



**[2025] JMSC Civ 23**

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

**IN CIVIL DIVISION**

**CLAIM NO. 2017 HCV 03293**

**BETWEEN                      RENEE WHYTE                      CLAIMANT**

**AND                      JERMAINE LAWRENCE                      1<sup>st</sup> DEFENDANT/  
ANCILLARY CLAIMANT**

**AND                      HEPBURN SHAW                      2<sup>nd</sup> DEFENDANT/  
ANCILLARY DEFENDANT**

**IN OPEN COURT**

**Mesdames Christine Mae Hudson and Antoinette Wynter instructed by Messrs. K Churchill Neita & Company for the Claimant**

**Ms Racquel Dunbar instructed by Dunbar & Co. for the 1<sup>st</sup> Defendant/Ancillary Claimant**

**Mesdames Ashley Mair and Chryslicha Gordon-Burton instructed by MayhewLaw for the 2<sup>nd</sup> Defendant/Ancillary Defendant**

**Heard: July 11, 2024, and February 28, 2025**

**Negligence – Motor vehicle collision – The duty of care – The duty of care in terms of proper care – Reciprocated duty – Road code – Breach – Effect – Breach creating no presumption of negligence – Contributory negligence – Credibility of witnesses**

## **Damages – Personal injury – Quantum of damages**

**Road Traffic Act, sections 51(2), 53(1)(a) and (b) and 95(3), Island Traffic Authority Road Code, Part 2 – 1, 35, 39(b),(c),(d) and (e) and 40**

### **A. NEMBHARD J**

#### **INTRODUCTION**

- [1]** This matter arises from a motor vehicle accident which occurred on or about 5 April 2017, at approximately 8:30 a.m. At the time of the accident, the Claimant, Renee Whyte, was standing on the sidewalk which is located on the right side of the Rose Hall Main Road, as one faces the direction of Montego Bay, in the parish of St. James.<sup>1</sup> The matter raises important considerations not only in relation to the Claim for Damages in Negligence but importantly, in relation to the issue of the propriety of an award of Damages for the psychiatric injury sustained by Ms Whyte as a direct result of this motor vehicle accident.

#### **The circumstances of the motor vehicle accident**

- [2]** The Rose Hall Main Road is a dual carriageway which facilitates the movement of vehicular traffic from Rose Hall to Falmouth, in the parish of Trelawny. Along this corridor, there are turn-off lanes in the vicinity of the Iberostar Waves Rose Hall Beach Hotel, which widens the road from two (2) lanes to three (3) lanes at those junctures.
- [3]** At the time of the motor vehicle accident, the 2<sup>nd</sup> Defendant/Ancillary Defendant, Hepburn Shaw, was the driver of a 2004, white Toyota Townace DX, registered 0732 EF. His route lay along the left lane along the Rose Hall Main Road, as one faces the direction of Falmouth, in the parish of Trelawny. Not far behind Mr Shaw was the 1<sup>st</sup> Defendant/Ancillary Claimant, Jermaine Lawrence, who was

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<sup>1</sup> See – Paragraphs 4-7 of the Second Further Amended Particulars of Claim, which was filed on 8 March 2024

driving a 2015, white Toyota Coaster registered PG 9806. He too was travelling along the left lane along the Rose Hall Main Road, as one faces the direction of Falmouth, in the parish of Trelawny.<sup>2</sup>

- [4] During the course of the motor vehicle accident, both vehicles collided in the turning lane along the roadway, which resulted in the Toyota, Townace DX hitting Ms Whyte and causing her to fall unconscious in the roadway.

**The position advanced by the 1<sup>st</sup> Defendant/Ancillary Claimant**

- [5] Mr Lawrence contends that he observed Mr Shaw indicate that he [Mr Shaw] intended to pull off the roadway, onto the soft shoulder. Consequently, Mr Lawrence sounded his vehicle's horn to alert Mr Shaw that he [Mr Lawrence] intended to overtake. Mr Lawrence asserts that while in the process of overtaking, Mr Shaw suddenly made a right turn causing him [Mr Lawrence] to have to swerve and make a right turn to avoid a collision. Despite his evasive action, the two motor vehicles collided in the turning lane along the roadway. Mr Lawrence contends that the left front corner section of the Toyota Coaster collided with the right rear door of Mr Shaw's motor vehicle.<sup>3</sup>

**The position advanced by the 2<sup>nd</sup> Defendant/Ancillary Defendant**

- [6] Conversely, Mr Shaw contends that he felt a sudden impact to the right door of his motor vehicle, as Mr Lawrence's vehicle collided into his vehicle while Mr Lawrence attempted to overtake. The collision between the two motor vehicles caused Mr Shaw to lose control of the Toyota Townace Bus. Consequently, the Toyota Townace Bus exited the roadway and collided with Ms Whyte on the sidewalk where she was standing.
- [7] Mr Shaw further contends that the motor vehicle which he was driving went to the right of the roadway and eventually came to rest with the face of the motor vehicle pointing in the opposite direction to that in which he was travelling, that is,

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<sup>2</sup> See – Paragraph 3 of the Witness Statement of Jermaine Lawrence, which was filed on 8 April 2024

<sup>3</sup> See – Paragraphs 4-7 of the Witness Statement of Jermaine Lawrence, which was filed on 8 April 2024

in the direction of Montego Bay, in the parish of St. James. On exiting the Toyota Townace Bus, Mr Shaw asserts that he observed Ms Whyte lying unconscious in the roadway behind his motor vehicle.<sup>4</sup> Ms Whyte was assisted to the Cornwall Regional Hospital, in the parish of St. James, to be treated for the injuries which she sustained because of the motor vehicle accident.<sup>5</sup>

## **THE ISSUES**

**[8]** Central to the issue of liability for the Court to determine are the following issues:

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- i. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Messrs. Jermaine Lawrence and Hepburn Shaw, respectively, owed a duty of care to the Claimant, Ms Renee Whyte.
- ii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, jointly or severally, breached that duty of care.
- iii. Whether that breach caused the Claimant to suffer harm that was reasonably foreseeable.
- iv. The quantum of Damages to be awarded to Ms Whyte.

**[9]** To determine those issues, the following factual issues must also be resolved: -

- i. Whether the motor vehicle collision occurred in circumstances where the 1<sup>st</sup> Defendant attempted to overtake a line of traffic and in attempting to complete the execution of that manoeuvre collided with the Toyota, Townace DX.

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<sup>4</sup> See – Paragraph 5 of the Witness Statement of Hepburn Shaw, which was filed on 29 June 2023

<sup>5</sup> See – Paragraph 2 of the Witness Statement of Renee Whyte, which was filed on 7 February 2024

- ii. Whether the motor vehicle collision occurred in circumstances where the 2<sup>nd</sup> Defendant, having exited the roadway, made a sudden right turn into the path of the Toyota Coaster.
- iii. Whether liability ought to be apportioned between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and, if so, the nature of the apportionment.

### **The Claim**

- [10] By way of an Amended Claim Form, which was filed on 5 February 2018, Ms Whyte commenced an action for Damages in Negligence, in respect of her injuries, loss, damage and in respect of the expenses which she incurred because of the motor vehicle accident. Additionally, Ms White prays in aid the doctrine of *res ipsa loquitur*.<sup>6</sup>

### **The Ancillary Claim**

- [11] By way of an Ancillary Claim Form, which was filed on 27 August 2018, Mr Lawrence seeks damages, contribution or indemnity against any successful judgment by the Claimant against him, interest and costs, on the basis that Mr Shaw was the negligent party in the accident. Mr Lawrence contends that he suffered serious personal injury, loss and damage to his motor vehicle and incurred expenses because of Mr Shaw's negligence.<sup>7</sup>

## **THE LAW**

### **The claim in negligence**

- [12] 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

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<sup>6</sup> See – Paragraphs 4-7 of the Second Further Amended Particulars of Claim, which was filed on 8 March 2024

<sup>7</sup> See – Paragraphs 9, 10 and 12-17 of the Witness Statement of Jermaine Lawrence, which was filed on 8 April 2024. See also, paragraph 4 of the Ancillary Particulars of Claim, which was filed on 27 August 2018

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**

[13] 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.<sup>8</sup>

[14] This principle was enunciated by Lord Griffiths in **Ng Chun Pi and Ng Wang King v Lee Chuen Tat and Another**.<sup>9</sup> He stated at pages 3 and 4: -

*"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."*

[15] In **Miller v Minister of Pensions**,<sup>10</sup> 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."*

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<sup>8</sup> 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

<sup>9</sup> Privy Council Appeal No. 1/1988, judgment delivered on 24 May 1988

<sup>10</sup> [1947] 2 All ER 372, at pages 373- 374

- [16] To establish a duty of care, there must be foreseeable damage, consequent upon the defendant's negligent act.<sup>11</sup> There must also exist sufficient proximate relationship between the parties, making it fair and reasonable to assign liability to the defendant.
- [17] Lord Bridge, in **Caparo Industries plc v Dickham**,<sup>12</sup> 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 duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, also falling within the ambit of the test of negligence."*

- [18] 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

- [19] 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.

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<sup>11</sup> See – **Roe v Ministry of Health and Others. Woolley v Same** [1954] 2 All ER 138 B-C

<sup>12</sup> [1990] 1 All ER 568, at page 572

### *The 'but for' test*

- [20] The authority of **Clements v Clements**,<sup>13</sup> 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.*

*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**

- [21] 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

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<sup>13</sup> [2012] 2 S.C.R., at paragraphs 8-10



this regard, in **Roe v Ministry of Health and Others. Woolley v Same**,<sup>14</sup> 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 duty of care in terms of “proper care”**

[22] Lord MacMillan expressed the duty of care in terms of “proper care” in **Hay or Bourhill v Young**.<sup>15 16</sup> He had this to say at page 403: -

*“...Then to whom is the duty owed? Again, I quote and accept the words of Lord Jamieson:*

*‘...to persons so placed that they may reasonably be expected to be injured by the omission to take such care.’*

*The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.”*

[23] Harris JA in the authority of **Glenford Anderson v George Welch**<sup>17</sup> made the following pronouncements at paragraph 26 of her decision: -

*“[26] 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*

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<sup>14</sup> Supra, at page 138 A-C

<sup>15</sup> ([1946]) AC 426

<sup>16</sup> This principle was adopted by the Jamaican Courts in the authority of **Esso Standard Oil SA Ltd – Another v Ian Tulloch** [1991] 28 JLR 553: “all users of the road owe a duty of care to other road users”.

<sup>17</sup> [2012] JMCA Civ 43

*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. It is also well settled that where a claimant alleges that he or she has suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities.*

*[27] ...*

*[28] In establishing a duty of care there must be foreseeable damage consequent upon the defendant's negligent act. There must also be in existence, sufficient proximate relationship between the parties making it fair and reasonable to assign liability to the defendant...*

*[29] Liability will be affixed to negligence where the defendant's act is the sole effective cause of the claimant's injury or it is so connected to it to be a cause materially contributing to it. The negligent act as a cause of a claimant's injury may arise out of a chain of events leading to liability on the part of a defendant but the claimant must so prove. Proof that a claimant's injury was caused by the defendant's negligence raises a presumption of the defendant's liability. However, the claimant must satisfy the court that his or her injury was caused by the defendant's negligence, or that for want of care, the defendant's negligence substantially accounted for the injury."*

### **The duty of care enshrined in statute**

- [24]** This duty of care is enshrined in the Road Traffic Act ("the Act"). Although the Act has since been repealed and replaced by The Road Traffic Act, 2018, the Court notes that this new legislation does not have retroactive effect. Therefore, the legislation in force at the time of this motor vehicle collision would be the earlier iteration of the Road Traffic Act. Consequently, any references in this Judgment to the Road Traffic Act is a reference to the Road Traffic Act with amendments up to 2015.
- [25]** It is also well settled that all users of the road owe a duty of care to other road users. Motorists have a statutory duty to take the necessary action to avoid an

accident and to exercise reasonable care to avoid causing injury to persons or damage to property.<sup>18</sup> Section 51(2) of the Act reads as follows: -

*“51(2) Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.”*

### **The Island Traffic Authority Road Code, 1987**

**[26]** The relevant portions of Part 2 of the Island Traffic Authority Road Code, 1987 (“the Road Code”) read as follows: -

*“3. Keep as near to the left as practicable, unless about to overtake or turn to the right. Do not drive on a footpath or pavement by the side of the road.*

*8. Do not overtake unless you can do so without danger to others or to yourself. Before you overtake, make sure the road is clear far enough ahead and behind. Use your mirrors and if you are on a pedal cycle or motorcycle look behind and to your offside or right side. Signal before you start to move out. Be particularly careful at dusk, in the dark and in fog or mist, when it is more difficult to judge speed and distance.*

*Do not overtake at or when approaching the following locations:*

*(a) Pedestrian crossing;*

*(b) Railway crossing;*

*(c) Road junction;*

*(d) Curve or bend;*

*(e) The brow of a hill;*

*(f) Humpback bridge;*

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<sup>18</sup> See – **Esso Standard Oil SA Ltd. & Anor v Ian Tulloch** (1991) 28 JLR 553 and **Nance v British Columbia Electric Railway Co. Ltd** [1951] AC 601, per Viscount Simmonds: *“Generally speaking when two parties are so moving in relation to one another so as to involve risk of collision each owes to the other a duty to move with due care and this is true whether they are both in control of vehicles or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle.”*

*(g) Where the road narrows.*

*9. When you wish to overtake another vehicle, take the following steps: -*

*(a) Before you turn to the right of the road make sure there is plenty of time to pass and return to the left before meeting any vehicle coming from the opposite direction.*

*(b) Overtake only on the right, unless traffic is moving in queues and the traffic queue on your right is moving more slowly than you are or the vehicle ahead, signals its intention to turn right. Never use the hard or soft shoulder to overtake.*

*(c) After overtaking a vehicle return to the left as soon as practicable but avoid cutting in too quickly.*

*(d) Remember that traffic may be coming up behind much more quickly than you think. Signal before you move out. Be careful at dusk, in the dark, in fog, or mist, or when it is more difficult to judge speed and distance. Be particularly careful when overtaking in rain or on a wet road surface.*

*10. When overtaking make sure that you will not have to cross a continuous double or single white line in the centre of the roadway.*

*11. When you are about to be overtaken by another vehicle move closer to the left and do not increase your speed. Remember, that a vehicle may need to temporarily join the line to afford the right of way to oncoming traffic, so make provision for same.*

*29. When the road is divided into three lanes keep to the left except in the following circumstances: -*

*(a) When overtaking another vehicle, you may use the middle lane if it is clear that you can do so safely and re-enter the left lane without inconvenience to oncoming traffic;*

*(b) When the traffic signs indicate that the left lane as well as the middle lane are to be used exclusively for vehicles travelling in the same direction during a given period of the day.*

[27] Section 95(3) of the Act is also relevant to these proceedings. This section reads:

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*“95(3) The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.”*

### **The doctrine of res ipsa loquitur**

[28] In the authority of **The Attorney General for Jamaica and The South East Regional Health Authority v Tahjay Rowe (a Minor, suing by Tasha Howell, His Mother and Next Friend)**<sup>19</sup> Edwards JA explained the doctrine of the maxim res ipsa loquitur.<sup>20</sup> The learned judge made the following pronouncements: -

*“[61] ... The maxim is usually invoked where the claimant has no reasonable explanation as to how and why the accident which resulted in the injury was caused, but based on the circumstances, the fact of the accident itself gives rise to an inference, which may be rebutted, that it was caused from the defendant’s want of care. In such a case, it is said that the ‘res (thing) speaks for itself’ and raises a prima facie case of negligence, which requires an explanation from the defendant as to how such an accident could occur even if all due care had been taken. Where the maxim res ipsa loquitur applies, therefore, a prima facie case of negligence against a defendant may be inferred, and, in such a case, the defendant would be required to show that there was some other probable explanation for the accident that is not related to any negligence on his part.*

*[62] It has sometimes been incorrectly described as a shift in the burden of proof onto the defendant, but it is more accurate to state that the claimant having raised a prima facie case of negligence, it falls to the defendant to provide*

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<sup>19</sup> [2020] JMCA Civ 56

<sup>20</sup> See also, paragraph 57 of the authority of **Adele Shtern v Villa Mora Cottages Ltd and Monica Cummings** [2012] JMCA Civ 20, per Morrison JA.

evidence to rebut that *prima facie* case. The defendant, would, therefore, bear an evidential burden, so to speak.

[63] ...

[64] In **Clifford Baker v The Attorney General & Detective Corporal Lewis**, (unreported), Supreme Court, Jamaica, Suit No CL B 274 of 1983, judgment delivered 8 October 1986, Smith J (Ag) (as he then was), in considering the applicability of the maxim said, at page 4, that:

“Certainly, the plaintiff had every right to believe that at one foot from the sidewalk he would be safe. This in my view provides a classic illustration of the doctrine of *res ipsa loquitur*. By this doctrine where an accident happens which by its nature is more consistent with its being caused by negligence for which the defendant is responsible than by other causes, the burden of proof shifts to the defendant to explain and to show that the accident occurred without fault on his part. The defendant need not prove how and why the accident happened. It is sufficient if he satisfies the Court that he personally was not negligent or at fault.”

[29] The President of the Court of Appeal, McDonald-Bishop JA, in the authority of **The Administrator General for Jamaica (Administrator of the Estate of Weston Wilson, deceased) v Airlift Handlers Limited and Anor**<sup>21</sup> stated the general principles as expressed by Megaw LJ in **Lloyde v West Midlands Gas Board**:<sup>22</sup>

“[31] [*Res ipsa loquitur*] means that a plaintiff *prima facie* establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) **on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible**, which act or omission constitutes a failure to take proper care for the plaintiff’s safety.”

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<sup>21</sup> [2024] JMCA App 29

<sup>22</sup> [1971] 2 All ER 1246

*[32] These statements by Megaw LJ are demonstrative of the well-settled principle of law that a prima facie case of negligence cannot be established with recourse to res ipsa loquitur, without some evidence to support an inference of negligence on the part of a defendant.”*

## THE SUBMISSIONS

### The submissions advanced on behalf of the Claimant

- [30] Learned Counsel Ms Christine Mae Hudson, in her detailed and comprehensive written submissions, referred the Court to the 11<sup>th</sup> edition of the text **Bingham & Berrymans, Motor Claims Cases**<sup>23</sup> to substantiate the submission that all road users owe a general duty of care to other road users, whom they can reasonably foresee as likely to be affected, to exercise due care so as not to cause harm to them by their acts and omissions. It was further submitted that section 51(2) of the Road Traffic Act imposes a statutory duty of care on drivers to take the necessary precautions to avoid accidents.
- [31] All persons, paralytic as well as others, Ms Hudson submitted, have a right to walk on the road and are entitled to the exercise of reasonable care on the part of persons driving carriages upon it.<sup>24</sup>
- [32] It was further submitted that, in the present instance, much depends on the parties' answers on cross-examination, and particularly, on the credibility of each witness. The Court was urged to carefully consider the evidence contained in paragraph 5 of the Witness Statement of Hepburn Shaw and that which is contained in paragraph 8 of the Witness Statement of Jermaine Lawrence. From this evidence, Ms Hudson further submitted, the Court can draw reasonable inferences to find negligence on the part of one or both drivers.<sup>25</sup>

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<sup>23</sup> See paragraph 4.1

<sup>24</sup> See – **Boss vs Litton** (1832) 5 C & P 407 (See Bingham & Berrymans Motor Claims Cases, 11<sup>th</sup> edition page 109)

<sup>25</sup> See – **Igol Coke vs Nigel Rhooms et al** [2014] JMCA Civ 54

[33] Both the 1<sup>st</sup> Defendant/Ancillary Claimant and the 2<sup>nd</sup> Defendant/Ancillary Defendant owed a duty of care to each other as road users travelling along the Rose Hall Main Road, in the parish of St. James. Each is equally burdened with the responsibility of reciprocating that duty of care to other road users, including the Claimant, Ms Renee Whyte, who was a pedestrian at the time of the motor vehicle accident.

[34] In the final analysis, Ms Hudson submitted that there is sufficient evidence before the Court, on the face of which, either by way of the direct evidence of the witnesses or the inescapable inferences to be drawn, the Court can determine that the accident occurred because of the negligence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**The submissions advanced on behalf of the 1<sup>st</sup> Defendant/Ancillary Claimant**

[35] For her part, Learned Counsel Ms Racquel Dunbar commenced her equally fulsome and comprehensive written submissions with a statement of the elements of the tort of negligence. Ms Dunbar asserted that there are three (3) elements of the tort of negligence, each of which must be proven by a party who alleges the tort under this head. These three (3) elements are as follows: -

- i. That a duty of care was owed by the defendant to the plaintiff.
- ii. There was a breach of that duty by the defendant.
- iii. The plaintiff suffered damage because of that breach.

[36] To substantiate this submission, Ms Dunbar referred the Court to the authorities of **Lochgelly Iron & Coal Co. Ltd v McMullan**<sup>26</sup> and **Anns v London Borough of Merton**.<sup>27</sup>

[37] It was further submitted that, in determining whether a duty of care was owed to the Claimant, Renee Whyte, the Court must consider whether it is reasonably

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<sup>26</sup> [1934] A.C. 1

<sup>27</sup> [1977] 2 All ER 492 at 498



foreseeable that Ms Whyte would have been harmed if the defendant did not exercise due care. Ms Dunbar asserted that if the answer to that question is yes, then the Court must proceed to consider whether there is a breach of that duty of care.

[38] In this regard, Ms Dunbar submitted that the Court must consider whether a reasonable man placed in the position of the defendant would have acted as the defendant did. Ms Dunbar maintained that the Court must consider each of the following: -

- i. the risk factor, namely the likelihood of harm.
- ii. the seriousness of the injury that is risked.
- iii. the importance or utility of the defendant's conduct.
- v. the cost and practicability of measures to avoid the harm.

It was further submitted that, once it is established that the Defendant breached his duty of care, the Court must then determine whether the Claimant suffered damage and if so whether the breach was the direct cause of that damage as well as the remoteness of the damage. In the present instance, Ms Dunbar maintained, Ms Whyte must prove that she suffered damage and that it was caused by the Defendant's breach of the duty of care which was owed to her.

[39] Additionally, Ms Dunbar submitted that a road user's duty of care is enshrined in the Road Traffic Act and referred the Court to the authorities of **James Mitchell & Aaron Gordon v Leviene McKenzie & Dorrell Gordon**,<sup>28</sup> **Calvin Grant v Pareedon & Pareedon**<sup>29</sup> and **Ronald Webb v Antonio Rambally**.<sup>30</sup>

[40] Special attention was drawn to sections 57(1) and 57(5) of the Road Traffic Act to illustrate the point that there is a statutory obligation which is cast on all motorists to give the appropriate signals when turning or when otherwise changing their direction of travel. The duty of care imposed on a driver when

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<sup>28</sup> SCCA 104/1991 delivered 21 October 1992

<sup>29</sup> Suit No CL 1983/G108 unreported 18/4/1986

<sup>30</sup> Suit No CL W101 of 1990 (unreported)

changing directions is that he is to first, signal and then to see that no one is incommoded by his change of direction. Further, Ms Dunbar submits that his duty of care is greater if he gives a wrong signal and then changes it. In this regard, Ms Dunbar relied on the authorities of **Pratt v Bloom**,<sup>31</sup> **Sorrie v Robertson**,<sup>32</sup> **Goke v Willett**,<sup>33</sup> **Clark v Wakelin**,<sup>34</sup> and **Another v Probert**.<sup>35</sup>

[41] It was submitted that Ms Whyte bears the burden of proof to prove that the accident happened in the manner she claims it did and to do so on a balance of probabilities. In support of this submission, Ms Dunbar referred the Court to the authority of **Jamaica Public Service Company Limited v Pamela Rance**.<sup>36</sup>

[42] Finally, Ms Dunbar submitted that logic dictates that it would not be possible to impact the side of a vehicle while overtaking it, unless it was a glancing blow. Furthermore, Ms Dunbar asserted, the property damage, with the damage being occasioned to the left front corner of Mr Lawrence's vehicle, supports his [Mr Lawrence's] version of the events. Ms Dunbar submitted that Mr Shaw gave misleading signals to Mr Lawrence and further that all the evidence supports the case advanced by Mr Lawrence.

#### **The submissions advanced on behalf of the 2<sup>nd</sup> Defendant/Ancillary Defendant**

[43] Learned Counsel Ms Ashley Mair in her concise written submissions which were filed on behalf of the 2<sup>nd</sup> Defendant/Ancillary Defendant maintained that the doctrine of *res ipsa loquitur* is not applicable in the present instance. This, because there is evidence by each Defendant as to how the accident occurred. To buttress this submission, Ms Mair referred the Court to the authority of **Shtern v Villa Mora Cottages Ltd et al**.<sup>37</sup>

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<sup>31</sup> Reported at page 85 of the Bingham & Berryman's Motor Claims Cases

<sup>32</sup> Reported at page 85 of the Bingham & Berryman's Motor Claims Cases

<sup>33</sup> Reported at page 86 of the Bingham & Berryman's Motor Claims Cases

<sup>34</sup> Reported at page 86 of the Bingham & Berryman's Motor Claims Cases

<sup>35</sup> Reported at page 86 of the Bingham & Berryman's Motor Claims Cases

<sup>36</sup> SCCA No. 11/92

<sup>37</sup> [2012] JMCA 20

- [44] Ms Mair submitted that the law in relation to the tort of negligence is settled. It is equally settled law that all users of the road owe a duty of care to other road users. All drivers of motor vehicles have a duty, both by statute and at common law, to exercise reasonable care while operating their vehicles on the roadway to avoid causing injury to persons or damage to property. Ms Mair maintained that the standard of care expected is that level of care which an ordinary skilful driver would have exercised in all the circumstances. In support of this submission, Ms Mair relied on sections 32(1) and 51(1) of the Road Traffic Act.
- [45] Finally, Ms Mair submitted that because the accounts of the motor vehicle accident as provided by the 1<sup>st</sup> Defendant/Ancillary Claimant and the 2<sup>nd</sup> Defendant/Ancillary Defendant and that of the Claimant differ, the physical evidence can assist in establishing negligence. Ms Mair referred the Court to paragraph 45 of the authority of **Gregory Cooper v Vaughn Anthony Williams**.<sup>38</sup>
- [46] Ms Mair asserted that it is not disputed that a duty of care was owed to Ms Whyte. Mr Shaw contends however that he did not breach that duty of care and that the cause of the accident was because of the negligence of Mr Lawrence. It was further asserted that Mr Lawrence is not a credible and reliable witness because of the inconsistencies which arise throughout his pleadings, his witness statement and his viva voce evidence at trial.

## ANALYSIS AND FINDINGS

- [47] The question now arising, is, whether, on the evidence, negligence can be ascribed to any party.

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<sup>38</sup> [2016] JMSC Civ 225

**[48]** The issue of liability is to be determined on the facts of each case, as each case has its own nuances. This principle was enunciated by Lord Greene M.R. in **Morris v Luton Corporation**.<sup>39</sup>

**[49]** Lord Greene M.R. is quoted as follows: -

*“There is sometimes a temptation for judges in dealing with these traffic cases to decide questions of fact in language which appears to lay down some rule which users of the road must observe. That is a habit into which one perhaps slips unconsciously...but it is much to be deprecated, because these are questions of fact dependent on the circumstances of each case.”*

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Messrs. Jermaine Lawrence and Hepburn Shaw, respectively, owed a duty of care to the Claimant, Ms Renee Whyte**

**[50]** The first issue that arises for the Court’s determination is whether, in the circumstances of this case, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Messrs. Jermaine Lawrence and Hepburn Shaw, respectively, owed a duty of care to the Claimant, Ms Renee Whyte. To succeed in her claim in negligence, Ms Whyte must prove, on a balance of probabilities, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants owed her a duty of care; that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants breached that duty of care; and that that breach caused her to suffer harm that was reasonably foreseeable.

**[51]** It is now trite law that there is a reciprocated duty of care that each driver on the road owes to others. This duty of care is to manage and control his motor vehicle in such a way as to prevent harm or damage to other users of the road. The duty is one that is limited to persons who are so placed that they may reasonably be expected to be injured by the omission to take such care. Undoubtedly, this duty extends to pedestrians who are using the road.

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<sup>39</sup> [1946] 1 K.B. 114

- [52] In the present instance, the issue of whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants owed Ms Whyte a duty of care is not a complex one. The Court finds that both Defendants owed a duty of care to Ms Whyte, to manage and/or control their respective motor vehicle with such care and in such a manner that would not cause harm or injury to the other users of the roadway, including Ms Whyte, as she stood on the sidewalk of the roadway.

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, jointly or severally, breached that duty of care**

**Whether that breach caused the Claimant to suffer harm that was reasonably foreseeable**

- [53] To determine the issue of liability, the Court must assess the two (2) divergent accounts of how the motor vehicle collision occurred. Both Defendants have given different accounts of the circumstances in which the motor vehicle collision occurred. That evidence bears repeating.
- [54] Mr Lawrence's evidence, as contained in his Witness Statement, which was filed on 8 April 2024, is quoted as follows: -

*"3. On the 5<sup>th</sup> day of April 2017, I was told by Juta Tours that I was working at Falmouth Pier. I was heading from Montego Bay to Falmouth Pier. I was driving behind a white Toyota Noah for about a minute or so. We were both travelling towards Falmouth direction. It is a single lane to head towards Falmouth.*

*4. Upon reaching in the vicinity of Iberostar Hotel, I saw that the white Toyota Noah in front of me indicated that he was pulling to the left by putting on the left indicator. It then began to pull off the road to his left so that half of his vehicle was in the lane and the other half on the soft shoulder. At first, I thought he was going to turn into the Iberostar Hotel, which is located on the left going towards Trelawny when coming from Montego Bay. However, he was not slowing down enough to turn into the resort. I was watching him carefully to see what he was doing and eased up on my speed by applying my brakes. He passed the hotel entrance and continued pulling over to his left so that the entire vehicle was now*

*on the soft shoulder. It was slowing down more almost to a complete stop. So now I thought he was going to pull over and stop on the soft shoulder.*

*5. I thought he was stopping on the soft shoulder since all of his vehicle was now on it. Just to make sure that he knew that I was passing. I blew my horn several times and my horn is very loud... I had upgraded my horn to ensure it was loud. At all times while I was driving behind the Toyota Noah, I was always in my left lane heading towards Trelawny. I was proceeding to pass it when the Toyota Noah suddenly and without warning made a right turn across my path as if to make a U-turn. I was about a vehicle length away from it when it did so. At the time I was driving at a moderate speed and when I saw him the sudden turn, I swerved right to run with him to try and go around him, but the Noah continued to turn right. It happened so fast that I didn't even get a chance to smash my brakes. I also realised I would not have been able to stop in time given how close the vehicles were when he turned. The two vehicles collided in the middle of the road.*

*6. At the time of the collision, the Noah was facing the Lilliput community as it was crossways the road. My vehicle was still facing Falmouth direction generally but in a slant position.*

*7. It was the left front corner section of my bus that collided into the right rear door of the Noah. When the vehicles collided, they were in the middle turning lane. The front of my vehicle was in the middle turning lane and the back was in the left lane as you face Falmouth direction. Our vehicles became stuck together. My vehicle started to push the Noah towards Falmouth direction. The Noah ended up on the right soft shoulder. My vehicle stopped with most of it in the right lane and a part in the middle lane on the road.*

*8. I tried to get out through my door, but it would not open. I had to climb through the driver's window. I was in shock, so I stayed in it for a few seconds before coming out. I found out later that the chassis was twisted and that is why my driver's door could not open. When I got out, I saw a lot of men running out from the community towards the vehicle...That's the first time I knew that someone got injured...".*

**[55]** Conversely, Mr Shaw’s account, as contained in his Witness Statement, which was filed on 29 June 2023, is as follows: -

*“4. I had just passed the Barrett Town Police Station, when I observed a white 2015 Toyota Coaster bus, which was travelling two car lengths behind my vehicle, starting to overtake the line of traffic. I continued to drive along the main road when I felt a sudden impact to the right door of my vehicle as the coaster collided with my vehicle while overtaking. My vehicle became airborne, and I lost control of it. My vehicle went to the right of the roadway and eventually rested with its face pointing to the opposite direction, that is, in the direction of Montego Bay.*

*5. After my vehicle came to a stop, I released my seatbelt and exited the vehicle through the left passenger door. Upon my exit, I observed a woman lying unconscious behind my vehicle. She was assisted by several bystanders and was eventually transported to the hospital. I have since learned that this woman is the Claimant in these proceedings.”*

### **The credibility and reliability of the witnesses**

**[56]** In assessing the credibility and reliability of the witnesses in the instant case, as well as that of the evidence that it has heard, the Court will be guided by the observations of Lord Pearce (dissenting) in the House of Lords decision of **Onassis v Vergottis**.<sup>40</sup>

**[57]** Lord Pearce is quoted as follows: -

*“Credibility involves wider problems than mere demeanour, which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following...Firstly, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly, and if so, has this memory correctly retained them? Also, has his recollection been subsequently*

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<sup>40</sup> [1968] 2 Lloyd’s Rep 403 at page 431

*altered by unconscious bias or wishful thinking or by over discussion of it with others?... Lastly, although the honest witness believes that he heard or saw this or that, is it so improbable that it is on a balance of probabilities that he was mistaken?*

*On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness.*

*All these... compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process...".*

- [58]** In assessing the credibility and reliability of the witnesses in the instant case, and in assessing the credibility and reliability of their evidence, this Court is guided by the pronouncements of the Lord Pearce in the authority of **Onassis v Vergottis**.

### **Findings of fact**

- [59]** The parties are agreed that the following facts exist: -
- i. That Jermaine Lawrence was the registered owner and driver of a motor vehicle which was registered PG 9806.
  - ii. That Hepburn Shaw was the registered owner and driver of a motor vehicle registered 0732 EF.
  - iii.. That a motor vehicle collision occurred between these two (2) vehicles along the Lilliput/Rose Hall Main Road, in the parish of St. James.
  - iv. That both vehicles were initially travelling in the direction of Falmouth, in the parish of Trelawny.
  - v. That the vehicle being driven by Jermaine Lawrence was initially travelling behind that which was being driven by Hepburn Shaw.
  - vi. That a female pedestrian was also involved in this motor vehicle accident.



- vii. That there was no impact between the vehicle which was being driven by Jermaine Lawrence and that female pedestrian.
- viii. That the impact was to the right side of the vehicle which was being driven by Hepburn Shaw.

**[60]** The Court makes the following findings of fact: -

- i. That there was a motor vehicle accident which occurred on or about 5 April 2017, at approximately 8:30 a.m.
- ii. At the time of the accident, the Claimant, Renee Whyte, was standing on the sidewalk which is located on the right side of the Rose Hall Main Road, as one faces the direction of Trelawny.
- iii. The Rose Hall Main Road is a dual carriageway which facilitates the movement of vehicular traffic from Rose Hall, in the parish of St. James, to Falmouth, in the parish of Trelawny. Along this corridor, there are turn-off lanes in the vicinity of the Iberostar Waves Rose Hall Beach Hotel, which widens the road from two (2) lanes to three (3) lanes at those junctures.
- iv. At the time of the motor vehicle accident, the 2<sup>nd</sup> Defendant/Ancillary Defendant, Hepburn Shaw, was the driver of a 2004, white, Toyota, Townace DX, registered 0732 EF. His route lay along the left lane on the Rose Hall Main Road, in the parish of St. James, as one faces the direction of Falmouth, in the parish of Trelawny.
- v. That, not far behind Mr Shaw was the 1<sup>st</sup> Defendant/Ancillary Claimant, Jermaine Lawrence, who was driving a 2015, white, Toyota Coaster, registered PG 9806. He too was travelling in the

left lane along the Rose Hall Main Road, in the parish of St. James, as one faces the direction of Falmouth, in the parish of Trelawny.

- vi. During the motor vehicle accident, both vehicles collided in the turning lane along the roadway, which resulted in the Toyota Townace DX hitting Ms Whyte and causing her to fall unconscious in the roadway.
- vii. On reaching the vicinity of the Iberostar Hotel, Mr Lawrence observed the Toyota Townace DX, registered 0732 EF, travelling in front of him. The driver of the said Toyota, Townace DX indicated that he was pulling to the left of the roadway by putting on the left indicator.
- viii. The Toyota, Townace DX, registered 0732 EF, began to pull off the roadway to its left so that one half of the vehicle was in the lane while the other half of the vehicle was on the soft shoulder.
- ix. The driver of the Toyota, Townace DX, registered 0732 EF, then passed the entrance to the Iberostar Hotel and continued to pull over to his left, so that the entirety of the vehicle was on the soft shoulder. The said Toyota Townace DX slowed almost to a complete stop.
- x. The Toyota Townace DX suddenly and without warning made a right turn across the path of the Toyota Coaster, as though to make a U-turn.
- xi. The driver of the Toyota Coaster swerved to his right to avoid the Toyota Townace DX, but the latter continued to turn right.

- xii. The two vehicles collided in the middle of the road.
- xiii. At the time of the collision, the Toyota Townace DX was facing the direction of the Lilliput community, in the parish of St. James and was positioned across the roadway.
- xiv. At the time of the collision, the Toyota Coaster was still facing the general direction of Falmouth, in the parish of Trelawny.
- xv. The left front corner of the Toyota Coaster collided with the right rear door of the Toyota, Townace DX.
- xvi. When the vehicles collided, they were in the middle turning lane.
- xvii. After the collision, the front of the Toyota Coaster was in the middle turning lane and the back of it was positioned in the left lane as one faces the direction of Falmouth, in the parish of Trelawny.
- xviii. The Toyota Coaster pushed the Toyota Townace DX towards the direction of Falmouth, in the parish of Trelawny.
- xix. The Toyota Townace DX came to rest on the right soft shoulder.
- xx. The Toyota Coaster came to rest with most of it in the right lane while a section of it was in the middle lane along the roadway.
- xxi. The Toyota Townace DX collided with the female pedestrian, Renee Whyte, the Claimant in this matter, who was standing on the sidewalk which is located on the right side of the Rose Hall Main Road, as one faces the direction of Falmouth, in the parish of Trelawny.

- xxii. The 2<sup>nd</sup> Defendant/Ancillary Defendant, Hepburn Shaw, breached the duty of care which he owed to the Claimant, Renee Whyte.
- xxiii. The 2<sup>nd</sup> Defendant/Ancillary Defendant, Hepburn Shaw, breached the duty of care which he owed to the 1<sup>st</sup> Defendant/Ancillary Claimant.
- xxiv. That the motor vehicle collision was wholly caused by the negligence of Mr Shaw.
- xxv. That the Claimant, Renee Whyte, sustained injuries and suffered loss and damage and incurred expenses as a direct result of the motor vehicle collision.

**[61]** The Court is strengthened in these findings of fact by the evidence contained in the Assessor's Report from Mendez, Livingstone Incorporated Ltd., which is dated 15 May 2017, and which was received in evidence as exhibit 18. In that report, the damage to the Toyota Townace DX is noted as being to the left and right side and was sustained to the following items: -

- a. Right A-pillar
- b. Roof
- c. Right wheelhouse
- d. Right side sliding door
- e. Instrument panel
- f. Right side of sliding door glass
- g. Right rocker panel
- h. Floor pan
- i. Right fender
- j. Left sliding door
- k. Right front seat
- l. Left side sliding door glass

- m. Right B-Pillar
- n. Right side body panel
- o. Right front door
- p. Windscreen
- q. Rear seat
- r. Roof headliner

**[62]** Equally significant for the purposes of this analysis are the images which were captured in the eight (8) photographs of the damage which was occasioned to the motor vehicles. These photographs were received in evidence as exhibits 19A-19H, respectively. The Court has regard to the image, which is captured in exhibit 19B, 19C, 19G and 19H. These images do not support the account given by Hepburn Shaw of the circumstances in which the motor vehicle collision occurred. The images which are captured in exhibits 19B and 19C reveal what may be described as a 'brunt force impact' to the right rear door of the Toyota Townace DX. That does not accord with the account given by Hepburn Shaw that the motor vehicle collision occurred while Jermaine Lawrence was attempting to overtake the Toyota Townace DX.

**[63]** In the present instance, it is important to examine with scrupulous care the independent physical evidence which is available to the Court. This, in circumstances where Messrs. Jermaine Lawrence and Hepburn Shaw have placed the responsibility for the motor vehicle collision squarely and solely at the feet of the other.

**[64]** The Court finds that the physical evidence of the point of impact, the location of the damage which was occasioned to the motor vehicles as well as the evidence of the final resting place of the respective motor vehicles after the motor vehicle collision, all accord with the account of Jermaine Lawrence as to the circumstances in which the motor vehicle collision occurred. The Court accepts Jermaine Lawrence as being a credible and reliable witness and his evidence as being both credible and reliable. In the circumstances of this motor vehicle collision, the duty of care imposed on the driver who is changing directions is to

(1) signal, and (2) to see that no one is incommode by his change of direction. His duty of care is greater if he gives a wrong signal and then changes it. He cannot make a sudden turn, even if he indicated his intention so to do, without first ensuring that the driver of the vehicle which is following him is aware of his intentions. The Court finds that a driver is entitled to assume that he can overtake or pass another vehicle without danger, if what he is overtaking or passing does not give the slightest sign that it was going to do something other than what another ordinary, careful motorist might expect.

**[65]** In the circumstances of this motor collision, the Court finds that Jermaine Lawrence, the driver of the Toyota Coaster, was entitled to assume that he could pass the Toyota, Townace DX, without danger. At the time that Hepburn Shaw pulled off the roadway, he yielded his position on the main road. To re-enter the roadway, he bore a greater duty of care to ensure that it was safe for him to do so.

**[66]** In the result, the Court finds that the 2<sup>nd</sup> Defendant, Hepburn Shaw, breached the duty of care which he owed both to the Claimant, Renee Whyte, and to the 1<sup>st</sup> Defendant, Jermaine Lawrence. The Court also finds that Hepburn Shaw is wholly liable for the motor vehicle collision which occurred on or about 5 April 2017.

## **ASSESSMENT OF DAMAGES**

### **The approach**

**[67]** The important consideration in making an award of General Damages is the need to arrive at a figure which will compensate the claimant for the injuries he sustained and its resultant pain and suffering.

**[68]** There are established principles and a process to be employed in arriving at awards in personal injury matters. In determining quantum, judges are not entitled to simply “pluck a figure from the air”. Consistent awards are necessary

to inspire and maintain confidence in the system of justice and litigants as well as the public are entitled to know the reasons for the decisions of the court. Regard must be had to comparable cases in which complainants have suffered similar injuries.

[69] In **Beverley Dryden v Winston Layne**,<sup>41</sup> Campbell JA said:

*“...personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards.”*

[70] In the case of **Singh (an infant) v Toong Fong Omnibus Co Ltd**,<sup>42</sup> Lord Morris of Borth-y-Gest said:

*“...As far as possible it is desirable that two litigants whose claims correspond should both receive similar treatment, just as it is desirable that they should both receive fair treatment. Those whom they sue are no less entitled.”*

[71] It is also desirable that the comparison be made with more recent cases. Lord Carswell in the case of **Seepersad v Persad and Another**<sup>43</sup> said:

*“The Board entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms.”*

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<sup>41</sup> SCCA No 44/87, judgment delivered on 12 June 1989

<sup>42</sup> [1964] 3 All ER 925, at page 927

<sup>43</sup> (2004) 64 WIR 378, at page 388, paragraph 15

### **The process**

- [72] In light of the reality of inflation, the Consumer Price Index (“CPI”), which is provided by the Statistical Institute of Jamaica, is used in the process of arriving at a just award. Having selected a comparable case or cases, the judge must apply the CPI to arrive at a figure that takes into consideration inflationary conditions.

### **The medical evidence**

- [73] The medical evidence reveals that Ms Whyte sustained the following injuries: -
- i. Polytrauma with multiple abrasions and lacerations to the body,
  - ii. Undisplaced pubic rami fracture,
  - iv. Undisplaced fracture of the parietal bone,
  - v. Improving symptoms of post concussions syndrome and left shoulder mass.<sup>44</sup>
- [74] At fifteen (15) months after the initial injury, Ms Whyte still displayed post-concussion syndrome. She was considered to have mild pain related disability with a whole person impairment of less than one percent (1%). The development of the left shoulder mass (which was likely a lipoma) could not be attributed to soft tissue trauma experienced to that area during the accident and she was referred to General Surgery for excision of the mass.<sup>45</sup>
- [75] The Medical Report of Dr Carl Bruce dated 5 April 2018, which was received in evidence as Exhibit 3, indicates that the MRI investigations revealed left scalp post laceration changes with evidence of previous intracranial haemorrhage. Dr Bruce diagnosed Ms Whyte further with the following: -

- i. Head injury with a displaced left parietal fracture,

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<sup>44</sup> See – The Medical Summary Form, dated 19 July 2017, from the Cornwall Regional Hospital, which was received in evidence as Exhibit 1.

<sup>45</sup> See – The Medical Report of Dr Nicholas Burrowes, dated 14 August 2018, which was received in evidence as Exhibit 2.



- ii. Glasgow coma assessed as 8/15 and which greatly improved,
- iii. Dislocation of the acromioclavicular joint,
- iv. Undisplaced pelvic fracture of the pubic area on the right,
- v. Polytrauma with multiple abrasions and lacerations,
- vi. Left acromio clavicular fracture associated with 3x3 cm soft swelling of the area of the trapezius,
- vii. Traumatic brain injury with a skull fracture.

**[76]** Dr Bruce's assessment of Ms Whyte was that she had a post-concussion syndrome. She had not achieved maximum medical improvement and had not had neurophysiological evaluation.

**[77]** Ms Whyte was ascribed a five percent (5%) whole person impairment (wpi) by Professor Renn O. Holness, Consultant Neurosurgeon, in his medical report dated 1 February 2024. This report was received in evidence as Exhibit 4. This was seven (7) years post-injury. Professor Holness opined that Ms Whyte has a 5/10 risk of developing epilepsy and that she has post-concussional headaches which are not severe, but which occur daily.

**[78]** The medical report of Dr Kevin Goulbourne, Consultant Psychiatrist, dated 9 February 2024, which was received in evidence as Exhibit 5, indicates that Ms Whyte was diagnosed as having adjustment disorder with depressive symptoms. Dr Goulbourne's medical opinion is that Ms Whyte experienced depressive episodes which were likely due to the negative impact of the motor vehicle accident, the disruption of her professional development and her personal goal of attaining financial independence. At the time of his seeing her, Dr Goulbourne opined that Ms Whyte's general mood has improved significantly though there were mild depressive symptoms.

**[79]** Finally, the MRI report dated 16 May 2017, which was received in evidence as Exhibit 6, indicates that there was evidence of a left parietal scalp laceration and

cranial defect which may be a fracture. There was a 0.5 cm focus of subacute haemorrhage involving the left post central gyrus.

**[80]** The impressions were as follows: -

- i. Left parietal and scalp and cranial post-surgical changes,
- ii. Small focus if underlying parietal lobe haemorrhage is present,
- iii. There is no fluid collection or mass effect,
- iv. Magnetic susceptibility artifact in the anterior falx, possible previous anterior cerebral artery haemorrhage.

**[81]** Additionally, Ms Whyte gave evidence of the effects which these injuries have had on her with respect to the recurrent headaches and memory loss. She testified of the coping mechanisms which she has adopted to alleviate the effects of same and spoke to the residual scarring arising from the facial injuries which she sustained and how that scarring has affected her self-image.

### **General Damages**

**[82]** In this regard, the Court was referred to several authorities. In the authority of **Ivan Theodore Tulloch v Esso Standard Oil & Stuart Marston**,<sup>46</sup> the injury to the claimant's head caused loss of consciousness for twenty (20) minutes. There was an extensive degloving laceration over the left fronto-parietal eminence of the skull, a large, bruised area with two (2) lacerations over the left hip, and an acute sprain of the right knee. The claimant remained in hospital for thirteen (13) days. An award of Ninety-Five Thousand Dollars (\$95,000.00) was made on 23 November 1990 for General Damages, which now updates to Four Million Nine Hundred and Twenty-Nine Thousand and Thirty-Eight Dollars and Forty-Six cents (\$4,929,038.46), using a CPI of 134.9.

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<sup>46</sup> Suit No. C.L. 1989/T115

- [83] In the authority of **Isiah Muir v Metropolitan Parks & Markets Limited and Dennis Whyte**,<sup>47</sup> the claimant was rendered unconscious and suffered a blow to the left frontal region of the head, a laceration to the left forehead, central concussion and a compound fracture of the skull. An award of One Million Five Hundred Thousand Dollars was made on 21 July 1995, for General Damages, which now updates to Seventeen Million One Hundred and Forty-Eight Thousand Three Hundred and Five Dollars and Eight cents (\$17,148,305.08), using a CPI of 134.9.
- [84] In the authority of **Kristophe Witter (By next friend Joan Samuels) v Sheldon James and The Attorney General of Jamaica**,<sup>48</sup> the claimant sustained a significant concussion of at least moderate severity. The medical expert opined that, from a broad functional perspective, the alteration in the claimant's mental status, Cognitive and Highest Integrative functions was such that it interfered with his ability to assume normal roles or to perform his usual activities of daily living. He was ascribed a PPD of sixteen percent (16%) of the whole person. On 29 January 2016, an award of Seven Million Dollars was made for General Damages, which now updates to Ten Million Six Hundred and Fifty-Eight Thousand and Thirteen Dollars and Fifty-Four cents (\$10,658,013.54), using a CPI of 134.9.
- [85] Although the injuries sustained by the claimants in these authorities are not the same as those sustained by Ms Whyte, the Court finds that the authorities are helpful in establishing a range for an award of General Damages. The Court finds that an award of General Damages should be within the range of Five Million and Seventeen Million Dollars.
- [86] In all the circumstances, the Court finds that an award of Twelve Million Dollars is appropriate.

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<sup>47</sup> Suit No. C.L. 1991 M 090

<sup>48</sup> [2016] JMSC Civ 5

### **Special Damages**

- [87] It is trite law that Special Damages must be specifically pleaded and specifically proven.<sup>49</sup>
- [88] In this regard, the Court finds that Ms Whyte has proven her Claim for Special Damages in the sum of Two Hundred and Thirty-Four Thousand Five Hundred and Eighty-One Dollars and Six cents (\$234,581.06).

### **The Ancillary Claim**

- [89] The Court repeats the statement of the law in relation to the tort of negligence which is set out above. The Court also repeats its findings of fact which are set out above and repeats its finding that the 2<sup>nd</sup> Defendant/Ancillary Defendant owed a duty of care to the Ancillary Claimant/1<sup>st</sup> Defendant. This duty of care is to manage and/or control his motor vehicle with such care and in such a manner that would not cause harm or injury to the other users of the roadway, including the Ancillary Claimant/1<sup>st</sup> Defendant. The Court also finds that the Ancillary Claimant/1<sup>st</sup> Defendant sustained injuries and suffered loss and damage and incurred expenses as a direct result of the motor vehicle collision.

### **Special Damages**

- [90] The Court has regard to the Damage Assessment Report from MSC McKay (Ja.) Limited dated 2 June 2017, which was received in evidence as Exhibit 15. The cost of the damage to the Toyota Coaster is assessed at One Million Seven Hundred and Thirty-Seven Thousand One Hundred and Eighty-Two Dollars and Forty-Eight cents (\$1,737,182.48).

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<sup>49</sup> See – **Caribbean Cement Company Limited v Freight Management Limited** [2016] JMCA Civ 2, at paragraphs [62] and [63]

- [91] The Assessor's Report Cost dated 9 June 2017, which was received in evidence as Exhibit 16, indicates that the cost of the Damage Assessment Report is Sixteen Thousand Six Hundred and Fifty Dollars and One cent (\$16,650.01).
- [92] On this evidence, the Court finds that the Ancillary Claimant/1<sup>st</sup> Defendant has proven his Claim for Special Damages and makes a total award in the sum of One Million Seven Hundred and Fifty-Three Thousand Eight Hundred and Thirty-Two Dollars and Forty-Nine cents (\$1,753,832.49).
- [93] The Court makes no award in relation to the Claim for loss of income from the loss of use of the Toyota Coaster. The Court finds that the Ancillary Claimant/1<sup>st</sup> Defendant has failed to specifically prove this category of Damage.

### **General Damages**

- [94] The medical report of Dr Korey Neil dated 6 March 2018, which was received in evidence as Exhibit 17, indicates that the Ancillary Claimant/1<sup>st</sup> Defendant was a gentleman with normal build and normal gait, not found to be in distress, with cervical collar in situ. Examination of his cervical spine showed full range of movement actively and passively in all directions with mild tenderness experienced bilaterally upon full rotation to the left and right. He was also found to have mild tenderness at the C6 and C7 area. Examination of his upper limbs was normal except for a small, superficial 3cm laceration to his left 4<sup>th</sup> finger.
- [95] On further examination, the Ancillary Claimant/1<sup>st</sup> Defendant had full flexion and extension of lumbosacral spine, full straight leg raise bilaterally with no difficulty nor spinal tenderness to the lumbosacral area. He was oriented in time, place and person with nil neurological deficits nor inappropriate response. Dr Neil opined that full recovery could be anticipated within six (6) months from the date of the accident, which was satisfactory thus far.

- [96]** On this evidence, the Court makes an award of General Damages in the sum of Five Hundred Thousand Dollars (\$500,000.00).

### **DISPOSITION**

- [97]** The following Orders are made on the Amended Claim Form, which was filed on 5 February 2018: -

1. Judgment is entered in favour of the Claimant against the 2<sup>nd</sup> Defendant on the Amended Claim Form, which was filed on 5 February 2018, on the issue of liability.
2. Special Damages are assessed and awarded to the Claimant against the 2<sup>nd</sup> Defendant in the sum of Two Hundred and Thirty-Four Thousand Five Hundred and Eighty-One Dollars and Six cents (\$234,581.06), with interest thereon at the rate of three percent (3%) per annum, from 5 April 2017 to the date hereof.
3. General Damages are assessed and awarded to the Claimant against the 2<sup>nd</sup> Defendant in the sum of Twelve Million Dollars with interest thereon at the rate of three percent (3%) per annum, from 10 March 2018 to the date hereof.
4. The Costs of the substantive Claim are awarded to the Claimant and the 1<sup>st</sup> Defendant against the 2<sup>nd</sup> Defendant and are to be taxed if not sooner agreed.
5. The Claimant's Attorneys-at-Law are to prepare, file and serve these Orders.

- [98]** The following Orders are made on the Ancillary Claim Form, which was filed on 27 August 2018: -

1. Judgment is entered in favour of the Ancillary Claimant/1<sup>st</sup> Defendant against the Ancillary Defendant/2<sup>nd</sup> Defendant, on the Ancillary Claim Form, which was filed on 27 August 2018, on the issue of liability.
2. Special Damages are assessed and awarded to the Ancillary Claimant/1<sup>st</sup> Defendant against the Ancillary Defendant/2<sup>nd</sup> Defendant in the sum of One Million Seven Hundred and Fifty-Three Thousand Eight Hundred and Thirty-Two Dollars and Forty-Nine cents (\$1,753,832.49), with interest thereon at the rate of three percent (3%) per annum, from 5 April 2017 to the date hereof.
3. General Damages are assessed and awarded to the Ancillary Claimant/1<sup>st</sup> Defendant against the Ancillary Defendant/2<sup>nd</sup> Defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00), with interest thereon at the rate of three percent (3%) per annum, from 23 October 2018 to the date hereof.
4. The Costs of the Ancillary Claim are awarded to the Ancillary Claimant/1<sup>st</sup> Defendant against the Ancillary Defendant/2<sup>nd</sup> Defendant and are to be taxed if not sooner agreed.
5. The Ancillary Claimant/1<sup>st</sup> Defendant's Attorneys-at-Law are to prepare, file and serve these Orders.