[2020] JMSC Civ 234

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2014 HCV 04600

BETWEEN	**RASHEED WILKS**	**CLAIMANT**
AND	**DONOVAN WILLIAMS**	**DEFENDANT**

IN OPEN COURT

Mrs Martina Shelton and Ms Christina Thompson instructed by Shelards for the Claimant

Ms Georgia Hamilton instructed by Georgia Hamilton & Co. for the Defendant

Heard: November 16, 17 and December 3, 2020

Civil procedure – Defence – Whether the defence filed amounts to a bare denial – Application to strike out portions of witness statement on the basis that it introduces facts not pleaded – Defence of automatism – Application to strike out defence of automatism – Res judicata – Doctrine of res judicata – Issue estoppel – Doctrine of issue estoppel – Civil Procedure Rules, 2002 – Rules 10.5, 20.1, 20.4, 26.3, 1.1 and 1.2

Costs – The appropriate cost order to be made in the circumstances – The factors to be considered – The conduct of the parties before and during the proceedings – The manner in which the parties have pursued their respective case – Civil Procedure Rules, 2002, rules 64.3, 64.6(1), 64.6(3), 64.6(4)(a),(b),(d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g)

A. NEMBHARD J

INTRODUCTION

[1] The instant matter arises from a motor vehicle accident which took place on 3 January 2011, at a bus stop located along Old Hope Road, Kingston 6, in the parish of Saint Andrew. The Claimant, Mr Rasheed Wilks and other pedestrians were awaiting public transportation when a 1995 white Toyota Avalon motor car, registered 9690 EQ ("the Toyota motor car"), collided into the bus stop hitting Mr Wilks.

[2] It is alleged that the Toyota motor car was owned by the Defendant, Mr Donovan Williams and, at the time of the accident, was being driven by Mrs Ann-Marie Kirlew-Williams, who was acting as the servant and/or agent of Mr Williams.

[3] As a consequence of this tragic occurrence, Mr Wilks alleges that he sustained injury, damage and loss.

THE PRELIMINARY OBJECTIONS

[4] On 16 November 2020, this matter came before the Court for trial, at which time, Mr Wilks, by way of a Notice of Preliminary Objection, filed on 13 November 2020, raised the following preliminary objections: -

(i) That certain paragraphs of the Witness Statements of Mr Williams and Mrs Ann-Marie Kirlew-Williams, each filed on 20 February and 28 February 2020, respectively, should be struck out. The application was made on the basis that, the Defence, as filed, contains a bare denial of the allegation of the existence of a relationship of agency between Mr Williams and Mrs Kirlew-Williams, in breach of rule 10.5 of the Civil Procedure Rules, 2002. Consequently, it was submitted, Mr Williams is precluded from introducing by way of the witness statements filed on his behalf, facts that have not been pleaded; and

(ii) That the doctrine of res judicata and issue estoppel apply and preclude Mr Williams from advancing the defence of automatism at the trial of the claim.

THE ISSUES

[5] The following issues arise for the Court's determination: -

(1) Whether the Defence, filed on 12 December 2014, is in breach of rule 10.5 of the Civil Procedure Rules, 2002;

(2) Whether the impugned paragraphs of the Witness Statements of Donovan Williams and Ann-Marie Kirlew-Williams, each filed on 20 February and 28 February 2020, respectively, ought properly to be struck out;

(3) Whether the Defendant is precluded from relying on the defence of automatism, having regard to the doctrine of res judicata and issue estoppel; and

(4) Whether the timing of the objections is fatal.

THE SUBMISSIONS

The Claimant's position

[6] Mr Wilks seeks to challenge the Defence, filed on 12 December 2014, on two (2) bases. Firstly, that it does not comply with the requirements of rule 10.5 of the Civil Procedure Rules, 2002 ("CPR") and that Mr Williams should be precluded from adducing evidence of facts which have not been pleaded.

[7] In particular, it was submitted that Mr Williams failed to plead in his Defence that, at the time of the accident, Mrs Kirlew-Williams was not acting as his servant and/or agent. Additionally, a complaint is also made that Mr Williams failed to set out in his

Defence the bases on which he denies the existence of a relationship of agency between himself and Mrs Kirlew-Williams.

[8] As a consequence, it was submitted that a portion of paragraph four (4) through to paragraph seven (7) of the Witness Statement of Mr Williams and a portion of paragraph three (3) and paragraph nine (9) of the Witness Statement of Mrs Kirlew-Williams, should be struck out.

[9] Secondly, Mr Wilks contends that the doctrine of res judicata and issue estoppel apply to the defence of automatism on which Mr Williams relies, in light of the pronouncements of the Court of Appeal in **Williams (Ann-Marie) v R**.[1]

The Defendant's position

[10] For his part, Mr Williams maintains that he has always denied Mr Wilks' assertion of the existence of a relationship of agency between himself and Mrs Kirlew-Williams. He contends that a negative averment cannot be particularized in a defence as the purpose of the pleadings is not to introduce evidence or statements of law. He maintains that evidence is confined to witness statements and/or viva voce evidence at trial. Consequently, he denies that the Defence, as filed, is in breach of rule 10.5 of the CPR and contends that the impugned paragraphs of his witness statement and those of Mrs Kirlew-Williams should be allowed to stand.

[11] Secondly, Mr Williams does not agree that the doctrine of res judicata and issue estoppel apply in the instant case and maintains that he should be permitted to rely on the defence of automatism, in response to the claim.

THE LAW

The nature and import of pleadings

[12] The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties. Pleadings serve the two-fold

[1] [2020] JMCA Crim 40

purpose of informing each party of the case of the opposing party and, at the same time, informing the court of the issues between the parties that will govern the interlocutory proceedings between them and which the court will have to determine at the trial.[2]

[13] Pleadings are therefore required to demarcate the parameters of the case that is being advanced by each party to an action and are critical to identify not only the issues joined between the parties but the extent of the dispute between them.

[14] Lord Woolf MR, in **McPhilemy v Times Newspapers Ltd and others**,[3] provided a comprehensive analysis of the nature and importance of pleadings. He stated as follows: -

> *"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."* [4]

The duty of a defendant to set out his case

[15] The obligation of a litigant to set out his case has been encapsulated in and streamlined by the CPR.

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[2] See - **Bullen and Leake and Jacob's Precedents of Pleadings**, 12th edition, at page 3

[3] [1999] 3 All ER 775, at pages 792 j - 793 b

[4] See also – **Gasoline Retailers of Jamaica Limited v Jamaica Gasoline Retailers Association** [2015] JMCA Civ 23, at paragraph [48], per Morrison JA (as he then was) and **Desmond Kinlock v Denny McFarlane & Others** [2019] JMSC Civ 20, at paragraphs [27] and [28], per Palmer J

[16] Rule 10.5 of the CPR outlines the duty of a defendant to set out his case. The relevant portions of the rule are set out below: -

> *"10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.*
>
> *(2) Such statement must be as short as practicable.*
>
> *(3) In the defence the defendant must say -*
>
> *(a) which (if any) of the allegations in the claim form or particulars of claim are admitted;*
>
> *(b) which (if any) are denied; and*
>
> *(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.*
>
> *(4) Where the defendant denies any of the allegations in the claim form or particulars of claim -*
>
> *(a) the defendant must state the reasons for doing so; and*
>
> *(b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.*
>
> *(5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not –*
>
> *(a) admit it; or*
>
> *(b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation."*

The purpose of the rule

[17] The purpose of the rule is to safeguard against unparticularized 'bare denials' which are the hallmark of holding defences. A defendant is therefore required to set out

all the facts on which he intends to rely to dispute the claim. He must say which of the allegations, if any, are admitted or denied, which, if any, are neither admitted nor denied. Where there is a denial of any of the allegations, a defendant must state the reasons for that denial. If a defendant intends to prove a different version of the events from that given by the claimant, he must set out his own version.

The mandatory nature of the rule

[18] In **Medine Forrest v Kevin Anthony Walker & Anor**,[5] Rattray J, in examining rule 10.5 of the CPR, highlighted the mandatory element contained in the rule. He stated that, where a defendant denies any of the allegations contained in the claim form or particulars of claim, he/she must state the reasons for that denial. The use of the word 'must' in the rule emphasizes the mandatory element of the provision. In the circumstances of that case, Rattray J found that, if the defendants intended to prove a different version of events from that given by the claimant, they were obligated by the rule to set out in their defence, their own version of what occurred.

[19] The circumstances of the **Medine Forrest case** are instructive. There, the claimant, Medine Forrest, alleged that she sustained personal injuries, as a result of a collision between a motor vehicle owned by the defendants and a motor vehicle in which she was a passenger. She alleged further that, whilst she was a passenger in a motor vehicle registered PT 9635, which had stopped behind another motorist, the first defendant so negligently drove, managed and/or controlled his motor vehicle that it collided into the rear of the motor vehicle in which she was travelling.

[20] The defendants, in their response, indicated merely that they would "challenge" the claimant's involvement in the accident and the alleged injuries, loss and damage that she claimed to have sustained.

[21] It is in those circumstances that Rattray J found that, if the defendants intended to prove a different version of events from that given by the claimant, then they were

[5] [2019] JMSC Civ 25

obligated by the requirements of rule 10.5 of the CPR to set out in their defence, their own version of what occurred.

The doctrine of res judicata and issue estoppel

[22] The doctrine of res judicata stipulates that a decision or ruling made by a court of competent jurisdiction cannot be re-litigated by the parties who are bound by the said decision or ruling, except on appeal. The purpose of the doctrine is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice be done between the parties.[6]

[23] Issue estoppel may arise where a plea of res judicata cannot be established because the causes of action are different. It has been established by some authorities that this form of estoppel arises where a particular issue, forming a necessary ingredient in a cause of action, has been litigated and decided and one of the parties seeks to reopen it in subsequent proceedings between the same parties, involving a different cause of action to which the same issue is relevant.[7]

[24] A party is therefore precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has solemnly and with certainty been determined against him. Even if the objects of the first and second actions are different, the findings on a matter which came directly (not collaterally or incidentally) in issue in the first action and which is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision is one of fact or law or a mixed question of fact and law.

[25] What can be gleaned from the authorities is that the principle is explained as requiring, among other things, that the issue in question must have been decided

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[6] See - **Gordon Stewart and Independent Radio Company Limited v Wilmot Perkins** [2012] JMCA Civ 2

[7] See - **Fletcher & Company Limited v Billy Craig Investments Limited** [2012] JMSC Civ 128, per McDonald-Bishop J (as she then was), at paragraph [43]

between the same parties or their privies before the estoppel can arise. The authorities on this subject have revealed two schools of thought as to the extent of the application of this form of estoppel. One school of thought is that the true test of an issue is whether for all practical purposes the party seeking to put forward the issue has already had that issue determined against him by a court of competent jurisdiction, even if the parties are different.

[26] The conflicting approach is to confine the issue estoppel to those species of estoppel *per rem judicatum* that may arise in civil actions between the same parties or their privies. It follows then that issue estoppel may or may not operate in cases involving a new party to the proceedings depending on the approach that is adopted.

[27] In **Fletcher & Company Limited v Billy Craig Investments Limited**[8] McDonald-Bishop J (as she then was) accepted as the better view the broader approach that issue estoppel should apply in circumstances where the parties are different, provided that the person against whom the estoppel is being sought to be invoked in the subsequent proceedings, was a party to the earlier proceedings in which the point in issue was determined against him.

ANALYSIS

Whether the Defence as filed is in breach of rule 10.5 of the CPR

[28] In response to the allegations made in the Claim Form, filed on 30 September 2014 and the Amended Particulars of Claim, filed on 29 May 2019, Mr Williams denies that, at the time of the accident, Mrs Kirlew-Williams was acting as his servant and/or agent. Mr Williams contends that this denial is sufficient to satisfy the requirements of rule 10.5 of the CPR. Finally, Mr Williams raises the question as to how it is that a negative averment is to be particularized.

[8] [2012] JMSC Civ 128, at paragraph [50]

[29] On the other hand, Mr Wilks asserts that that denial on the part of Mr Williams does not satisfy the requirements of rule 10.5 of the CPR. To ground that assertion, the Court was referred to the authority of **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack**.[9]

[30] In **Seebalack**, at the first case management conference the claimant was given permission to amend the claim form and statement of case to allege that the driver was at all material times the servant and/or agent of the owner of the truck that was involved in the accident between the now deceased, Reagan Nicky Bernard and the defendant. Further case management conference hearings were held, as well as, a pre-trial review hearing. Subsequent to the pre-trial review hearing, the claimant filed a witness statement and a bundle of documents which included receipts for funeral expenses and pay sheets evidencing details of the now deceased's employment and monthly income. It was not until after the claimant had filed these documents that she made a formal application to re-amend her statement of case to add a claim for special damages in relation to funeral expenses and general damages in respect of a claim for "lost years".

[31] The Board cited with approval the dicta of Lord Woolf MR in **McPhilemy v Times Newspapers Ltd**, as set out in paragraph **[14]** above and stated that, if a statement of case contains allegations which are "sufficiently made" (so that it satisfies the requirements of Part 8 of the Trinidad and Tobago Civil Proceedings Rules), there is no need to amend it in order to provide particulars. These can be provided by way of further information in the form of a witness statement. The Board emphasized the point that the claimant in **Seebalack** ought to have included in her statement of case, a short statement of the categories of loss that were being claimed. It is for this reason that the application to re-amend the statement of case was refused. The

[9] [2010] UKPC 15

Board also attached importance to the "litigation culture" existent in Trinidad and Tobago and the response of the local courts to it.[10]

[32] This Court readily accepts the pronouncements in law that were made by the Board in **Seebalack**. The Court is of the view, however, that the case of **Seebalack** is properly to be distinguished from the instant matter. It is important to note that the claimant in **Seebalack** sought to introduce, by way of a witness statement and a bundle of documents, a claim for special damages in relation to funeral expenses and for general damages for "lost years". This is in the context where no formal application had been made for permission to re-amend the statement of case at the interlocutory stage.

[33] In the instant case, the denial of a relationship of principal and agent between Mr Williams and Mrs Kirlew-Williams is stated in the Defence, filed on 12 December 2014. Witness statements have been filed and exchanged on behalf of Mr Williams. The matter has moved through the interlocutory stage and is listed before the Court for trial. The complaints made, in respect of Mr Williams' Defence and the witness statements filed on his behalf, are being made for the first time at trial.

[34] In those circumstances, the Court must determine whether the Defence, as filed, breaches the requirements of rule 10.5 of the CPR and whether the justice of the case demands that the impugned paragraphs of the witness statements be struck out, as Mr Wilks contends.

[35] The language of rule 10.5 of the CPR is plain and precise. The word 'must', as used in the context of the rule, is absolute. It places on a defendant a strict and unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated offends the rule.

[36] The main purpose of this duty is to alert a claimant to the parameters of a defendant's case and to identify not only the issues that are joined between the

[10] See – **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack** (supra), at paragraphs 27 and 28-31

parties but the extent of the dispute between them. It is in this way that a claimant is afforded a proper opportunity to respond.

[37] This Court accepts that a mere denial of an allegation in a defence is inadequate and does not meet the requirements of rule 10.5 of the CPR. For that reason, the Defence, filed on 12 December 2014, would be in breach of the requirements of rule 10.5 of the CPR.

Whether the impugned paragraphs of the witness statements ought properly to be struck out

[38] Mr Wilks contends that, a portion of paragraph four (4) through to the end of paragraph seven (7) of the Witness Statement of Donovan Williams, filed on 20 February 2020 and a portion of paragraph three (3) and paragraph nine (9) of the Witness Statement of Ann-Marie Kirlew-Williams, filed on 28 February 2020, should be struck out. It is his contention that Mr Williams ought not to be allowed to introduce in evidence, by way of the witness statements filed on his behalf, facts that have not been pleaded.

[39] The Court readily accepts that the power to strike out a party's statement of case or a part of a party's statement of case is a discretionary one which must be exercised sparingly and only in exceptional cases.[11]

[40] The Court also accepts that the effect of this aspect of the preliminary objections, were they to be sustained, would be essentially a striking out of Mr Williams' case and a denial of his right to be heard. For that reason, and, having regard to the overriding objective of the CPR to deal with cases justly,[12] this Court is of the view that the timing of these objections must properly inform its consideration of the issues raised.

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[11] See - Rule 26.3 of the CPR and **Desmond Kinlock v Denny McFarlane & Others** (supra), at paragraphs [26] and [42], per Palmer J

[12] See - Rules 1.1 and 1.2 of the CPR

[41] The Notice of Preliminary Objection was advanced on the first day on which the matter came before the Court for trial. This is in circumstances where the pleadings, witness statements and all other requisite documents have been duly filed and served on both parties. The Court was advised that the witnesses for the respective parties were accessible and available (save and except one), some of whom were present on 16 November 2020.

[42] It was submitted on Mr Wilks' behalf that the timing of the complaints made in respect of the Defence as filed was to ensure that he did not lose the "tactical advantage" of going to trial with a defence that denies vicarious liability but does not set out the reasons for the denial.

[43] It would have been better had these complaints been made by way of an interlocutory application before a judge alone in chambers, which would have afforded Mr Williams an opportunity to cure or remedy the defects in his pleading, prior to trial.[13]

[44] The witness statements of Mr Williams and Mrs Kirlew-Williams were filed on 20 February and 28 February 2020, respectively. This is approximately nine (9) months before the first day on which the matter came before the court for trial. In those circumstances, the witness statements would have provided Mr Wilks not only with additional information in relation to the defence being advanced but also with a sufficient understanding of the parameters of Mr Williams' case. In circumstances where the trial of this matter has been rescheduled for a date in 2026, it cannot be said that Mr Wilks has been taken by surprise or that he will not have ample time to properly prepare to meet the case being advanced by Mr Williams. Nor can it be said that any prejudice will inure to Mr Wilks.

[13] See - Rule 20.1 of the CPR which provides for the amendment of a party's statement of case, at any time before the case management conference, without the court's permission and rule 20.4 of the CPR which provides for the amendment of a party's statement of case, after a case management conference, with the Court's permission.

[45] Furthermore, in **Topaz Jewellers and Raju Khemlani v National Commercial Bank Jamaica Limited**,[14] the trial of the claim was about to commence when the respondent applied for an amendment to the final paragraph of the defence to include the plea that the claim was statute barred. The application was granted by King J. The appellants, feeling aggrieved by this decision, appealed that decision of King J. The appeal was dismissed and the amendment granted by King J was permitted to stand. The Court of Appeal held that there was no injustice done in allowing the amendment; that, in any event, limitation was a very relevant point, as, if it is valid, it would bring an end to the litigation that ought not to have been commenced; and finally, that, in the circumstances, it could not be said that the discretion of the learned trial judge had not been properly exercised.

[46] In applying the principles enunciated by the Court of Appeal in **Topaz**, Mr Williams could have elected, in response to the preliminary objections that have been raised, to apply to amend his statement of case, to cure the defect, even at this late stage. It would then have been for the Court to determine whether any injustice would result from allowing the amendment.

[47] For these reasons, the Court is unable to accept the submissions advanced on behalf of Mr Wilks that the impugned paragraphs of the Witness Statements of Donovan Williams and Ann-Marie Kirlew-Williams, each filed on 20 February and 28 February 2020, respectively, ought to be struck out.

Whether the doctrine of res judicata and issue estoppel are applicable

[48] It was submitted on behalf on Mr Wilks that the doctrine of res judicata is applicable to the defence of automatism on which Mr Williams relies. It was also submitted that Mr Williams is estopped from relying on that defence, in light of the ruling of the Court of Appeal in **Williams (Ann-Marie) v R**.[15]

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[14] [2011] JMCA Civ 20

[15] (supra)

[49] At first instance, Mrs Kirlew-Williams relied on a medical report under the hand of Dr Carl Bruce, dated 16 April 2012, in support of her defence of automatism, in answer to two (2) counts of Causing Death by Dangerous Driving. The Court of Appeal, in reviewing the evidence adduced at trial, held that the evidence of Dr Bruce failed to establish a sufficient basis for that defence.

The defence of automatism in the criminal arena

[50] Automatism is defined as "connoting the state of a person who, though capable of action, is not conscious of what he is doing. In this connection the word does not mean the doing of what is involuntary, in the sense that the doer, while knowing what he is doing, cannot resist the impulse to do it. It means unconscious involuntary action and it is a defence because the mind does not go with what is being done."[16]

[51] There are two types of automatism, namely, insane and non-insane automatism. In **Williams (Ann-Marie) v R**,[17] at paragraph [73], Phillips JA stated as follows: -

> *"In arriving at its decision, the Court of Appeal reviewed a number of cases which drew a distinction between insane and non-insane automatism. The court stated that based on those authorities, if the defence of automatism is said to arise from "internal" causes, such as an epileptic seizure, a stress disorder or even sleepwalking, then pursuant to the rules in M'Naghten's Case [1843-60] All ER Rep 229, the verdict should be one of not guilty by reason of insanity. But if automatism arises from "external" causes, such as hitting the driver on the head, then a successful defendant is entitled to be acquitted."* [18]

The burden and standard of proof in the criminal arena

[52] Where the defence of automatism is raised in criminal proceedings, the burden of proof starts and remains upon the defence. The burden and standard of proof in

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[16] See - **Bratty v Attorney-General for Northern Ireland** [1963] A.C. 386, at page 401, per Viscount Kilmuir L.C.

[17] (supra)

[18] See also - **Bratty v Attorney General for Northern Ireland**, (supra)

this regard was examined by Devlin J, in **Hill v Baxter**.[19] He had the following to say: -

> *"I am satisfied that even in a case in which liability depended upon full proof of mens rea, it would not be open to the defence to rely upon automatism without providing some evidence of it. If it amounted to insanity in the legal sense, it is well established that the burden of proof would start with and remain throughout upon the defence. But there is also recognized in the criminal law a lighter burden which the accused discharges by producing some evidence, but which does not relieve the prosecution from having to prove in the end all the facts necessary to establish guilt. This principle has manifested itself in different forms; most of them relate to the accused's state of mind and put it upon him to give some evidence about it."*

[53] In the criminal proceedings against Mrs Kirlew-Williams, she raised the defence of non-insane automatism. In those circumstances, she would have been required to prove that the act alleged to constitute a crime was involuntary and was not caused by a disease of the mind within the meaning of the M'Naghten Rules.[20]

[54] It was in an effort to establish that defence that she relied on the medical report of Dr Bruce. The Court of Appeal determined that that evidence did not sufficiently establish the defence of automatism. At paragraph [83], Phillips JA said as follows: -

> *"Medical evidence was indeed adduced in support of the applicant's case, but as was the case in* ***Attorney General's Reference (No 2 of 1992)****,* ***R v Pullen*** *and* ***R v C****, it appears that Dr Bruce's evidence did not establish a sufficient basis for the defence of automatism for the following reasons: -*
>
> 1. *Dr Bruce could not say whether the applicant's syncopal attack resulted in a partial or complete loss of awareness.*
>
> 2. *He said that in the applicant's case, in circumstances of a first seizure having occurred, the protocol did not require use of a CT scan; and he*

[19] [1958] 1 QB 277, at page 284

[20] See - **Regina v Burgess** [1991] 2 Q.B. 92

therefore made his findings on a clinical diagnosis, without the benefit of the results of a CT scan.

3. *He accepted that the applicant's injuries could have been caused by the accident and/or the syncopal attack.*

4. *He was not asked about nor did he speak to whether the "bright red light" that the applicant said she had seen is connected to or associated with a syncopal attack.*

5. *Dr Bruce had not examined the applicant on a consistent basis, nor was she his regular patient and so he could only speak to her having one syncopal attack.*

6. *The applicant spent about two weeks in Dr Bruce's care at UHWI, and never had a syncopal attack, nor was there evidence that she had suffered any such attack since leaving his care."*

The defence of automatism in the civil arena

[55] The nature of the defence of automatism in the criminal arena and the civil arena are wholly different. The standard of care that a defendant who raises the defence of automatism in civil proceedings is obligated to show is that which is expected of a reasonably competent driver unware that he is or may be suffering from a condition that impairs his ability to drive.[21]

[56] The defence of automatism in civil proceedings was examined by Leggatt L.J. in **Mansfield and Another v. Weetabix Ltd**. **And Anothe**r.[22] There, a lorry-driver employed by the first defendants was unaware that he suffered from malignant insulinoma, a condition that resulted in a hypoglycaemic state which starved the brain of glucose so that it was unable to function properly. In the course of a forty (40) mile journey he was involved in two incidents of driving erratically and

[21] See - **Mansfield and Another v. Weetabix Ltd. And Another** [1998] 1 WLR 1263

[22] (supra)

in a minor accident with another vehicle. Subsequently, he failed to negotiate a bend and crashed into the plaintiffs' shop, causing extensive damage. The defendants denied negligence on the basis that, at the time of the incident, the condition produced impairment and/or loss of consciousness. The judge at first instance found that the defendants were negligent and liable for the loss and damage of the plaintiffs.

[57] On appeal by the defendants, the court held, allowing the appeal, that there was no reason in principle why a driver who was involved in an accident caused by a disabling event should not escape liability where the disabling event was not sudden but gradual, provided that he was unaware of it; that the standard of care such a driver was obliged to show to other road users was that which was to be expected of a reasonably competent driver unaware that he was or might be suffering from a condition that impaired his ability to drive; that to apply an objective standard in a way that did not take account of such a condition would be to apply a test of strict liability; and that, accordingly, since the first defendant's driver did not and could not reasonably have known of his infirmity which caused the accident, he was not at fault and was not negligent.

The burden and standard of proof in the civil arena

[58] The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence proof of the fact in issue is essential.[23] Consequently, where a defendant raises the defence of automatism, he assumes the legal burden of proving such a defence on a balance of probabilities.

[59] In the instant matter, Mr Williams raises the defence of the non-insane automatism of the driver, Mrs Kirlew-Williams. In those circumstances, Mr Williams will be required to prove at trial, on a balance of probabilities, that Mrs Kirlew-

[23] See - **Murphy on evidence**, 9th edition, at page 71, paragraph 4.5

Williams was unaware that she was or may have been suffering from a condition that impaired her ability to drive.

[60] In that regard, Mr Williams would be seeking to rely on the report of Dr Bruce with an entirely different objective. The observations of the Court of Appeal in the **Williams (Ann-Marie) v R** decision would not therefore be applicable, in circumstances where the medical report is being relied on to establish the defence of automatism in civil proceedings. This is so because the nature and requirements of the defence are substantially different.

[61] Consequently, the Court finds that the doctrine of res judicata and issue estoppel are inapplicable in the instant matter.

The appropriate cost order

The applicable principles considered

[62] Part 64 of the CPR contains general rules in relation to costs and the entitlement to costs. Where a court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.[24]

[63] In deciding who should be liable to pay costs, the court must have regard to all the circumstances and, in particular, to the conduct of the parties, both before and during the proceedings. The court may also consider whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings; whether it was reasonable for a party to pursue a particular allegation; and/or to raise a particular issue; the manner in which a party has pursued his/her case, a particular allegation or a particular issue; and whether the claimant gave reasonable notice of an intention to issue a claim.[25]

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[24] See - Rule 64.6(1) of the CPR

[25] See - Rules 64.6(3), 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g) of the CPR

[64] The provisions of the CPR make it quite clear that the court has a wide discretion to make any cost order it deems fit, against any person involved in any type of litigation.

[65] In its approach to the issue of costs, the Court will be guided by the principles stated above. The Court has regard to the timing of the challenge to the witness statements that have been filed on behalf of Mr Williams. It is significant that no complaint was made in this regard at the interlocutory stage. This is in circumstances where Mr Williams is allowed by law to seek to amend his Defence, to cure the defect, even at this late stage. The Court also has regard to the manner in which Mr Wilks has pursued his case during these proceedings. For those reasons, the Court is of the view that the costs of the proceedings on 16 and 17 November 2020 ought properly to be awarded to Mr Williams to be taxed if not sooner agreed.

CONCLUSION

[66] In summary, the Court finds that the Defence, filed on 12 December 2014 is in breach of rule 10.5 of the CPR.

[67] Secondly, having regard to the timing of the objections raised and the overriding objective of the CPR to deal with cases justly, the impugned paragraphs of the witness statements of Mr Williams and Mrs Kirlew-Williams, each filed on 20 February and 28 February 2020, respectively, ought not to be struck out.

[68] Finally, the Court finds that the doctrine of res judicata and issue estoppel do not apply in the instant case.

DISPOSITION

[69] It is hereby ordered as follows: -

(1) The objections made by way of the Notice of Preliminary Objection, filed on 13 November 2020, are overruled;

(2) The matter is to proceed to trial on the issue of liability in relation to the Defence filed on 12 December 2014;

(3) The trial of the matter is scheduled for 23, 24 and 25 March 2026, at 10:00 a.m., by a judge alone in Open Court;

(4) The costs of the proceedings on 16 and 17 November 2020 are awarded to the Defendant against the Claimant and are to be taxed if not sooner agreed;

(5) The Claimant is granted leave to appeal; and

(6) The Defendant's Attorneys-at-Law are to prepare, file and serve the Orders made herein.