33], stated as follows: -

“[33] The process of interpretation of statutes has evolved. It is now appreciated that, on the face of it, there is usually a range of meanings

²³ (1844) 11 Cl & Fin 85

²⁴ [2012] JMSC Civ 110

that may be applied to the words used. This does not mean that a judge is free to give any meaning he wishes to the statute...The meaning eventually given to the words ought to be one that the words can reasonably carry unless of course the context compels some very unusual meaning. What used to be called rules of interpretation are nothing more than guides to direct the thought process when interpreting a statute. The Latin maxims operate more as refined tools designed to see if the court's interpretation is reasonable."

[54] The Court accepts the submission advanced by Mrs Gibson Henlin QC that The Toll Roads Act, 2001 and subsequent Toll Orders do not ascribe to or impose on, concessionaires, a duty of care to the users of the highway. A careful examination of The Toll Roads Act, 2001 supports such a finding.

[55] Section 16 of the Toll Roads Act provides as follows: -

"16. Every concessionaire shall –

(a) maintain the toll road to which his concession relates in good repair and condition and in accordance with sound engineering and operating practices; and

(b) comply with such design, construction, operating, maintenance and safety standards as may be prescribed by the Minister after consultation with the Authority."

[56] Section 16 of The Toll Roads Act imposes a statutory duty on every concessionaire to maintain the toll road, to which his concessionaire relates, in good repair and condition and in accordance with sound engineering and operating practices.

[57] Additionally, The Toll Roads Act imposes a statutory duty on every concessionaire to comply with such design, construction, operating, maintenance and safety standards as may be prescribed by the Minister after consultation with the Toll Authority.

[58] The words used in The Toll Roads Act are both precise and unambiguous and ought to be given their ordinary and natural meaning. The word "maintain", as

defined by the New Concise Oxford English Dictionary, 11th ed., means “to keep in good condition by checking or repairing regularly.”

[59] The Court finds that the statutory duty imposed on JIO by The Toll Roads Act is a duty to maintain the highway and to keep the structure and fabric of the highway in good repair, in keeping with sound engineering and operating practices. The duty is not merely to keep the highway in such a state of repair in which it may be at any particular point in time but to put it in such good repair, so as to render it reasonably suitable for the passage of the ordinary flow of traffic, throughout all seasons of the year and without danger caused by virtue of its physical condition.

[60] Additionally, JIO has a duty to comply with such design, construction, operating, maintenance and safety standards as may be prescribed by the Minister, in consultation with the Toll Authority.

[61] In the result, from a careful examination of the provisions and the general context of the statute, this Court is of the view that it cannot be said that JIO owed a duty of care to Mr Melbourne by virtue of The Toll Roads Act, 2001.

Liability under The Occupiers’ Liability Act, 1969

[62] At common law, an occupier of premises owes a duty to take such care as is reasonable in all the circumstances, to ensure that visitors to his premises are reasonably safe, in their use of the premises for the purposes for which they are invited or permitted by the occupier, to be there. This position has been codified by The Occupiers’ Liability Act, 1969.

[63] The Occupiers’ Liability Act, 1969 replaced the rules of the common law and abolished the common law distinction between invitees and licensees and substituted for it a single common duty of care owed by the occupier to his “visitors”. It reads identically to The Occupiers’ Liability Act, 1957 of the United Kingdom.

[64] Section 2(1) of The Occupiers’ Liability Act, 1969 provides as follows: -

“2.-(1) The rules enacted by sections 3 and 4 shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of

dangers due to the state of the premises or to things done or omitted to be done on them.”

[65] So far as is material, section 2(2) of The Occupiers' Liability Act, 1969 is in the following terms: -

“(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly, for the purpose of the rules so enacted, the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licensees.”

The common duty of care

[66] Section 3 of The Occupiers' Liability Act, 1969 reads, in part, as follows: -

“3. –

(1) An occupier of premises owes the same duty (in this Act referred to as the “common duty of care”) to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.

(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”

The degree of care

[67] The degree of care and of want of care which would ordinarily be looked for by a visitor requires an occupier to: -

(i) be prepared for children to less careful than adults; and

- (ii) expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it.

[68] In determining whether the occupier of premises has discharged the common duty of care, regard must be had to all the circumstances.²⁵

Who is an occupier

[69] At common law, an occupier may be defined as a person who has a sufficient degree of control over premises to put him under a duty of care towards those who come lawfully onto the premises.²⁶

[70] Halsbury's Laws of England, Volume 78 (2018), paragraph 30, states the test to be employed to determine whether a person is an occupier. It reads as follows: -

"The rules of the common law continue to determine who is an occupier. In order to be an occupier exclusive occupation is not required, and the test is whether a person has some degree of control associated with and arising from his presence in and use of or activity in the premises. Two or more persons may be occupiers of the same land, each under a duty to use such care as is reasonable in relation to his degree of control."

Who is a visitor

[71] A visitor is defined as anyone to whom the occupier gives an invitation or permission to enter or use the premises.²⁷

[72] In **British Railways Board v Herrington**,²⁸ Lord Pearson, after careful examination of section 2 of The Occupiers' Liability Act, 1957 of the United

²⁵ See – Section 3(4) of The Occupiers' Liability Act, 1969. See also the pronouncements of Campbell JA (Ag.) in **Rose Hall Development Ltd v Wesley Robinson and Jamaica Public Service Co Ltd** (1984) 21 JLR 76, where he summarized the relevant principles that are applicable to The Occupiers' Liability Act, 1969.

²⁶ See – **Wheat v E. Lacon & Co., Ltd** [1966] 1 ALL ER 582, at pages 593-594, at paragraphs I-D, per Lord Denning

²⁷ See – Halsbury's Laws of England, Volume 78 (2018), paragraph 31

²⁸ [1972] 1 All ER 749, at page 779, paragraphs d-e

Kingdom, which is identical to section 3 of The Occupiers' Liability Act, 1969 of Jamaica, defined the term "visitors" as follows: -

"The broad effect of s 2 of the Occupiers' Liability Act 1957 is that an occupier of premises owes to his lawful visitors, ie the persons who come on the premises at his invitation or with his permission, the common duty of care; and that is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there."

The premises

[73] The term "premises" is widely defined in section 2(3) of The Occupiers' Liability Act, 1969. The section provides that "premises" means any fixed or moveable structure, including any vessel, vehicle or aircraft. The section reads as follows: -

"2.-(3) The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the same extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate -

- (a) the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft; and*
- (b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including property of persons who are not themselves his visitors."*

The Occupiers' Liability Act, 1957 of the United Kingdom

[74] It is well established that a highway authority cannot be held liable under the provisions of The Occupiers' Liability Act, 1957 of the United Kingdom, in

respect of incidents occurring on the highway. An authority neither invites nor licenses the public to use a footpath. Rather, it is used as of right and the highway authority has no right to exclude them. The duty to maintain the footpath is not sufficient to establish the necessary control over the path to render the highway authority an occupier.²⁹

- [75] Where a highway is maintained at the public expense and the surface is vested in and under the control of, that authority, the owner of the subsoil will not, in any event, be the occupier of the surface. Where the highway is not maintainable at the public expense then the landowner will still have ownership of the surface and may have a certain degree of control over it. However, the same limitation on the application of the statutory common duty of care applies, as the users of the footpath do so, not by licence or by invitation but by exercise of their public right.³⁰
- [76] In **Holden v White and Another**,³¹ the only access to a row of five terraced houses was on foot over a pathway which had been conveyed to the first defendant's predecessor-in-title, together with the first house in the row, subject to a private right of way for the benefit of the other houses. The first defendant, the owner of the servient tenement, let the first house to a tenant and lived in the second and third houses. The plaintiff, delivering milk to the fourth house in the row, trod on a defective manhole cover in the pathway in front of that house and it broke, causing him to injure his foot. He brought an action against the first defendant claiming damages for negligence and breach of the common duty of care owed by the occupier under section 2 of the Occupiers' Liability Act, 1957. The judge found the first defendant liable under the Act and awarded the plaintiff an agreed sum of damages.
- [77] On appeal, the English Court of Appeal held, allowing the appeal, that the purpose of The Occupiers' Liability Act, 1957, was to eradicate some of the unsatisfactory features of the way in which the common law had developed as regards the liability of occupiers or premises for injuries sustained by third

²⁹ See – **Holden v White** [1982] Q.B. 679

³⁰ See – **Greenhalgh v British Rlys Board** [1969] 2 Q.B. 286; **McGeown v Northern Ireland Housing Executive** [1994] 3 W.L.R. 187 HL

³¹ Supra

parties lawfully resorting there, the extent of the duty varying according to whether the person injured was vis-à-vis the occupier, an invitee or a licensee. The Act removed this distinction and substituted a single common duty to all visitors, whether licensees or invitees but it was not its purpose to enlarge the overall class of persons to whom the duty was owed.

[78] The English Court of Appeal applied **Greenhalgh v British Railways Board**³² and, in particular, the following judgment of Lord Denning M.R., at pages 292-293:

“In the second place, it was said that the board owed a duty to Mrs. Greenhalgh under the Occupiers’ Liability Act 1957. It was said that she is a ‘visitor’. But I do not think she was. Section 1(2) shows that, in order to determine whether a person is a ‘visitor’, we must go back to the common law. A person is a ‘visitor’ if at common law he would be regarded as an invitee or licensee; or be treated as such, as for instance, a person lawfully using premises provided for the use of the public, e.g., a public park, or a person entering by lawful authority, e.g. a policeman with a search warrant. But a ‘visitor’ does not include a person who crosses land in pursuance of a public or private right of way. Such a person was never regarded as an invitee or licensee, or treated as such.”

[79] In the result, the English Court of Appeal found that the owner of land, over which there was a right of way, owed no duty of care at common law to those using the right of way; that the Act of 1957 did not extend the common law duties of an occupier and the first defendant’s liability under the Act was restricted to her visitors; and that, although the plaintiff was lawfully using the right of way, he was not the first defendant’s visitor and, as a consequence, his claim against her failed.

[80] This Court accepts the reasoning and pronouncements of the English Court of Appeal in **Holden v White** and **Greenhalgh v British Railways Board**, and finds that those pronouncements are equally applicable in the present instance.

³² [1969] 2 Q.B. 286. A case in which the plaintiff was injured by the defective surface of the defendant’s bridge over which she was passing in the exercise of a public right of way. The Court of Appeal unanimously rejected the submission that she was a “visitor” of the defendants.

- [81] Consequently, the Court finds that The Occupiers' Liability Act, 1969 of Jamaica is not applicable to the highway.
- [82] Further, the Court finds that JIO is not an "occupier" for the purposes of The Occupiers' Liability Act, 1969, nor does the highway constitute "premises", as defined or contemplated by the statute. It is important to note that the word "premises", as defined in the statute, means any "fixed or moveable structure". The word "structure" is defined by the New Concise Oxford English Dictionary, 11th ed., as "a building or other object constructed from several parts." This Court is of the view that the highway does not satisfy this definition of the word "premises". The Court also finds that Mr Melbourne was not a "visitor", for the purposes of The Occupiers' Liability Act, 1969, nor was he the "visitor" of JIO.
- [83] The Court also accepts the submissions made by Mrs Gibson Henlin QC where she asserts that the authority of **Danielle Archer** ought properly to be distinguished.
- [84] In that regard, the Court makes two observations. Firstly, the authority of **Danielle Archer** concerned goats which had entered the highway, thereby colliding with the claimant's motor vehicle. Secondly, at paragraph [71], the court opined that Highway 2000 is private property which is occupied by JIO, which allows access to persons who pay a toll. The court stated further that there is no jurisprudential reason that the Occupiers' Liability Act, 1969 should not apply to JIO. The court did not, however, state the bases on which it arrived at this conclusion.
- [85] In the circumstances, on the basis of all the legal principles which have been examined and discussed in this Analysis and Findings, this Court must, respectfully, differ.

Whether JIO can be held liable in negligence

- [86] It is well established that negligence, as a tort, is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the claimant. Its ingredients are firstly, a legal duty on the part of A towards B to exercise care in the conduct of A which falls within the scope of the legal duty;

secondly, breach of that duty; and thirdly, consequential damage to B. It is not for every careless act that a man may be held responsible in law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care.

[87] In the present instance, JIO has a duty, to the extent that it is able, to provide safe passage to the users of the highway. A failure to exercise care in its conduct which falls within the scope of its legal duty, would render JIO liable in negligence. For example, JIO may be held liable in negligence were any part of the physical structure of the Bernard Lodge Bridge to become loose and to fall, thereby occasioning loss, injury, harm, damage or even death.

[88] In the circumstances of the instant case, this Court is of the view that JIO could not properly be held liable in negligence for the action of the person or persons who threw the object(s) that impacted Mr Melbourne. There is no evidence, nor does Mrs Melbourne allege, that the unidentified person or persons who threw the object(s) that impacted Mr Melbourne, acted with the knowledge and or authority of JIO.

[89] In those circumstances, the Court finds that, on a preponderance of the evidence, Mrs Melbourne has failed to prove that JIO is liable in negligence for the injuries sustained by and the subsequent death of her husband, Mr Osbourne Melbourne.

Whether the doctrine of res ipsa loquitur applies

[90] Nor does the Court find that the doctrine of res ipsa loquitur applies, for the reason that Mrs Melbourne has failed to prove that: -

- (i) what caused the damage, injury and subsequent death of Mr Melbourne was under the management of JIO or its servants; and
- (ii) in the ordinary course of things, the accident would not have happened without negligence.

[91] While the burden of proving negligence rests on the claimant throughout the case, a claimant may rely on the doctrine of res ipsa loquitur which, when

applicable, raises an inference of negligence, requiring a defendant to provide evidence capable of rebutting that inference.

- [92]** Halsbury's Laws of England, Volume 78 (2018), paragraph 64, provides a detailed summary of the application of the doctrine of *res ipsa loquitur*. It reads as follows: -

“Under the doctrine of res ipsa loquitur a claimant establishes a prima facie case of negligence where:

(1) 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; and

(2) 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 claimant's safety.

There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the defendant or his employees, 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 defendant, that the accident arose from want of care.”

- [93]** Paragraph 68 outlines the effect of the application of the doctrine of *res ipsa loquitur*. It states as follows: -

“Where the claimant successfully alleges res ipsa loquitur its effect is to furnish evidence of negligence on which a court is free to find for the claimant. If the defendant shows how the accident happened, and that is consistent with absence of negligence on his part, he will displace the effect of the maxim and not be liable. Proof that there was no negligence by him or those for whom he is responsible will also absolve him from liability. However, it seems that the maxim does not

*reverse the burden of proof, so that where the defendant provides a plausible explanation without proving either of those matters, the court must still decide, in the light of the strength of the inference of negligence raised by the maxim in the particular case, whether the defendant has sufficiently rebutted that inference.”*³³

[94] In **Jamaica Omnibus Services, Ltd v Hamilton**³⁴ Fox JA stated the two conditions that a claimant must satisfy in order to obtain the assistance of the doctrine of *res ipsa loquitur*. He opined as follows: -

‘In Scott v London and St Catherine Dock Co. (1865), 3 H & C 596, ERLE, C.J., described the conditions for the application of the doctrine of res ipsa loquitur in a statement which has long been famous:

“There must be reasonable evidence of negligence. 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.”

To obtain the assistance of the doctrine, a plaintiff must therefore prove two facts:

- (1) that the “thing” causing the damage was under the management of the defendant or his servants; and*
- (2) that in the ordinary course of things the accident would not have happened without negligence.’*³⁵

³³ See also - **Ng Chun Pui and Ng Wang King v Lee Chuen Tat and Another** (supra), at page 3, per Lord Griffiths: - "...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.”

³⁴ (1970) 16 WIR 316, at page 318, paragraphs F, G and H

³⁵ See also – **Adele Shtern v Villa Mora Cottages Ltd and Monica Cummings** [2012] JMCA Civ 20, per Morrison JA (as he then was), at paragraph [57]

Whether JIO is liable by contract

- [95] The Court accepts that there was an agreement created between Mr Melbourne and JIO, on 13 February 2011. That agreement was to allow Mr Melbourne to travel from point A to point B, along the corridor of the highway, for the payment of a fee. The Court finds however, that there is no duty of care owed by JIO to Mr Melbourne, by virtue of this agreement, nor can a duty of care be implied.
- [96] In the circumstances, the Court also finds that JIO is not liable by contract for the injuries sustained by or the subsequent death of Mr Melbourne.

The ancillary claim

The Ancillary Claimant's submissions

- [97] Mrs Gibson Henlin QC submits that the Ancillary Claim alleges that, at all material times, the Bernard Lodge Bridge was a public road and/or thoroughfare and that the servants and/or agents of the Ancillary Defendant, the Attorney General of Jamaica, had the oversight responsibility in respect of same. Mrs Gibson Henlin further submits that this is as a result of the fact that the highway had been handed over to the NWA, prior to 13 February 2011. As a consequence, the Bernard Lodge Bridge was the responsibility of the Director, pursuant to the Main Roads Act. The Director is the Chief Technical Officer, whose functions were transferred to the Chief Executive Officer of the NWA, by virtue of the Chief Technical Director (Transfer of References) Act, 2000.
- [98] Mrs Gibson Henlin QC contends that the NWA bears the responsibility for the upkeep and maintenance of the Bernard Lodge Bridge, which had been handed over for public use and which, ultimately, was the responsibility of the Government of Jamaica.
- [99] Mrs Gibson Henlin QC further contends that the proximate cause of the accident is action or activity that occurred on the Bernard Lodge Bridge.

[100] Finally, Mrs Gibson Henlin QC maintains that TransJamaican Highway is the developer of the highway, pursuant to an agreement with the National Road Operating and Construction Company (“NROCC”), dated 28 January 2011. By virtue of this agreement, JIO is the operator of the highway. In relation to secondary roads which pass over or under the highway, JIO’s contractual responsibility is limited to the toe of the ramps on intersection or to the toe of the embankment of the highway.

The Ancillary Defendant’s submissions

[101] For her part, Learned Counsel Ms Faith Hall, in her succinct and equally comprehensive written submissions, advanced on behalf of the Attorney General of Jamaica, maintains that the ancillary claim must fail for the reason that the Bernard Lodge Bridge does not fall under the responsibility of the NWA. That responsibility, she submits, rests with TransJamaican Highway.

[102] Additionally, Ms Hall asserts that the NWA has no statutory and/or common law duty to maintain the Bernard Lodge Bridge and/or to implement preventative measures to ensure the safe usage of the highway.

Analysis and findings

[103] The main thrust of the Ancillary Claim, as the Court understands it, is that the Bernard Lodge Bridge was handed over to the NWA and that, as a consequence, the oversight responsibility for the care and maintenance of the Bernard Lodge Bridge rests with the NWA and not with JIO.

[104] In its effort to prove this assertion, JIO produced in evidence a letter dated 30 September 2005, addressed to Mr Ivan Anderson, the then Chief Executive Officer of the NWA. By virtue of this letter, JIO purports to hand over to the NWA, side or cross roads, including the Port Henderson Road (Underpass).

[105] Mr Rae Parchment, the Manager of Network Planning and Research for the NWA, in his viva voce evidence, stated that the Port Henderson Road Underpass is one and the same as the Bernard Lodge Bridge. The main contention of Mr Parchment’s evidence is that bridges which fall under the responsibility of the NWA are listed in the Inventory of Bridges, which is maintained by the NWA.

[106] The following evidence of Mr Parchment bears repeating: -

“Q: *Is hand over completed by a mere letter?*

A: *To the best of my knowledge, a transfer to the National Works Agency has to be acknowledged by a response which is incorporated by a Gazette. The transfer of ownership would be complete by incorporation in a Gazette.*

Q: *In your capacity, are you aware of a Gazette being issued in respect of the Bernard Lodge Bridge?*

A: *I am not aware of or have been able to locate same.”^{36 37}*

[107] This Court is of the view that, on a preponderance of the evidence adduced by JIO, in support of the Ancillary Claim, it has failed to prove the assertions contained in the Ancillary Claim.

[108] Consequently, this Court is of the view that the Ancillary Claim Form, which was filed on 24 March 2014, ought properly to be dismissed.

DISPOSITION

[109] It is hereby ordered as follows: -

(1) Judgment for the Defendant, Jamaican Infrastructure Operator Limited, against the Claimant, Erlene Melbourne, Administratrix of the Estate of the late Osbourne Melbourne, Deceased, on the Claim Form, which was filed on 7 February 2014;

(2) By and with the consent of the Claimant and the Defendant, there shall be no Order as to costs, in respect of the Claim Form, which was filed on 7 February 2014;

³⁶ See – Section 4 (1) of the Main Roads Act, which states that there is a Schedule of Main Roads that is to be kept by the Director. Section 5(1) of the Main Roads Act, empowers the Minister to declare other roads to be main roads, through the addition or removal of roads from the Schedule.

³⁷ See – The document entitled **NWA Jamaican Roads Inventory and Condition Survey, St. Catherine Parish Roads and Section Numbers, Drawing No. 1006/9C/01**, which was received in evidence as exhibit 16.

- (3) The Ancillary Claim Form, which was filed on 24 March 2014, is dismissed;
- (4) By and with the consent of the Ancillary Claimant and the Ancillary Defendant, there shall be no Order as to costs, in respect of the Ancillary Claim Form, which was filed on 24 March 2014;
- (5) Messrs. Knight, Junor & Samuels are to prepare, file and serve these Orders.