



[2019] JMSC Civ 246

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

**CIVIL DIVISION**

**CLAIM NO. 2013HCV06497**

<b>BETWEEN</b>	<b>PETE RUSSELL</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>PATROY STEVE WHITELY</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>WAYNE WILSON</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>SEACOAST TRUCKING LIMITED</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>MAURICE POWELL</b>	<b>4<sup>TH</sup> DEFENDANT</b>

**AND**

<b>BETWEEN</b>	<b>PATROY STEVE WHITELY</b>	<b>ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>SEACOAST TRUCKING LIMITED</b>	<b>1<sup>ST</sup> ANCILLARY DEFENDANT</b>
<b>AND</b>	<b>MAURICE POWELL</b>	<b>2<sup>ND</sup> ANCILLARY DEFENDANT</b>

**IN OPEN COURT**

**Ms. Christine Hudson and Ms. Renae Barker instructed by K. Churchill Neita and Company for the Claimant**

**Ms. Suzette Campbell instructed by Burton Campbell and Association for the 1<sup>st</sup> Defendant**

**Mr. Kwame Gordon instructed by Samuda and Johnson for the 3<sup>rd</sup> Defendant/1<sup>st</sup> Ancillary Defendant**

**Heard: March 18, 19, 20 and 25, May 6 and 14, June 14 and 21 and December 20, 2019**

**Negligence – Motor vehicle accident – Claim for personal injuries – Ancillary Claim for repairs to motor vehicle – Damages – Assessment**

**LINDO, J**

**The Claim**

- [1] The Claimant, Pete Russell, brings this action against the Defendants to recover damages for negligence arising out of a motor vehicle accident which occurred on or about August 15, 2011, involving the 1<sup>st</sup> and 3<sup>rd</sup> Defendants' motor vehicles, registered at **1271 PP** and **CF 5677**, respectively.
- [2] By way of his Amended Claim Form filed on February 27, 2014 and Further Amended Particulars of Claim, filed on September 15, 2016, the Claimant claims that he was a passenger in the 1<sup>st</sup> Defendant's motor bus, driven by the 2<sup>nd</sup> Defendant along the Spanish Town road in the parish of St. Andrew, when a collision occurred between said motor bus and the motor truck driven by the 4<sup>th</sup> Defendant.
- [3] He claims that the accident was caused by "*either the negligence of the Second Defendant...when he suddenly and without warning stopped, whereupon the Fourth Defendant collided into the rear of the said motorbus or caused by the negligence of the Fourth Defendant who was driving too close behind the First Defendant's motorbus and collided in the rear...or caused by the negligence of both Second and Fourth Defendants...*". The Claimant further claims that as a result of this accident, he has suffered loss and injuries and incurred expenses.
- [4] The Claimant alleges, *inter alia*, that the 2<sup>nd</sup> Defendant was particularly negligent in the following ways "*failing to keep any proper or any proper lookout or to have any sufficient regard or consideration for other traffic on the road; stopping and or braking suddenly ahead of [the 3<sup>rd</sup> Defendant's motor truck] without any warning; driving without due care and attention; failing to have any or any sufficient regard of his attention to stop or slow down...*"

[5] He further alleges, *inter alia*, that the 4<sup>th</sup> Defendant was particularly negligent in the following “*failing to keep any proper or any proper lookout or to have any sufficient regard or consideration for other traffic on the road; driving too close to [1<sup>st</sup> Defendant’s motorbus]; failing to observe the presence of [the 1<sup>st</sup> Defendant’s motorbus] which was stationary so as to avoid colliding into the rear...; failing to stop, slow down, swerve or in any other way so as to manage or control the said motor vehicle as to avoid colliding...;failing to drive within brake distance so as to avoid colliding into rear of motor vehicle...;colliding into rear of [1<sup>st</sup> Defendant’s] motor vehicle which was stationary.*”

### **The Defence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

[6] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Amended Defence on March 13, 2014. Both Defendants admit to the date and place of the accident as alleged by the Claimant but they also allege that the accident was caused by the negligence of the 4<sup>th</sup> Defendant.

[7] In the Particulars of Negligence of the 4<sup>th</sup> Defendant, they allege, *inter alia*, that he was “*failing to keep any or any proper look out; driving at an excessive and/or improper speed; failing to see or to heed the presence of the 1<sup>st</sup> Defendant’s vehicle which was positioned directly in front of him and had stopped in a line or traffic; failing to see or heed that the line of traffic had stopped; failing to drive within break distance of the 1<sup>st</sup> Defendant’s vehicle so as to avoid collision; colliding with the rear section of the 1<sup>st</sup> Defendant’s vehicle...*”.

### **The Defence of the 3<sup>rd</sup> Defendant**

[8] The 3<sup>rd</sup> Defendant filed its Amended Defence on December 27, 2018 disputing the claim and alleging that “*any injury loss and damage and expenses incurred by the Claimant was as a result of the manner in which the 2<sup>nd</sup> Defendant operated the 1<sup>st</sup> Defendant’s motor vehicle...*”. In the Particulars of Negligence of the 2<sup>nd</sup> Defendant, he states, *inter alia*, that the 2<sup>nd</sup> Defendant “*failed to give a proper look-out; switched lanes without due care thereby resulting in a collision with the 3<sup>rd</sup>*

*Defendant's motor vehicle; drove in a manner which was reckless and careless so to do; failed to observe the 3<sup>rd</sup> Defendant's motor vehicle which was lawfully travelling along the said roadway; failed to have regard for...the 3<sup>rd</sup> Defendant in particular; drove without due care or attention; Res Ipsa Loquitur..."*

### **The Ancillary Claim**

[9] The Ancillary Claimant, Patroy Steve Whitely, claims against the 3<sup>rd</sup> Defendant/1<sup>st</sup> Ancillary Defendant "*an indemnity/contribution against any damages it may be found liable to pay the Claimant arising from the accident which occurred on or about the 15<sup>th</sup> August 2011.*"

[10] In his Particulars of Claim, filed November 16, 2016, he avers that the 4<sup>th</sup> Defendant/2<sup>nd</sup> Ancillary Defendant negligently drove and or operated the 1<sup>st</sup> Ancillary Defendant's motor vehicle, causing and or permitting it to collide into the back section of his motor vehicle. As a result of this he states that the Claimant has allegedly suffered loss, injuries and sustained damage, in addition to loss and damage suffered by him. In his Particulars of special damages, he claims a total of \$171,561.00 in respect of cost to repair his motor vehicle.

### **The Trial**

[11] The matter came on for trial on March 18, 2019 and after presenting evidence in support of the claim, the Claimant, through his Counsel, indicated that he was not proceeding against the 2<sup>nd</sup> Defendant.

[12] Special damages claimed by the claimant were agreed in the sum of **\$72,400.00.**

[13] The following documents were agreed and admitted in evidence:

1. 'Medical Data' from Kingston Public Hospital (KPH) dated February 15, 2012
2. Medical Report of Dr Donald Gordon M.B, B.S, dated May 28, 2013
3. Medical Report of Dr D.K. Garg, dated March 18, 2016

- 4a. Medical Report of Dr Tricia Giraud-Spence M.B, B.S dated June 7, 2012
- 4b. Report from Medical Associates Hospital and Medical Centre, dated January 23, 2015
5. Motor Accident Report Form bearing stamp dated September 2, 2011
6. Statement of Wayne Wilson dated July 4, 2013 (inclusive of questions and answers)

### **The Claimant's Case**

- [14] The Claimant's witness statement filed on August 22, 2018 stood as his evidence in chief and permission was granted to him to amplify the statement. He states that on August 15, 2011 at around 6:45 p.m., he, along with his two-year-old daughter were back seat passengers of motor bus registered **1271 PP**, travelling in a westerly direction along the Spanish Town Road, heading towards Six Miles. He describes Spanish Town Road as "*a dual carriage roadway with three lanes heading towards the direction of Six Miles and three lanes heading towards the direction of Three Miles. Both lanes are separated by a median*". He states that the bus was travelling in the middle lane at about 10-20kph as there was "*bumper to bumper traffic...*".
- [15] He states further that when the bus reached "*somewhere near in the vicinity of Red Stripe and Tia Maria*", he felt a sudden impact to the rear of the bus which caused his head to be thrown forward and backward and then he felt another impact, more intense than the first, which caused his entire body to be "*jerked...forward in a whip like motion...*". He also states that after the impacts, he instantly started to "*feel some serious pain to the middle and lower section of [his] back*".
- [16] He adds that he did not see the 2<sup>nd</sup> Defendant switch lanes or drive in a reckless and careless manner "*as the road was filled with vehicular traffic...*" and that he, along with four other passengers who were also injured on the bus, were taken to

the Kingston Public Hospital (KPH) by a Police Officer, where he was admitted for three days.

- [17] He outlines the treatment he received at the KPH and contends that he “*still [has] pains up to today, in [his] neck and lower back...pain in [his] neck is not as frequent as the pain in the back. Some days the pain is bad, where [he] can't turn [his] neck or move it freely...[sic]*”. He also contends that his injuries have affected his search for a job as jobs that require standing for long hours lifting aggravate the pain in his lower back.
- [18] In cross examination by Ms. Campbell, Mr Russell stated that when he felt the impact the bus was moving and after the impact, it remained in the middle lane and he was in pain so he did not get to see if any damage was done to the bus. He said he paid his fare to the conductor on the journey.
- [19] When cross examined by Mr. Gordon, he agreed that the conductor was present at court and that he boarded the bus “*Downtown by the market*” and sat in the back seat. He admitted to giving two different statements to two different investigators but said he does not recall saying on a previous occasion that when he boarded the bus he sat in the third single seat. He agreed that he told the investigators “*exactly how the accident occurred*” and did not tell them that the bus stopped suddenly before the collision. He states that he has difficulty reading and when directed to paragraph 4 of his Amended Particulars of Claim, he denied saying that the bus “*suddenly stopped*” before the collision.
- [20] He further stated that he is certain that the bus was always in the middle lane while travelling along the Spanish Town Road, but he later admitted that he remembers the bus being in the bus lane “*because it is on the document here*”, (referring to the Motor Accident Report Form Exhibit 5). He added that he does not recall the bus switching lanes before the collision and that he was sure the accident took place in the middle lane.

[21] To the suggestions by Counsel that the collision occurred after the bus swerved in the middle lane and after it immediately came to a stop, he said he does not remember. He however admitted that the truck bus was heavily laden with lumber.

### **The 1<sup>st</sup> Defendant's/Ancillary Claimant's case**

[22] The evidence in chief of Delroy Levy is as contained in his witness statement filed November 19, 2018. He states that in 2011 he worked as a bus conductor for the 1<sup>st</sup> Defendant on his Mitsubishi Rosa Motor bus, which travelled the Kingston to Savanna-la-mar, Westmoreland route.

[23] He states that on the 15<sup>th</sup> day of August, at about 7:00 p.m., the bus was involved in an accident along the Spanish Town Road, and was being driven at the time by the 2<sup>nd</sup> Defendant who is known to him as "*Bwoy Bwoy*". He asserts that the bus was travelling in the middle lane, there was "*bumper to bumper traffic*", the bus was filled to capacity and he was standing on the step of the bus.

[24] He contends that as they were approaching Seaview Gardens, the bus stopped and was stationary for a short period of time, "*less than a minute*" when he felt an impact to the back of the bus and looked to see that it was an "*International Truck*", which hit the bus a second time. He explains that the impact "*pushed the bus a little forward causing the front to turn slightly to the left towards Seaview Gardens*".

[25] He says that on exiting the bus he observed that the back of the bus was damaged, "*[t]he back door, glass and the rear truck (which was corrected to say the rear of the bus) was mashed up*". He further states that the truck was close 'but not attached' to the bus, it had a trailer, and was loaded with lumber.

[26] When cross examined by Ms. Barker, he stated that the bus loaded at Darling Street and "*pick up three by Three Miles*" and that the only stop it made after leaving Three Miles was "*when the truck hit we*".

[27] Under cross examination by Mr. Gordon, he said the bus did not go in the left lane at any time before the collision and disagree that the bus switched to the middle

lane. He further stated that when he first saw the truck, it was at the back of the bus and there were about twenty-nine people on the bus, including himself. He admitted that there was a truck to the front of the bus "*about half mile down the road*", but that he did not see a truck in the left lane. He disagreed with the suggestion that immediately prior to the collision, the bus switched lanes and went into the middle lane but agreed that the bus stopped suddenly. He said, "*a no the bus alone stop, yes, sir the bus stop, but what cause it to stop*".

[28] When re-examined, he said the bus did not switch lanes before it stopped. He denied that the bus left the middle lane before the accident. He explained that the bus was in the bus lane at one time "*by Three Miles, pick up passengers in the bus lane and then drive over into the right lane, the middle lane and from that it don't go back over*".

[29] The witness statement of Patroy Steve Whitely, filed November 19, 2018 was admitted as his evidence in chief after he was sworn and it was identified by him. He states that in 2011 he was the owner of a Mitsubishi Rosa Motor bus licensed **1271 PP**, which he hired the 2<sup>nd</sup> Defendant to drive. He adds that the said bus was covered by a third party insurance policy issued by Advantage General Insurance Company.

[30] He states further that on the 15<sup>th</sup> day of August, 2011, his bus was involved in an accident along the Spanish Town Road, while being driven at the time by the 2<sup>nd</sup> Defendant. He claims that as a result of the accident, his vehicle "*had damage to the rear bumper, bumper lamp, the back door and the back door glass.*"

[31] He also states that as he had third party insurance, was not able to claim against the policy and "*had to repair the bus out of [his] own pocket*". He says it cost "*more than the estimated one hundred and seventy one thousand dollars (\$171,000.00) to repair*" because other parts were purchased which were not included in the estimated cost. He adds and that he has paid "*roughly two hundred thousand dollars*" to repair the bus but is unable to produce any receipts as proof of same



and that the bus was examined by Charles Thompson “*a mechanic employed by Indian Garage...in St. Elizabeth*”. The undated document from Indian Garage signed by Charles Thompson indicating an estimate of \$171,561.00 was admitted in evidence as Exhibit 7 after the court noted that it was referenced in a Notice of Intention to tender to which no counter notice was served.

[32] When cross examined by Mr. Gordon, Mr Whitely admitted to being able to identify the 2<sup>nd</sup> Defendant’s signature having known him for twelve years. He said the 2<sup>nd</sup> Defendant is an honest person. Exhibits 5 and 6 were shown to him and he agreed that they bear the signature of the 2<sup>nd</sup> Defendant. He also maintained that there was a conductor on the bus on the day in question.

#### **The 3<sup>rd</sup> and 4<sup>th</sup> Defendants’/1<sup>st</sup> and 2<sup>nd</sup> Ancillary Defendants’ case**

[33] Maurice Powell’s witness statement filed on December 27, 2018, stood as his evidence in chief and he was permitted to amplify. He states that on August 15, 2011, at approximately 6:30 p.m., he was driving a 1992 International Tractor head, licensed **CF 5677**, which is owned by the 3<sup>rd</sup> Defendant and was loaded with lumber.

[34] He says that he traversed along the Spanish Town Road “*and proceeded in the middle lane on the left side of the road heading towards Spanish Town*”. He adds that he remembers passing a coaster bus at Three Miles, and it went through the traffic lights ahead of him, at the intersection of Chesterfield Drive and Seaview Gardens, but he had to stop because the traffic light changed to red. He states that the said coaster bus stopped at a bus stop, some distance from the traffic lights and he continued in the middle lane when the traffic lights changed to green.

[35] He also states that he “*could see*” two trucks carrying sand, which were parked in front of where the coaster bus stopped and he also noticed another sand truck, ahead of him in the middle lane. He contends that the coaster bus “*suddenly and without indication swerved from the left lane to the middle lane and stopped directly in front of the truck that [he] was driving*”, and he had to immediately apply his

brakes, “*but because of the amount of weight that [he] was hauling, the truck could not stop suddenly. [He] collided into the back of the Coaster bus*”. He says he inspected the truck and saw that damage was done to front bumper and windshield “*but the vehicle could still drive*”.

**[36]** In amplifying his evidence in chief, he said that the truck was loaded with twenty bundles of lumber and approximate weight of the unit was 45 tons, but unladen it is ten tons. He said he has been driving this motor vehicle for “*about a year or two*” and in his experience of driving this kind of motor vehicle “*can’t drive too fast, not containerised, it cannot stop too sudden and driven haphazardly, it is an exposed load ...*”. He said he engaged those driving tactics on the day in question.

**[37]** When cross examined by Ms. Barker, he agreed that at the time of the accident, there were three lanes in the vicinity, and all three lanes had heavy traffic but disagreed that it was “*bumper to bumper traffic*” as “*one lane had two units that has broken down...so two lanes were occupied*”. He stated that he noticed damage to the rear of the bus, the trunk and the glass at the trunk. He disagreed that he failed to keep a proper lookout or was travelling too close to the bus immediately before the accident, and said that immediately before the accident he stopped at a stop light.

**[38]** In cross examination by Ms. Campbell, he explained that “*bumper to bumper traffic*” means “*peak hours traffic congestion, traffic and cars in a close proximity with one another*”. He agreed that the cars along Spanish Town Road were travelling slowly behind one another but disagreed that this was the case all along the journey from he left Three Miles. He stated that the sand truck he referred to in his evidence in chief was about four cars from him, in the middle lane, and further stated that he first noticed this sand truck from he left the stop light at Seaview Gardens, Chesterfield and Spanish Town Road.

**[39]** He said that this sand truck remained in the middle lane but came to a sudden halt “*when it came beside the one that was broken down*” and stopped for “*about a*

*minute or so*” and during this time he was applying his brakes “*and all that because [he] saw what was happening*”. He said that when the truck stopped, he immediately applied his brakes and thereafter, the motor bus came over in the lane he was travelling in.

- [40] He contended that when the motor bus stopped, his truck was not very far away from it because the bus had swerved over on him. He explained that the two trucks on the road were in the extreme left lane and positioned “*one in front of the other*” but the front truck was “*partially in the middle lane*”. He stated that the truck which was travelling in the middle lane had stopped beside the truck that was at the front of the left lane, and the bus “*was coming from the left lane where the trucks were and merged and come in improperly*”.
- [41] He agreed that if the bus driver had switched lanes, the front of the bus would have come over before the back and that when he collided with the bus, it was positioned in the middle lane, adding “*me think seh it come over*”. When pressed he admitted that the bus was positioned “*straight*” in front of him and that he hit it directly in the back. He disagreed that the bus would be in a slant position if it had come over. He further stated that he was travelling about 5 kmph because he had just moved off from the stoplight at Chesterfield and Seaview Gardens immediately before the accident happened. He described the truck as “*barely moving, bumper to bumper...*” and explained that the more load the truck is carrying, the less time it has to stop, and, with the load he was carrying that day, he had a stopping distance of “*about two car lengths*”.
- [42] He stated that he recalls hitting the bus only once and disagreed with the suggestion that there was no car in front of him. He also disagreed that the bus was directly in front of him and then said that right after the impact the bus was in front of him, in the middle lane and “*they moved it from the middle lane*”. He said he does not recall “*noticing*” the vehicles which were in front of the bus as he was “*never really paying attention*”.

- [43]** On March 20, 2019, the court considered an application by the 3<sup>rd</sup> Defendant/1<sup>st</sup> Ancillary Defendant for an adjournment, extension of time/abridgement and permission to file witness statements after start of trial and prior to close of case for 3<sup>rd</sup> Defendant.
- [44]** The application for adjournment was granted and on March 25, 2019, the 3<sup>rd</sup> Defendant was granted permission to file and serve one additional witness statement on or before April 4, 2019. Permission was granted to the Claimant and the 1<sup>st</sup> Defendant to recall their witnesses for the purposes of commenting on the statement of Wayne Wilson and/or call evidence to rebut the evidence contained in the said statement. It was also ordered that any evidence being called be reduced in a witness statement and filed and served within 21 days of the date of service of the statement from the 3<sup>rd</sup> Defendant. Costs of the application and costs occasioned by the granting of the orders were awarded to the Claimant and the 1<sup>st</sup> Defendant, to be taxed, if not agreed and to be paid by the 3<sup>rd</sup> Defendant. Leave to appeal sought by the 1<sup>st</sup> Defendant was refused and the matter was set for continuation on May 14, 2019.
- [45]** The trial resumed on May 14, 2019 and Kevon Waite, Operations Supervisor and Investigator employed to Detect Investigations Company Limited (Detect Investigations) was called as a witness for the 3<sup>rd</sup> Defendant/1<sup>st</sup> Ancillary Defendant. His witness statement filed on April 1, 2019, stood as his evidence in chief and he was cross examined.
- [46]** His evidence is that in or about August, 2011, Detect Investigations was contacted in writing by British Caribbean Insurance Company Limited (BCIC) and given certain instructions and as a result they commenced investigations into a motor vehicle accident which occurred on August 15, 2011 along the Spanish Town Road, Kingston. This investigation was assigned to Mr. Kennille Wilson, who was employed to the Company from 2010 to 2014 and has since migrated.

- [47] He further states that it is the usual course of business for an investigation to be assigned to an investigator and the investigation process includes locating witnesses, taking their statements and visiting the scene of the incident. He indicates that once the investigator has completed taking statements, he would prepare a report, and the statements along with the report are submitted to Detect Investigations, the statements are then typed and the full report is vetted and submitted to the client.
- [48] He states that in relation to this matter, the normal business processes were followed and Mr. Kennille Wilson submitted his report in or about May, 2012 to BCIC, and it included statements collected from Morris Powell, Maurice Powell, Patroy Whitely, Wayne Wilson and Pete Russell.
- [49] Mr. Waite's evidence further is that on March 20, 2019, he was contacted by a representative from BCIC and based on their conversation, he made efforts to locate Mr. Kennille Wilson, but all such efforts have been futile.
- [50] He states that he was not present when Mr. Kennille Wilson interviewed Mr. Wayne Wilson, but he has no doubt that Mr. Kennille Wilson obtained a statement from him. He adds that over the years, Mr. Kennille Wilson was employed to Detect Investigations, to the best of his knowledge, he displayed complete honesty and professionalism and "*worked on over one hundred investigations and...was very familiar with the processes at Detect Investigations...*".
- [51] Mr. Waite further indicates that he reviewed all the statements concerning this matter that were taken by Mr. Kennille Wilson, and would be able to identify them as also the typed statement of Mr. Wayne Wilson because the format would follow that of the written version and would end with Mr Kennille Wilson's certification.
- [52] The Report prepared by Detective Investigations Company Limited dated May 14, 2012 and the Addendum to that report dated June 13, 2012, were admitted in evidence as Exhibits 8 and 9.

- [53] In cross examination by Ms. Campbell, Mr. Waite stated, *inter alia*, that Mr. Kennille Wilson received training from Detect Investigations. He indicated that the first thing they do in carrying out their investigations, is to ask for identification, so that they are certain they are speaking to the right person and the statement collected would start with a description of the person.
- [54] In relation to the accident, he indicated that they would be looking for the nature and extent of damage, injury to all parties involved and liability. He agreed that it would be important to identify the vehicle involved. He explained that in identifying the vehicles involved, the registration plate affixed to the vehicle would be used also, “... *go as far as to confirm chassis number and engine number that’s on the vehicle*”.
- [55] He disagreed that the omission to refer to parties in a statement and no reason being given for that omission would make the statement flawed, but agreed that he does not see any license number being mentioned and that in most cases, the person being interviewed would expect to give the license number for the vehicle they were driving. He stated that based on the standard of his Company, the omission of the license number would pose a problem.
- [56] He agreed that the name of the third party, license number and name of insured were omitted and explained that this information does not have to be included in a statement before it is sent to the insurers. He agreed that the statement was reviewed by someone at the Company and further agreed that the conclusion of the addendum report is different from the original report.
- [57] When cross examined by Ms. Hudson, Mr Waite agreed that he took photographs of Taxpayer Registration Number (TRN) and recorded this in the statement and agreed that he has identification for the person interviewed, and was satisfied that the picture identification and the person being interviewed are one and the same person. He stated that the declaration to the statement was read by the person being interviewed before they signed.

## **Submissions**

**[58]** After hearing the evidence, Counsel for the parties were directed to file written submissions on or before June 14, 2019 and any response to authorities cited, by June 21, 2019. I am grateful to Counsel for providing these submissions. I have carefully read and considered them and note that they have adumbrated the disputed and undisputed facts as well as the applicable law. I will therefore not restate them.

## **Undisputed Facts**

**[59]** The Claimant was a passenger of motor vehicle (coaster bus) registered **1277 PP**, owned by the 1<sup>st</sup> Defendant and driven by the 2<sup>nd</sup> Defendant, who was his servant and/or agent.

**[60]** The accident occurred on the date, and at the place and time as reported by the Claimant, despite the variations in the time by the witnesses by a few minutes. This court accepts that the accident occurred sometime between 6:30 p.m. and 7:00 p.m. and that the Spanish Town Road is a dual carriage roadway, with three lanes heading towards each direction, which are separated by a median.

**[61]** The 3<sup>rd</sup> Defendant's motor vehicle (motor truck) registered **CF 5677** was being driven at the time by the 4<sup>th</sup> Defendant, its lawful servant and/or agent, and the accident involved the motor truck colliding into the rear of the 1<sup>st</sup> Defendant's motor bus. The 3<sup>rd</sup> Defendant's motor truck was heavily laden with lumber at the material time.

## **The Issues**

**[62]** Although it cannot be disputed that no fault can be attached to the Claimant who was a passenger in the bus, and there should be no difficulty in finding that there should be judgment in his favour, the court has to determine, whether he has shown, on a balance of probabilities, that the Defendants are to be held liable for the injuries he sustained resulting from the accident. The main issue in this case

therefore concerns the precise manner in which the collision occurred and who is at fault and this has to be resolved by assessing the credibility of the witnesses and the plausibility of their accounts of the factual circumstances surrounding the accident.

[63] I have therefore placed reliance on my assessment of the witnesses who gave evidence, having examined their demeanour.

### Law and application

[64] In **Anderson (Glenford) v Welch (George)** [2012] JMCA Civ 43, Harris JA at paragraph 26 of the judgment stated the following principle:

*“It is well established by the authorities that in a claim grounded in the tort of negligence there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty.*

[65] All users of the road owe a duty of care to other road users and drivers of motor vehicles have a duty by statute and at common law to exercise reasonable care while operating their vehicles on the roadway. The standard of care expected is that level of care which an ordinary skilful driver would have exercised in all the circumstances. The duty involves avoiding excessive speed, keeping a proper lookout, observing traffic rules and signals, to avoid an accident and to exercise reasonable care to avoid causing injury to persons or damage to property. (**Esso Standard Oil SA Ltd. & Anor. v Ian Tulloch** [1991] 28 JLR 553) Section 51 (2) of the RTA. **Bourhill v Young** [1943] AC 92.

[66] In this case, both the 2<sup>nd</sup> and 4<sup>th</sup> Defendants owed a duty of care to each other as they were traversing the roadway, both travelling in the same direction and driving motor vehicles. (**Nance v British Columbia Electric Railway Co. Ltd.** [1951] AC 601). They also owed a duty of care to the Claimant who was a lawful passenger in the bus, to so operate their vehicles as not to cause him any foreseeable harm.



- [67] The Claimant's account of what took place was not significantly shaken in cross examination notwithstanding his inability to state with complete certainty whether or not the bus had been in the bus lane immediately prior to the accident. These however are not so material as to cause me to doubt whether the bus was in fact in the middle lane at the time of the collision and neither has his evidence been discredited in any material respect as to affect my finding on liability.
- [68] I also accept that Mr Delroy Levy was the bus conductor on the day of the incident and find him to be a witness of truth. I also find the 1<sup>st</sup> Defendant to be a credible witness, although his evidence was limited in that he was not present at the material time.
- [69] I find as a fact that the 2<sup>nd</sup> Defendant had been driving in the bus lane prior to crossing over the traffic lights at the intersection of Spanish Town Road and Chesterfield, Seaview Gardens and that he went into the middle lane before the 4<sup>th</sup> Defendant proceeded through the traffic lights and continued in the said lane.
- [70] I find on the 4<sup>th</sup> Defendant's evidence that he was aware of the presence of the 1<sup>st</sup> Defendant's vehicle on the roadway, having admitted to seeing it prior to the collision. I formed the view that the 4<sup>th</sup> Defendant was not being truthful especially in relation to the speed at which he said he was driving and that manner in which he states that the bus "*switched lanes*".
- [71] I bear in mind that in cross examination the 4<sup>th</sup> Defendant admitted that the bus was positioned "*straight*" in the middle lane at the time of the collision. The fact that the impact was to the extreme back of the 1<sup>st</sup> Defendant's bus and the extreme front of the 3<sup>rd</sup> Defendant's truck demonstrates to me that it is hardly likely that the 2<sup>nd</sup> Defendant had switched lanes suddenly, but shows that he was properly positioned, in the middle lane and moving slowly in bumper to bumper traffic. This leads me to a finding that it was the fact that the 4<sup>th</sup> Defendant was not keeping a proper lookout which caused the accident.

[72] I reject as unreliable, the evidence of the 4<sup>th</sup> Defendant that the 2<sup>nd</sup> Defendant switched lanes suddenly. I also reject his evidence that he was driving at 5kmph. I find it highly unlikely, notwithstanding the evidence which I accept that there was bumper to bumper traffic. I therefore find that he was travelling too closely to the bus and was not keeping a proper lookout.

[73] I find that the evidence of the witnesses in relation to the point of impact important in coming to a determination as to liability also.

[74] In **The Modern Law of Evidence**, 7<sup>th</sup> Ed., at page 29, the learned author states as follows:

*“The weight of evidence is its cogency or probative worth in relation to the facts in issue”.*

[75] The 2<sup>nd</sup> Defendant gave three statements, dated August 17, 2011, March 27, 2012 and July 4, 2013 which were put in evidence. I have attached the appropriate weight to each, bearing in mind that they could not be tested. Where the statements are in conflict, I prefer and accept the earlier two statements, which are closer in time to the date of the accident.

[76] In determining how much weight to be attached to them, all the circumstances of the case were assessed and reasonable inferences drawn as to their accuracy or otherwise.

[77] I accept that the left lane was obstructed by a sand truck which had stopped, and as such find it reasonable to believe that the 2<sup>nd</sup> Defendant had switched over from the bus lane into the middle lane. There is no evidence that either of the drivers were speeding and all witnesses describe the traffic conditions on that day as *“bumper to bumper traffic”*.

[78] I find that the weather condition was good, the drivers had good visibility of the road and of each other prior to the accident and even on the account given by the 4<sup>th</sup> Defendant, it is clear that from where he was positioned, he had good visibility

of the traffic ahead of him, including the 1<sup>st</sup> Defendant's motor bus, and the sand trucks which he referred to. The 4<sup>th</sup> Defendant was therefore able to foresee any traffic changes, and should have proceeded through the traffic lights more cautiously.

**[79]** The 4<sup>th</sup> Defendant is adamant that the 2<sup>nd</sup> Defendant "*inappropriately switched lanes*" but I find that fact that the 2<sup>nd</sup> Defendant would have had sufficient time to completely fit in the space available without causing any damage to the vehicles in front of him, bearing in mind the evidence which I accept as true, that vehicles were moving slowly and there was bumper to bumper traffic, means that the 4<sup>th</sup> Defendant must be at fault for not proceeding more cautiously and for driving too close to the motor bus, especially having been able to observe "*what was happening*" ahead and the fact that the truck was heavily laden.

**[80]** Further, the 4<sup>th</sup> Defendant admits to being an experienced driver of motor trucks and being knowledgeable about the "*stopping distance*" available to him depending on the weight of the truck. It seems to me therefore, that he should have applied greater care in approaching after having moved from the traffic lights and that his evidence that he was driving at 5 kmph could not be credible, as under the circumstances it is hardly likely that he would collide in the rear of the bus, twice.

**[81]** The court did not have the benefit of an assessor's report of the condition of the vehicles which would have provided physical evidence on the point of impact. However, the evidence of the damage to the two vehicles, which has not been disputed, is conclusive and wholly supportive of a finding that the bus was properly positioned in the middle lane and was "*straight*" in front of the truck at the time of the collision. It is the front section of the motor truck, including the front bumper and windshield and the back section of the motor bus, including rear bumper, bumper lamp, back door and back glass, that were damaged. There was no damage to the sides of the vehicles.

[82] Having carefully considered all the evidence presented and the submissions of Counsel, I find on a balance of probabilities that the collision occurred as a result of the 4<sup>th</sup> Defendant not keeping a proper lookout, driving too close to the 1<sup>st</sup> Defendant's bus and failing to take reasonable steps to avoid colliding in the rear of the said bus. The only conclusion to be arrived at, therefore, is that the accident was wholly caused by the negligence of the 4<sup>th</sup> Defendant, the driver of the 3<sup>rd</sup> Defendant's motor truck.

[83] In view of all the foregoing, there will be judgment for the Claimant against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the claim and for the 1<sup>st</sup> Defendant/Ancillary Claimant on the Ancillary Claim.

[84] I will therefore now proceed to assess the damages to which each is entitled.

### **Damages - Assessment**

#### **Special Damages**

[85] The court accepts the sum of **\$72,400.00** agreed between the parties as special damages to be awarded to the Claimant. There is no evidence to show that any additional amount should be awarded to the Claimant under this head of damage.

#### **General Damages**

[86] The medical reports of Doctors Ramdial, Donald Gordon, D.K. Garg and Giraud-Spence indicate that the Claimant sustained injuries to his neck and back region. He had, *inter alia*, tenderness in the left side of his neck muscles, severe muscular spasm to the left side of his neck and tenderness over the cervical and lumbar spine with decrease range of motion. He was diagnosed with whiplash injury and soft tissue injury to his skeletal ligaments and the para-vertebral muscles in the thoracic and lumbar region.

[87] Counsel for the Claimant submitted the following cases as useful guides in arriving at a reasonable compensation:

1. **Wilford Williams v Nedzin Gill & Christine Forrest**, reported in **Khan's Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica**, Volume 5 at page 148. The Claimant in this case was diagnosed with whiplash injury to the neck. He was awarded \$350,000.00 November 2000 (CPI 56.20). The award updates to \$1,677,135.23 when CPI 269.3 for November 2019 is used.
2. **Talisha Bryan v Anthony Simpson & Andre Fletcher** [2014] JMSC Civ.31, in which the Claimant was diagnosed with whiplash injury to the neck and lower back strain. She was treated conservatively by way of pharmacology and physiotherapy. She was awarded \$1,400,000.00 in March 2014 (CPI 214.2), which updates to \$1,760,130.72.
3. **Rupert Hunter v Gary Thompson and Another**, (unreported) Supreme Court Claim No. 2006 HCV00624, judgment delivered December 2008. The Claimant was diagnosed with chronic lower back strain and was treated conservatively and advised to undergo physiotherapy. He was awarded \$800,000.00 (CPI 136.5). This updates to \$1,578,315.02.

[88] It was submitted that, in the case at bar, given the Claimant's protracted period of pain and suffering, two years post injury, and the types of injuries he sustained, he is deserving of a greater award than those in the cases presented, and as such, the sum of \$1,800,000.00 would be appropriate compensation.

[89] Counsel for the 1<sup>st</sup> Defendant/Ancillary Claimant submitted that an award of \$1,200,000.00 would be more appropriate. He also cited the case of **Wilford Williams** as well as the case of **Anthony Gordon v Chris Meikle and Esrick Nathan** reported at **Khan's**, *supra*, at page 142, as useful guides. In the case of **Anthony Gordon**, the Claimant sustained cervical strain, contusion to the left knee and lumbosacral strain. He had tenderness on palpation of his entire lumbar spine and was assessed as having 5%PPD. In July, 1998 he was awarded \$200,000.00 (CPI 48.37) which updates to \$1,113,500.10.

[90] On behalf of the 3<sup>rd</sup> Defendant submitted that the medical reports for the Claimant *"strongly suggest that [he] did not suffer severe injuries...his injuries are capable of being managed by appropriate treatment...there is an expectation of full*

recovery...none of the reports have assigned disability rating". Counsel suggested that an award of \$900,000.00 would be appropriate. The following cases were cited as useful guides:

1. **Peter Marshall v Carlton Cole & Alvin Thorpe** reported in **Khan's, supra**, Vol.6, page 109. The Claimant in this case suffered moderate whiplash, sprain, swollen and tender left wrist and left hand and moderate lower back pain and spasm. He was given two weeks' sick leave, analgesics and Cataflam injections. At the end of sixteen weeks he had no residual pain and suffering. His award of \$350,000.00 in October 2006 (CPI 99.83) is worth \$944,155.06 when updated using the CPI for November 2019.
2. **Billy Tait v Wesley Salmon** [2015] JMSC Civ. 215. This Claimant suffered whiplash injury to the neck with moderate muscular spasm, pain in the muscles of the neck, upper back and shoulders, accompanied by headaches. Movements to the neck were limited. He also had lower back strain with moderate muscular spasm of the muscles of the lower back, gluteal areas and hamstring muscles which affected movements of the back. Additionally, there was contusion to the sterna area of the chest, with tenderness along the parasternal area; which resulted in painful coughs. The doctor gave eight weeks as the claimant's period of incapacitation and assessed that there could be long term complications as a result of the injuries. The court awarded \$900,000.00 (CPI 231.8 November 2015) which updates to \$1,045,599.65.
3. **Danielle Archer v Jamaica Infrastructure Operator Ltd** [2013] JMSC Civ.76. The Claimant suffered mild to moderate whiplash, multiple soft tissue injuries, moderately painful distress, marked restriction to range of motion due to pain, pains to back and neck, painful movements on right side shoulder, tender in distal calf muscle of right leg. The award of \$800,000.00 made to her in May 2013 (CPI 199.6) updates to \$1,079,358.72.

[91] Having examined the cases cited, I agree with Counsel for the Claimant that in the case at bar, the Claimant's injuries seem to be more serious than those suffered by the Claimants in the cases cited by her. I bear in mind that in the case of **Peter Marshall**, he had no residual pain after sixteen weeks and that the injuries sustained by the Claimant also appear to be more serious than those of **Billy Tait**

and **Danielle Archer**, as he had severe muscular spasm and spent three days in hospital.

[92] I accept that the percentage impairment of the body is a factor to be taken into account and although there is no evidence that the Claimant in this case had any rating in this regard, and I note that **Anthony Gordon** is said to have been assessed as having 5% permanent partial disability, I am of the view that that case may not be good for comparison as it is of some vintage.

[93] When all the circumstances are considered, I find that the sum of **\$1,770,000.00** would be appropriate compensation for the Claimant in this case and will award that sum.

### **The Ancillary Claim**

[94] The Ancillary claim by the 1<sup>st</sup> Defendant was against the 1<sup>st</sup> Ancillary Defendant, Seacoast Trucking Limited for an indemnity and/or contribution for any sums he may be held liable to pay to the Claimant. As correctly submitted by Counsel for the 1<sup>st</sup> Ancillary Defendant, the resolution of this ancillary is subject to the court's ruling on the substantive claim

[95] Additionally, he claimed that he suffered damage to his bus and the repairs cost "*roughly two hundred thousand dollars*". He further stated that repairs to the bus were carried out at "*Indian Garage*".

[96] He has specifically pleaded a total of \$171,651.00 as the cost to repair motor vehicle and has tendered in evidence a document setting out estimates to repair his vehicle. I note that the document does not provide any information to satisfy the court on a balance of probabilities that the sum stated was in fact incurred by the Ancillary Claimant. Although the Ancillary Claimant gave evidence that he spent more than the sum stated, no evidence was led to show whether repairs were actually done to the bus, there was no evidence as to the date any repairs

were carried out or that the sum noted on the “*invoice*” was actually paid. It is described as an “*estimate*” of the work to be done.

[97] Special damages must be specifically pleaded and proved. (See **Lawford Murphy v Luther Mills** [1976] 14 JLR 119) The authorities however show that the court has some discretion in relaxing the rule in the interest of fairness and justice, based on the circumstances. (**Julius Roy v Audrey Jolly** [2012] JMCA Civ 53).

[98] Despite the document being admitted into evidence, no weight can be attached to it as proof of payment for repairs to the coaster bus to substantiate the claim for special damage. There will therefore be no award for special damages on the ancillary claim.

### **Disposition**

[99] Judgment for the Claimant against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/ 1<sup>st</sup> and 2<sup>nd</sup> Ancillary Defendants.

Special damages awarded to the Claimant in the sum of **\$72,400.00** with interest at 3% p.a. from August 15, 2011 to date of judgment

General damages awarded to the Claimant in the sum of **\$1,770,000.00** with interest at 3% per annum from March 3, 2014 to the date of the judgment

Costs to the Claimant to be taxed, if not agreed, and to be paid by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Judgment for the 1<sup>st</sup> Defendant/Ancillary Claimant on the ancillary claim with costs to be taxed if not agreed.