IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM 2011 HCV 03579

BETWEEN	**DAVID PRINCE**	**CLAIMANT**
AND	**JAMAICA URBAN TRANSPORTATION COMPANY**	**DEFENDANT**

Heard: 27th May 2014, 28th May 2014 & 4th July, 2014

Negligence – Employers Liability - whether bus seat defective- injury to back- Damages

Danielle Archer instructed by Messrs. Kinghorn & Kinghorn for the Claimant

Gillian Mullings instructed by Naylor & Mullings for the Defendant

Coram: Batts, J.

[1] In this matter the Claimant, an employee of the Defendant seeks damages for negligence. It is alleged that a defect in the Defendant's bus and/or its system of inspecting buses resulted in injury.

[2] The Defendant denies that its bus was defective or that its system was defective.

[3] These being the allegations, one might have expected the parties to call the evidence of experts as to the operation and/or testing and/or the system for testing such vehicles. Well there was none, no such expert evidence was called. The Defense called only Mr. Donovan White. He is an ex-policeman who describes his occupation as an accident investigator. He is employed to the JUTC. His witness statement stood as his examination in chief.

[4] He stated that on the 13th November 2007 he received a telephone call at 4.10pm. As a result on Wednesday the 14th November 2007 at a time he cannot recall, he went to Arthur Wint Drive in the vicinity of the Bustamante Hospital for

children. There he examined the lay-by and saw two potholes. He carried out a close examination of them. He observed two JUTC buses manoeuvre through them. He describes in detail how he observed the bus rock to the right and left. He said,

> "From my observation both drivers were very cautious while negotiating the potholes. This cautiousness minimized the movement of the bus body and had negligible effect on the persons in the bus including the driver."

It is important to note that he made no comment on the condition of the seat used by the driver of those two buses.

[5] This witness also says that on the 14th November 2007 he also inspected bus number 02D1329 and carried out, "extensive examination and inspection of the driver's seat, bus flooring, bus body, wheels and springs of the said unit." He went on board the bus along with senior driver Morris Luton. The witness continued,

> "He drove the bus aggressively on the compound of the Rockfort depot, the bus was tested by driving same across humps and sleeping police along a concrete surface. The driver seat in the bus was aggressively tested and we checked how the same and the mechanism beneath the same reacted when the bus went across the said humps and sleeping policemen. We observed that there was no defect in the bus seat and in mechanism housing the bus seat. There was no issue whatsoever with shock absorption regarding the seat or of the flooring under the seat."

[6] I pause to observe that to the extent this investigation was endeavoring to recreate the incident it will have failed. Driving over a sleeping policeman which is a uniform obstruction cannot possibly mirror the impact of two Jamaican potholes. His own evidence describes the side to side motion he observed as the other buses negotiated the pot holes in the lay by on Arthur Wint Drive.

[7] When cross-examined this witness admitted to having no training in auto mechanics. Is he I ask, competent to say that the shock absorption was adequate or that the seats had no defects? I think not. His evidence can be accepted to the extent it represents his observation as a lay person of the bus and its seat and how it performed while driven aggressively in the depot over sleeping policemen. One must also bear in mind that he is not a disinterested third party but an employee of the Defendant. In this regard it did nothing for his credibility that certain documentation, which he stated in paragraph 9 of his witness statement he examined on the 14th November 2007, when produced bore a date in 2013. The original could not be produced, nor could the actual report which he allegedly inspected. In consequence I struck out paragraph 9 of his witness statement for a) breach of the disclosure rules and b) breach of the hearsay rule.

[8] Mr. Donovan White did however corroborate the claimant in the following important regards:

a) He confirmed that some supervisors employed to the defendant would chide drivers who reported minor defects.

b) He agreed that minor defects relate to anything which would not prevent a bus operating.

c) He admitted it would be better for the maintenance department to speak to the condition of the shock absorber under the bus and under the driver's seat.

d) He confirms that the Claimant's complaint about the condition of the seat was contemporaneous with the alleged injury. That is on the 13th November 2007.

e) He admitted he could not speak to the system of maintenance,

> "Q: JUTC had no proper system to ensure driver given a bus fully maintained with no defects.
>
> A: I can only say I am not in maintenance department, so cannot speak to that"

[9] It is clear that this witness was singularly unhelpful to the resolution of the issues in this case. The sole area of his evidence that might be considered germane, I doubt its veracity. This is the evidence given orally, that during the test at the Rockfort depot; he had driven the bus while doing so. I find this was an afterthought. He never in his witness statement mentioned that he had driven the bus. He said only that a senior driver named Morris Luton had done so. In any event however his reasons for saying that there was no defect in the seat was that he "found nothing strange" in the reaction of the seat. This therefore must relate to his own perception of what is the norm for such seats. It may be the norm for the seats to have movement, it may not. However in the absence of the expert mechanic or bus technician giving evidence as to what is supposed to be the norm, this witness's evidence as to his examination of the seat really takes this matter no further and is of little assistance.

[10] I cannot of course decide the matter based upon the deficiencies in the Defense. It is the duty of the Claimant to prove his case and he must do so on a balance of probabilities. In this regard it is I think fair to say that the Claimant wishes for a favourable decision based on inference. He is asking the court to infer, from primary facts, that the Defendant was negligent. I say this because he led no expert or other evidence as to the standards required. Neither as to what was to be expected of the particular seat in question nor of the desirable system of inspection for a motor bus company.

[11] The Claimant, whose witness statement stood as his evidence in chief said that on the 13th November 2007 at about 7.30am he drove out of the Rockfort depot in the usual manner. On reaching the vicinity of the Bustamante Children's Hospital he pulled into the lay by to allow passengers to disembark. He describes the lay by as being "riddled" with pot holes. While exiting the lay by and in order to re-enter the roadway he had to negotiate these pot holes. This caused the bus to rock violently. He thereafter drove to Cross Roads, returned to Church Street for the second trip when on reaching the vicinity of the Gleaner Company he

began feeling pain in his lower back. The pain was so intense that on reaching the stop light by the traffic court on South Camp Road he asked another JUTC driver to drive the bus for him. That driver he named as Barrington Miller and said he had earlier come on board the bus and was in uniform. He instructed Mr. Miller to only let off passengers and not take on anymore. When the last passenger was let off and after letting off" "Barry", he drove back to Church Street. After parking the bus there he entered the Church Street offices of the Defendant and made a report. He named the person Patricia Howell, to whom the report was made. He got help from his union delegate Miss Anissa Foster who assisted him to the Rockfort depot. There he reported to Mr. Albert Carty in the Human Resource Department. Mr. Carty wanted him to write a report before he went to the doctor.

[12] The Claimant says it was the intervention of Mr. Wayne Barrett the manager which saw him being sent immediately to a doctor. He says Mr. Leonard Lawrence (Lenky) drove him to the doctor in a white JUTC Toyota Tercel motor car. Having gone to the doctor where he received two injections and a prescription for tablets and a referral letter for an x-ray, he returned to the depot. He was given seven (7) days sick leave. He wrote the report Mr. Carty demanded and left the depot at 4.00 p.m.

[13] The Claimant, in his witness statement, asserts that he was wearing his seat belt because, "if I had not been wearing my seat belt I would have fallen out of the seat." I shall return to this matter of the seat belt later. He says further that he had driven other buses along that route and in and out of those pot holes and had not been injured. The reason he was injured on this occasion was that the bus seat was defective. He said,

> "The seat was defective, although it was bolted to the floor of the bus it was shaky and not firm. The fact of the seat of the bus being shaky is to cause a twisting of my back when the bus went into the pot holes that day."

The Claimant gave details of his treatment. While giving oral evidence he stated that for two years the Defendant had taken him off bus driving duties. He still worked for the Defendant and is now driving again. He now drives a VDL Janckheare bus whose seats he says are more secure and safe for drivers.

[14] The first thing that impressed me about the Claimant's evidence in chief was its detail. He named every individual of note who had anything to do with the incident that day. None was called by the Defendant to say it was untrue. Nor was the Claimant challenged on the report he says he made in writing at the depot. It must be presumed that it was consistent with his account. So on the face of it we have a bus driver who on the same day he develops back pains immediately reports these pains and has to stop working.

[15] The Claimant put in evidence by consent medical reports. One of these is from Dr. Winston Davidson, exhibit 5. Dr. Davidson's report is in his own handwriting and hence difficult to read. He does confirm seeing the Claimant on the 13th November 2007. The patient history is consistent with the Claimant's account before this court. The doctor confirms he was in severe excruciating pain.

[16] The Claimant on a balance of probabilities has proven that on the 13th November 2007 he had an injury to his back. It was such that he was in great pain and had to be relieved of his job as driver for some considerable time. Has the Claimant however proved on a balance of probabilities that it was a defect in the bus which caused this injury to his back? The Claimant is the only source of evidence that the seat was defective. Much then turns on his credibility.

[17] When cross examined the Defendant's counsel attacked that credibility. She put to the witness the allegation made in his particulars of claim that the bus seat had no seat belt. He admitted that the allegation was untrue and could give no explanation as to why he had signed the particulars of claim. No such assertion be it noted is made in his witness statement, nor for what it is worth does doctor

Davidson mention that in the history recounted by the patient. One would have thought that the absence of seat belts would be relevant to any history relative to a back injury in a motor vehicle. Counsel also put to him that Shereel Dixon a physiotherapist reported that on the 22nd September 2008 the Claimant says he was pain free (exhibit 4). The Claimant denied he was pain free but says the doctor was not lying. It should be noted that the physiotherapist also stated that aggravation of back symptoms may occur from time to time. The witness admitted that the roads to his residence in Trinityville are far worse than the route he drives, but the condition of the lay by was worse. In any event and as the witness pointed out, he does not drive a bus home. He was challenged on failure to report the defective seat before driving out and said that was what would be caused a minor defect. This is so because it does not stop the bus from driving and had he reported it they would have said he was lazy and did not want to work.

[18] I accept the evidence of the Claimant as truthful. I do not form the view he has set out to mislead the court. The allegations in his particulars of claim about an absence of seat belt (in a claim form filed in 2011) stand by themselves. The doctor's contemporaneous report does not refer to that. The Claimant expressly discounted that and his witness statement of the 19th March 2014 makes no reference to that. I do not therefore conclude that the inconsistency is sufficient to cause me to reject all his evidence.

[19] I therefore accept his evidence that the seat of the bus he drove that morning was defective in that it was not firm but rocked from side to side. The impact with the pot holes was sufficient to cause the Claimants back to be hurt as it rocked from side to side. There was no expert medical or other opinion as to the effect a seat belt may or may not have had in such circumstances. I am therefore unable to say whether the wearing of a seat belt, as the Claimant says he was, negates the allegation of injury. The seat belt factor on the evidence before me is of no

moment in determining whether the condition of the seat caused the Claimant's injury.

[20] I therefore find the Defendant liable to the Claimant for allowing him to drive a bus with a defective driver's seat. His place of employment was therefore not reasonably safe.

[21] Insofar as damages are concerned the Claimant relies on several medical reports and documents put in by consent. Dr. Rory Dixon Orthopaedic Surgeon in a report dated 19thJuly 2011 states he first saw the Claimant on the 13th august 2008. After examination and tests he was assessed as having a back strain with underlying degenerative changes in the lumbosacral spine. On 25th October 2009 the patient reported recurrent low back pain and erectile dysfunction. There was no neurological deficit in the lower limbs but he had mild age related degenerative changes in the lumbar spine. He was encouraged to do some home exercise and cialis was prescribed. The doctor said he had no whole person impairment.

[22] Dr. Kurt Waul in a report dated 28th November 2011 (exhibit 2) examined the claimant on the 27th February 2009. When examined he detected moderate tenderness over L3-L5 of Lumbar vertebrae and adjoining paravertebral musculature. The doctor diagnosed moderate lower back strain and underlying degenerative lumbar disease. The report stated,

"Erectile dysfunction to rule out lower back pain as a possible cause."

[23] Dr. May Lwin Oo in report of April 9, 2009 (exhibit 3) said the Claimant was seen on 8th December 2007. An X-ray showed "possible fracturing of transverse process of L-3" and scoliosis of mid thoracic region.

[24] The physiotherapist as we have already seen (exhibit 4) concluded that the soft tissue tenderness had resolved and there was pain free active movements of the

lumbar spine. I have also already considered Dr. Winston Davidson's report dated the 21st November 2007 (exhibit 5).

[25] The Defendant's counsel asked me on the evidence to accept that the Claimant's complaint was related to a degenerative condition and not to trauma, further that there was insufficient evidence of loss of libido and finally that he had long ago ceased to have pain. The Claimant's counsel on the other hand submitted that although there were degenerative changes these were aggravated by the trauma. She relied on the Claimants viva voce evidence as regards loss of libido and continuing pain.

[26] It is true that he who avers must prove. The medical reports do not assist in any way in determining whether or what causative relationship exists between the trauma and the degenerative changes observed. Similarly with the loss of libido, no report states the trauma caused it. On the issue of pain only the physiotherapist says that had resolved and warned of possible aggravation in future.

[27] On the evidence therefore I find as a fact that the Claimant had a back strain due to trauma (rocking of the seat) but also that his degenerative changes are unrelated to the trauma. They both caused pain. The pain due to trauma has resolved and the continuing pain is due to his degenerative condition. I do not find that the loss of libido is continuing or significant and will make no award on that account.

[28] Both Counsel cited several authorities on pain suffering and loss of amenities. It is fair to say that the awards in this area are as varied as they are numerous. I bear in mind the admonition of Sykes J, in the now well known Icilda Osbourne case, that when assessing damages it is the Claimant before me who is to be compensated. Authorities are a mere guide as to that amount which will enable a Defendant to say he has done the right thing. In this regard the cases I have

found most relevant are: ***Trevor Benjamin v Ford HCV 2876/2005*** unreported; and ***Peter Marshall v Carlton Cole*** (2006) Khan 6 d page 109. When updated on counsel's calculation the awards are $957, 471.20 and $749,000.00 respectively. The Claimants continuing pain as I have found, is due to a degenerative condition which was not proved to be caused or enhanced by the trauma. In those circumstances damages for pain suffering and loss of amenities for which the Defendant is liable I assess at $700,000.00.

[29] No issue was taken with the claim to special damages. The receipts are helpfully totaled in the Claimants written submission, these amounted to $182,500.00.

[30] There is therefore judgment for the Claimant against the Defendant as follows:

i.	General damages for pain suffering and loss of amenities	$700,000.00
ii.	Special damages	$182,500.00

Interest on general damages from the 14th June 2011 to date of judgment and interest on special damages from the 13th November 2007 to the date of judgment. Costs are awarded to the Claimant to be taxed if not agreed.

David Batts
Puisne Judge