



[2021] JMSC Civ. 120

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

**CLAIM NO. 2014 HCV 05208**

<b>BETWEEN</b>	<b>ROSEMARIE WILLIAMS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MICHEAL BISASOR</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>MARILYN MYERS</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL OF JAMAICA</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>THE COMMISIONER OF POLICE</b>	<b>4<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>WASHINGTON PERRY</b>	<b>5<sup>TH</sup> DEFENDANT</b>

**CONSOLIDATED WITH:**

**CLAIM NO. 2015 HCV 03571**

<b>BETWEEN</b>	<b>THE ADMINISTRATOR- GENERAL (Administrator for and on behalf of the Estate of Annmarie Newman)</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MICHEAL BISASOR</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>MARILYN MYERS</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL OF JAMAICA</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>THE COMMISIONER OF POLICE</b>	<b>4<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>WASHINGTON PERRY</b>	<b>5<sup>TH</sup> DEFENDANT</b>

Mr. Odane Marston instructed by Jordan & Francis Attorneys-at-Law for the Claimant

Miss Raquel Dunbar and Miss Houston Thompson instructed by Dunbar & Company for the 1<sup>st</sup> Defendant

Mr. Dale Austin instructed by the Director of State Proceedings for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants

**Negligence - Motor Vehicle Collision - Personal Injuries- Liability - Road Traffic Act - Fatal Accidents Act – Law Reform (Miscellaneous Provisions) Act**

Heard: 16<sup>th</sup> - 17<sup>th</sup>, September 2019 and June 23, 2021

**WOLFE – REECE, J**

**INTRODUCTION**

[1] The are two claims before this Court were consolidated for determination. Both claims were initiated for damages for negligence arising out of a motor vehicle collision that occurred on July 23, 2012.

[2] The first claim filed November 4, 2014 by Claimant, Rosemarie Williams sought Damages Against the Defendants for injuries as a result of the negligence of the 1<sup>st</sup> and 5<sup>th</sup> Defendants. The second Claim was filed in 2015 claim by the dependents of Annmarie Newman. The Claim initiated was pursuant to the provisions of Fatal Accidents Act. The Claimants were later substituted by the Administrator General of Jamaica (Administrator for and on behalf of the estate of Annmarie Newman). On December 10, 2018 an Amended Claim Form was filed pursuant to the Fatal Accidents Act and under the Law (Reform Miscellaneous Provisions) Act seeking the following orders:

- a) Special Damages and/or funeral expenses;
- b) Damages for loss of financial dependency;
- c) Damages;

- d) Interest there on pursuant to the Law Reform (Miscellaneous Provisions) Act for at such rate and for such and for such period as this Honourable Court deems just;
- e) Cost; and
- f) Such further and other relief as this Honourable Court deems just.

**[3]** On the accounts of both Claimants at the time of the accident, Rosemarie Williams and Annmarie Newman were standing on the sidewalk at the corner of Penwood Road and Wellside Crescent when suddenly, and without warning, they were hit and severely injured because of a motor vehicle collision.

**[4]** The collision was between a Mitsubishi Pajero motor vehicle owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and being driven by the 1<sup>st</sup> Defendant and a Toyota Hiace motor vehicle owned by the 4<sup>th</sup> Defendant and being driven by the 5<sup>th</sup> Defendant who was at all material times the servant and/or employee of the 4<sup>th</sup> Defendant.

**[5]** The Claimants aver that the incident occurred when the 1<sup>st</sup> Defendant, while driving along Penwood Road from the direction of Spanish Town Road, upon reaching the vicinity of Penwood Road and Wellside Crescent, began turning right when, at the same time, the 5<sup>th</sup> Defendant began to overtake and in so doing, both vehicles collided causing the 5<sup>th</sup> Defendant's vehicle to mount the curb of the sidewalk and collide into Rosemarie Williams and Annmarie Newman. They were both injured and resulting in subsequent death of Annmarie Newman.

**[6]** The 1<sup>st</sup> Defendant however alleges that the accident was caused solely by or substantially contributed to by the negligence of the 5<sup>th</sup> Defendant and counterclaimed against the 5<sup>th</sup> Defendant:

- a) Damages
- b) Interest at a rate of 3% per annum from the 23<sup>rd</sup> of July 2012 to the date of judgment pursuant to the Law Reform (Miscellaneous Provisions) Act
- c) Cost and Attorney Costs.

- [7] The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants on the other hand denies that the 5<sup>th</sup> Defendant is negligent and advanced that the collision was wholly caused or contributed to be the negligence of the 1<sup>st</sup> Defendant.

## **CLAIMANTS CASE**

### **Rosemarie Williams**

- [8] Rosemarie Williams gave evidence that she was unpacking her goods to sell on the pavement at the corner of Wellside Crescent when she looked up and saw two vehicles proceeding along Pennwood Road from Spanish Town towards Waterhouse. She contends that the Mitsubishi Pajero was in front of the Toyota Hiace and upon reaching the corner of Wellside Crescent, the Pajero motor vehicle attempted to make a right turn onto Wellside Crescent while at the same time, the driver of the Toyota Hiace began to overtake and in so doing, both vehicles collided thereby causing the Toyota Hiace to mount the left curb colliding with her and another pedestrian, Annmarie Newman.
- [9] Miss Williams asserts that she was hit on the right side of her body and flung some distance away which resulted in her falling heavily on the sidewalk hitting her back. She was taken to the Kingston Public Hospital in the back seat of a Police Vehicle that arrived on the scene a little while after the accident occurred as she was feeling extreme pain in both of her legs and the right side of her stomach.
- [10] She states that at the hospital, X-Rays were done to her spine, chest, both legs and pelvic area and it was determined that all was fine. Her right knee was pressure bandaged; she received medication and was discharged from hospital the same day. However, the following day she remained in excessive pain, and she visited Dr George Lawson. Dr Lawson ordered more X-Rays that were done on her C-Spine, L/Spine and her right knee. He gave her medication and ordered follow up visits as time progressed.
- [11] Miss Williams' evidence is that as a result of the accident, she also had to engage the services of Ms Taneisha Whyte for approximately (14) fourteen months to do housework on her behalf.

**Paul Newman**

- [12] Paul Newman is the sister of the deceased Annmarie Newman, and he gave evidence that on the 23<sup>rd</sup> of July, 2012, his sister was involved in a motor vehicle accident while she was standing on a sidewalk at the corner of Pennwood Road and Wellside Road. She was taken to the Kingston Public Hospital to receive medical attention following which she had to do several procedures.
- [13] His evidence is that he cannot recall the specific details of the medical procedures, but he paid for her treatment as well as purchase medication to aid with surgery. He adds that he also had to purchase hospitality materials such as pampers and states that when the deceased passed, on October 5, 2012, he had to pay for a death Certificate at the Registrar's General Department. He was also responsible for the burial of the deceased.
- [14] He avers that at the date of the death of the deceased, she was employed as a vendor and the sole breadwinner for her three sons namely; Johnross Walker, Sewanski Williams and Tyieoh Walker. She had also helped in raising Jaheem Perch, Christina Perch and Vanessa Reid by assisting with the school and medical expenses until the date of her death. He maintains that as a result of her death, he is solely responsible for the children of the deceased and has incurred expenses.

**1<sup>ST</sup> DEFENDANTS CASE- (Michael Bisasor)**

- [15] The 1<sup>st</sup> Defendant asserts that the accident was caused solely by or substantially contributed to by the negligence of Washington Perry, the 5<sup>th</sup> Defendant.
- [16] He asserts that on the morning of July 23, 2012 at about 8:30 am, he was driving along Penwood Road, alone and he was traveling in a northerly direction on the left side of the road, heading toward Wellside Crescent to pick up one of his workers.
- [17] On his description of Pennwood Road, Mr Bisasor states that it is mostly straight and asphalted however, that on approaching Wellside Crescent, there is a slight blind corner for vehicles approaching the intersection. The road is 22 feet wide and

bordered by paved sidewalks on the left but not on the right until a few feet from Wellside Crescent where the sidewalk is about 4 feet wide.

- [18]** The 1<sup>st</sup> Defendant states that at the time of the accident, he was driving at about 15 to 20kmph in a zone that had a speed limit of 50kmph. His evidence is that at about 35 meters from Wellside Crescent, he put on his right indicator signal and checked his rear-view mirrors including the interior mirror. On proceeding around the slight bend, he checked for vehicles and noticed that it was clear of oncoming vehicles and so immediately drifted to the middle of the road and rechecked all mirrors. He states that he did not see any vehicles behind him and so began turning right towards Wellside Crescent.
- [19]** Mr. Bisasor stated that on turning, he felt an impact to the right side of his vehicle starting from the right rear wheel arch to the right front door. He maintains that at this time, he was now partially in the lane for vehicles travelling towards Spanish Town Road on Penwood Road. After the impact, he swerved back to the left side of Penwood Road and stopped. He looked through the right window and saw a Toyota Hiace truck appearing to proceed out of control mounting the left-hand sidewalk and swerving onto Wellside Crescent.
- [20]** There was a stall and a dog in front of the stall and two ladies sitting on the wall by the stall. The Hiace hit the stall, the dog and the two ladies then re-entered the roadway, spun around and came to a stop facing the wall on the opposite side of the road where the ladies were sitting.
- [21]** The 1<sup>st</sup> Defendant asserts that he exited his car at that point, stood to right side of his vehicle and started looking at the two ladies who were laying on the ground a couple feet away. He states that he noticed that the dog appeared to be dead and one of the lady's foot appeared crushed with a lot of blood over it. He adds that at that time, a man exited his vehicle with his hand on his head. The Hiace vehicle was marked Caribbean Search Centre at the side.
- [22]** The injured ladies were placed in a pick-up and rushed off to hospital by the police who had come on the scene. Mr Bisasor contends that the police examined his

vehicle and advised him to take it to the examination depot in Spanish Town and he drove it there. At the examination depot, his vehicle was examined and he was told that all was well and that is when he left to the Hunts Bay Police Station to give a statement.

### **3<sup>RD</sup>, 4<sup>TH</sup> AND 5<sup>TH</sup> DEFENDANTS**

**[23]** Washington Perry the 5<sup>th</sup> Defendant who was at the material time, employed to the Jamaica Constabulary Force as a Corporal of Police at the Caribbean Search Centre gave evidence on behalf of himself and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

**[24]** Mr Perry's evidence is that on the day in question, he was involved in a joint search operation which comprised members of JCF and JDF operational teams in the St. Andrew South Police division. Sometime after 8 in the morning the team of officers were traveling in a convoy of approximately seven (7) marked police service vehicles. On reaching the vicinity of the stoplight at the Seaview Gardens entrance and Spanish Town Road, the convoy proceeded onto Penwood Road when a tinted black and grey Mitsubishi Pajero that was being driven by the 1<sup>st</sup> Defendant broke into the convoy and inserted itself between the vehicle Corporal Perry was driving and the rest of the convoy.

**[25]** Mr. Perry states that the 1<sup>st</sup> Defendant was repeatedly signalled to exit the operational convoy and he eventually complied and pulled out of the convoy in the vicinity of Wellside Crescent. The Mitsubishi Pajero pulled towards the left of the road and came to a complete stop. Whilst he was in the process of passing the Mitsubishi Pajero the 1<sup>st</sup> Defendant suddenly without giving any signal or warning turned his vehicle right and collided into the Toyota Hiace Bus that Corporal Perry was driving.

**[26]** He contends that it was negligent actions of the 1<sup>st</sup> Defendant which therefore caused the collision between the two vehicles. The collision he asserts caused him to lose control of his vehicle, which was pushed by the mass, and momentum of the 1<sup>st</sup> Defendants vehicle onto the curb and onto the side walk where the vendors Rosemarie Williams and Annmarie Newman were. He states that the other

pedestrians who were traversing the sidewalk quickly got out of the way but two vendors who were seated along the sidewalk were not able to do so.

- [27] Corporal Perry says that at the material time he drove at a safe speed and based on his direct observation of what happened, it was the 1<sup>st</sup> Defendant who drove in an unsafe manner; who failed to keep an adequate lookout and who suddenly and without warning made a right turn when it was manifestly unsafe to do so.

### **CLAIMANTS SUBMISSION**

- [28] Counsel for the Claimants Mr. Marston prefaced his submissions by stating that the issues for the courts consideration are (a) whether any or all of the Defendants were negligent and therefore liable to compensate the Claimant? (b) whether the Claimant is contributory negligent and (c) If so, how much compensation is the Claimant entitled?
- [29] Counsel contends that neither the 1<sup>st</sup> nor the 5<sup>th</sup> Defendants were driving in a manner that was safe and as a result, it led to the collision and injuries sustained by Rosemarie Williams and Annmarie Newman.
- [30] It was submitted that that, it is for the Court to consider whether or not the 1<sup>st</sup> Defendant failed to use his indicator in showing that he was about to turn from Penwood Road onto Wellside Crescent and if such a finding is made it would be the basis for finding that the 1<sup>st</sup> defendant was liable or contributed to the accident.
- [31] Mr. Marston sought to rely on **Section 103** of the **Road Traffic Act** which stipulates that where two or more roads intersect, the driver of any vehicle, before turning into, or crossing, a principal road, should bring the vehicle to a full stop and on turning into, or crossing the principal road should not drive his vehicle so as to obstruct any traffic on the principal road.
- [32] To further establish the duty of a driver he urged upon the court the case of **Pratt v Bloom** [1958] Times 21 October Div. Court, as found at page 58 of **Bingham and Berryman's Personal Injury and Motor Claims Cases** 12<sup>th</sup> edition where Streatfield J said,



***“the duty of a driver changing directions is (1) to signal and (2) to see that no one was incommoded by his changing of direction and the duty is greater if he first gives a wrong signal then changes it”.***

- [33] Mr. Marston stated that as a fundamental principle, it is understood that the 1<sup>st</sup> Defendant had a duty before undertaking to turn on to Wellside Crescent to signal his intention so to do and to ensure that the other road users were not inconvenienced by his change of direction.
- [34] The 1<sup>st</sup> Defendant in his evidence stated that he had indicated his intention to turn. The 5<sup>th</sup> Defendant disputes this evidence. Therefore, Counsel submitted that this is an issue of credibility and is therefore a matter for the Court to determine. If the finding is that he had failed to do so adequately, or at all, he is liable hereunder and at the very least contributed to the accident.
- [35] In regard to 5<sup>th</sup> Defendant Mr. Marston submitted that he must have been speeding or driving at a speed that was manifestly excessive and unsafe in the circumstances. Counsel submitted that if the vehicle was being driven at a speed that was safe, the vehicle could not have gotten out of control and caused such damage. Mr Marston contended, that it is hard to accept the 5<sup>th</sup> Defendant's version and he should be held liable for the accident or there should be a finding that he contributed significantly to the collision. He argues that it is undisputed that it was the vehicle being driven by Corporal Perry that ventured on to the sidewalk, struck both Miss Williams and Miss Newman which caused their injuries
- [36] Counsel sought to assess the Claimant's evidence and states that albeit Miss Williams could not assist the Court in relation to the question of whether or not the 1<sup>st</sup> Defendant came to the intersection and indicated his intention to turn onto Wellside Crescent, or whether the 5<sup>th</sup> Defendant was overtaking, she is to be viewed as a credible witness as at no time did she make a false representation to bolster her claim nor did she give evidence to facts that she could not recall even when they would have served her interest.
- [37] It was further urged on the Court that given there were no evidence before the to show the damage to the 5<sup>th</sup> Defendant's vehicle, which would have greatly assisted

the court to determine the point of impact. He opined that it would have been crucial if the impact were to the front left of the vehicle, one can accept that the 1<sup>st</sup> Defendant may have drove into its path while approaching however, if the impact was to the rear of the 5<sup>th</sup> Defendant's vehicle, it is suggestive that the 5<sup>th</sup> Defendant would have already passed the 1<sup>st</sup> Defendant and he then drove into the rear side of his vehicle.

[38] Counsel added that one other significant aspect is in relation to the point of impact in the direction of which the vehicle would have gone immediately after colliding. He states that on the 5<sup>th</sup> Defendant's version, he would've ventured further right after the collision and the submission made was that theis movement would not have been consistent with a rear collision. In the absence of anything to the contrary, Counsel submitted that the court should disregard the evidence of the 5<sup>th</sup> Defendant in relation to where the bus was hit.

[39] Reliance was also placed on **section 2** of the **Road Code** which says one should not exceed the speed limit; keeping as near to the left as is practical practicable; always been able to stop one's vehicle well within the distance for which one can see the road to be clear; not traveling too close, to the vehicle that is in front of one's vehicle. Importantly, with respect to the last-mentioned rule is the following: *"Always leave enough space between you and the vehicle in front so that you can pull up safely if it slows down or stops"*

Mr. Marston submitted that Corporal Perry failed to observe the provisions of the Jamaica Drivers Guide. In particular, the provisions referred to is as page 54, which says;

***"do not overtake unless you can do so without danger to other road users and yourself. Do not overtake at a pedestrian crossing, railway crossing, road juncture, corner or bend, where the road narrows or where there is an unbroken white line in the centre of the roadway. Remember to check your mirrors and give proper signal before you overtake."***

[40] It was submitted that if Corporal Perry was travelling at a slow speed as he said in his evidence, the incident could not have occurred as he stated as he would have been able to stop the vehicle by applying his brake. Counsel submitted that the 5<sup>th</sup>

Defendant is an untruthful witness. Counsel also contends that the 5<sup>th</sup> Defendant overtook at a "T- Junction" when it was unsafe to do so.

## 1<sup>ST</sup> DEFENDANTS SUBMISSION

[41] Miss Dunbar submitted that the elements of negligence that must be proved by the Claimant are as follows;

- (a) A duty of care was owed by the 1<sup>st</sup> Defendant to the Claimant;
- (b) There was a breach of that duty by the 1<sup>st</sup> Defendant;
- (c) That the Claimant suffered damage as a result of that breach

[42] Counsel for the 1<sup>st</sup> Defendant, Miss Dunbar, relied on the case of **Caparo Industries PLC v Dickman** [1990] 1 All ER 568, where what emerged is that:

*"in addition to the foreseeability of damages, the necessary ingredients in any situation giving rise to a duty of care is that there should exist between the party owing the duty and the party to whom it is owed, a relationship characterized by the law the as one of proximity, or neighborhood and that this 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 upon the one party for the benefit of the other."*

[43] According to Lord Wilberforce in **Anns v London Borough of Merton** [1977] 2 All E.R. 492 at 498., in order to determine "whether the duty was owed to the Claimant, in question, one has to consider whether as between the alleged wrongdoing and the person who has suffered damage there is a sufficiency of proximity or neighbourhood such that, in the reasonable contemplation of the former carelessness on his part maybe likely to cause damage to the latter."

[44] Counsel relied on the dicta of Justice Theobalds in **Ronald Webb v Antonio Rambally** Suit No. C.L W101 of [1990] (unreported) at page 5 where he says:

*"Generally speaking, when two parties are so moving on to the public roads in relation to one another, each party owes a duty to avoid the consequences of collision. Each owes to the other a duty to move with due care and this is true whether one is on foot or the other is controlling a motor vehicle."*

- [45] In **Elizabeth Brown et al v Daphne Clarke and Ors** [2015] JMSC Civ 234, Justice Laing as paragraph 29 explored the law of negligence and what the Claimant needed to prove to succeed, and at paragraphs 30 and 32, he stated "*it is similarly settled law that all users of the road owe a duty of care which an ordinary skilful driver would have exercise under all the circumstances and includes an avoidance of excessive speed, keeping a proper lookout and observing traffic rules and signals.*"
- [46] Miss Dunbar submitted that every driver on the roads of Jamaica must be guided and abide by the provisions of the Road Traffic Act. She made specific reference to Sections 32(1), 27(1) & 51(1).
- [47] Counsel submitted that the 1<sup>st</sup> Defendant's account of events is consistent with the available physical evidence, the damage sustained to his vehicle was to the right and his evidence is that his vehicle was impacted on the right side, while he was making a right turn. His vehicle repair estimate and the pictures taken of his vehicle act as evidence of the damage. Miss Dunbar opined that if the 5<sup>th</sup> Defendant's version of events were to be believed, there would be damage to the front of the 1<sup>st</sup> Defendant's vehicle and not only the right side and the damage to his vehicle would have been far more extensive.
- [48] Counsel contends also that the 1<sup>st</sup> Defendant's version of the accident provides a logical explanation to the events of July 23, 2012.
- [49] Counsel stated as well that the Claimant's particulars of claim support the 1<sup>st</sup> Defendant's position at the time of the accident that it was the 1<sup>st</sup> Defendant making a right turn when the 5<sup>th</sup> Defendant attempted to overtake as the 1<sup>st</sup> Defendant was proceeding to turn right. The statement of the 5<sup>th</sup> Defendant also speaks to him attempting to overtake the 1<sup>st</sup> Defendant at the time of the accident.
- [50] Counsel submitted that a vehicle ahead positioned as if to turn with an indicator on should be passed on its left or not at all. This is based on both the Road Code and the Road Traffic Act. All road users owe a duty of care to other road users to use

the motor vehicle especially when required to exercise reasonable care and observe and obey rules of the road, being the Road Traffic Act.

[51] submitted that while the 1<sup>st</sup> Defendant acted reasonably in the circumstances, taking steps to ensure that the road was clear before attempting to make a right turn, the 5<sup>th</sup> Defendant has failed to show his actions were negligent. The 5<sup>th</sup> Defendant attempted to overtake when it was unsafe to do so. He did not provide any evidence to prove that he controlled his vehicle in a manner to avoid the Collision with the 1<sup>st</sup> Defendant. His statement places him behind the 1<sup>st</sup> Defendant and the submission was that if he had paid attention or maintain any proper lookout, he would have seen the 1<sup>st</sup> Defendant's turning signal and notice the position of the 1<sup>st</sup> Defendants motor vehicle. The court was asked to find but the 5<sup>th</sup> Defendant negligently attempted to overtake the 1<sup>st</sup> Defendant while the 1<sup>st</sup> Defendant attempted to make a right turn.

[52] The submission was that the 5<sup>th</sup> Defendant failed to keep a proper lookout, or manoeuvre his vehicle in a manner to avoid colliding with the 1st Defendant's motor vehicle. The speed he travelled at was excessive in the circumstances, and contributed to the inability to avoid the collision and contributed to him losing control of the vehicle been hitting the Claimant and Anne-Marie Newman.

[53] Counsel closed off her submissions by stating the 1<sup>st</sup> defendant did not breach any duty of care owed to the Claimant or any road users. Furthermore, he was not negligent and or did not contribute to the cause of the collision. He took reasonable care to avoid a collision.

### **3<sup>RD</sup>, 4<sup>TH</sup> AND 5<sup>TH</sup> DEFENDANTS SUBMISSIONS**

[54] Mr Dale Austin, prefaced his submissions by giving a synopsis of the various accounts before the Court. He says that the burden of proof at common law is that in order for Claimants to succeed in a claim for damages for actionable negligence as alleged against the crown, they must prove the following ingredients of the tort laid down in the locus classicus on this subject. In **Donoghue v Stephenson**

[1932] A.C. 562, the seminal principle what are applicable to the area of law was adumbrated as:

- a) that the driver of the respective vehicles owed the Claimant a duty of care;
- b) the said drivers breached the duty of care and failed to comply with the standard of care prescribed by law; and
- c) that damage, which is casually connected with the breach and recognized by law, has been occasioned to the Claimants.

**[55]** He stated that the Claimant failed to prove any of the three elements of negligence, they would be unable to succeed in an action for damages. On the Crown's case, the driver of the Pajero would be exposed to liability where the negligence alleged may be reasonably inferred from acts which may make it more probable than not that the damages alleged was caused by his negligence as opposed to some other cause.

**[56]** The general principle in the respect of the duty of care was enunciated by Lord Atkins at page 580 in the seminal case **Donoghue v Stephenson** (supra) where he said that:

*"[one] must take reasonable care to avoid acts or omissions which he cannot reasonably foresee would be likely to injure his neighbour.... [ who is defined as] persons who are closely and directly affected by [his] act that [he] ought reasonably to have them in contemplation as being so affected when [his] mind is directed to the acts or omissions which are called in question."*

**[57]** Relying on the case of **Nettleship v Weston** [1971] 3 All ER it was submitted that emerging from this general duty are the obligations for drivers of vehicles to keep good look out for other traffic which is or may be expected to be on the road.

**[58]** Reliance was placed on Lord Macmillan at page 104 **Bourhill v Young** [1943] A.C. 92 where he says that a motorist must exercise reasonable care when driving, this care involving "avoidance of excessive speed, keeping a good lookout, observing traffic rules and signals...." This submission was that in that case, Lord

McMillan propounded that reasonable care means the care, which an ordinary skilful driver would have exercised under all circumstances.

- [59] Counsel contends that motorist owe a duty of care when using the road. The duty arising when it is reasonably foreseeable that if someone does not exercise due care, another party will be harmed. He relied on section 32(1) of the Road Traffic Act and stated that the duty of a motorist is to keep a proper lookout at all times when using the road as a driver.
- [60] Counsel further submitted that the 5<sup>th</sup> Defendant's evidence as to absence of liability on his part is preferred view and should be accepted by the court. Mr Austin stated the more crucial question is whether one or more of the drivers breached this particular and specific duty of care in the circumstances and fail to comply with the standard-of-care prescribed by law. Counsel submitted is that this is the analytic lynchpin to resolve the issue of liability for tort.
- [61] It was urged upon the Court that the road as a concept is not a neutral and undefined space; with a constant and unchanging character in the nature of duties, it places on drivers who traverse it. Rather, it is a dynamic thoroughfare with varying and distinctive features, which summons varying and specific types of obligations to road-users that correspond with the distinctive features of the particular road environment being traversed. At junctions therefore, at stoplights, at intersections, at sharp corners, not only do the general duty of care applies, but also the specific duty of care that is also specific to that context (situationally specific) that also applies.
- [62] In the present case, the 1<sup>st</sup> Defendant acknowledges that he sought to make a turn in the middle of the road in the vicinity of a corner and an intersection. His obligations as a road user in these circumstances were self-evident and as suggested by the crown, he ignored them to the detriment of other road users including Mr. Perry, Rosemarie Martin, and Ann Marie Newman.
- [63] In addition to the general duty of care to keep a good lookout for traffic, to avoid excessive speed, to observe the traffic rules and signals, and submit no error of

judgment he is also prohibited from making turns in the way that he sought to do which ultimately caused the collision and ultimately the injuries damages and loss sustained by a number of persons.

[64] The 1<sup>st</sup> Defendant fail in not only appropriately discharging his general duty of care, but also fundamentally he failed in discharging his duty of care as a road user making a turn as he did in the vicinity of a corner and intersection without adequate regard to other road users. Counsel contends that the probabilities favour the finding that the 1<sup>st</sup> Defendant failed to keep a proper lookout and he should not have pulled out and tried to make a turn in the way he did and he certainly should not have done so in the vicinity of a corner and an intersection where there would be a strong likelihood of traffic approaching suddenly.

## ISSUES

[65] The issues arising from the facts are:

- a) Whether the Defendants owed the Claimants a duty of care? If yes, was the duty breached?
- b) Whether the Defendants are liable in Negligence?
- c) What, if any is the quantum of damages to be awarded to the Claimants.

## LAW AND ANALYSIS

[66] In a claim for negligence, it is trite law he who asserts must prove. The onus is on the Claimant to satisfy the Courts on a balance of probabilities that the Defendant owed him a duty of care, the duty was breached and consequently, he suffered damage. Harris JA in **Glenford Anderson v George Welch** [2012] JMCA Civ.43 at paragraph 26, competently expressed this rule by saying:

*“... there must be evidence to show that a duty of care is owed to the Claimant by the 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 ...”*



[67] Concerning drivers of motor vehicles, there is a duty to exercise reasonable care to avoid causing injury to persons or damage to property. As cited by Counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, in the case of **Bourhill v Young** [1943] AC 92, the duty to take reasonable care is such which, an ordinary, skilful driver would have exercised under all the circumstances. The duty involves avoiding excessive speed and keeping a proper lookout.

[68] In the case of **Nance v British Columbia Electric Railway Company Ltd** [1951] AC 601, Viscount Simon, at page 610 said:

*“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.”*

[69] According to section 51(2) of the Road Traffic Act:

*“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.”*

[70] It becomes apparent from the authorities therefore, that both the Defendants owed a duty of care to the Claimants as users of the road; the duty being one to take such actions as is necessary to avoid an accident, to avoid the use of excessive speed and to keeping a proper lookout.

[71] In view of the facts before the Court, I find that this duty was breached on July 23, 2012 when the 5<sup>th</sup> Defendant's motor vehicle collided with the Claimants who were on the sidewalk at the Corner of Pennwood Road and Wellside Crescent. There is no dispute as to where and when the incident occurred and as to the fact that the Claimants were injured. The 5<sup>th</sup> Defendant admitted, both in his witness statement and under cross-examination that it was his motor vehicle that collided with the Claimants who all parties agree were positioned on the sidewalk at the time of the accident.

- [72] The indispensable issue for the courts determination and the cause of disagreement is liability. In making a determination on this issue, the credibility of the witnesses has to be assessed.
- [73] I had the opportunity to listen to the witnesses as they gave their evidence and to observe their demeanour. Of the two accounts before the Court, I accept the 1<sup>st</sup> Defendant's version to be the more reliable of the two. I find him to be a coherent witness who was forthright in his account of what happened on the day in question. The evidence of the 5<sup>th</sup> Defendant on the other hand was contradictory for the most part and there were quite a few discrepancies between his evidence on Examination-in-Chief and his evidence under cross-examination. I find it difficult to accept that the accident occurred as he states.
- [74] The 5<sup>th</sup> Defendant asserts that at the time of the incident, he was involved in a search operation comprising a joint JCF and JDF operational team in the St Andrew South Police division and whilst on operation, they travelled in a convoy with approximately (7) seven marked police service vehicles. When asked by Counsel for the 1<sup>st</sup> Defendant if he went on any assignments on the day of the incident however, the 5<sup>th</sup> Defendant replied 'no'. When asked if he was on duty at the time of the incident, his reply was also 'no'.
- [75] I find it implausible that the 5<sup>th</sup> Defendant not being on duty at the material time, found himself a part of a search operation traveling in a convoy of marked police vehicles. In addition, to my mind, any search operation with members of the JCF and JDF would have been classified as an assignment and I so find that the 5<sup>th</sup> Defendant was insincere in this regard.
- [76] Furthermore, the 1<sup>st</sup> Defendant denies that there was a convoy of motor vehicles and states that at the time he turned onto Wellside Crescent, there were no vehicles in front or behind him. The evidence of the 5<sup>th</sup> Defendant was antithetical to that of the 1<sup>st</sup> Defendant, he stated that when the convoy turned onto Pennwood Road, the 1<sup>st</sup> Defendant broke into and inserted himself between the 5<sup>th</sup> Defendant's vehicle and the sixth vehicle of the convoy. The Claimant, Rosemarie Williams also gave evidence, which was contrary to that of the 5<sup>th</sup> Defendant's

account. She stated that when she looked up from unpacking her stall, she saw two vehicles proceeding along Pennwood Road from Spanish Town Road towards Waterhouse. When cross-examined as to whether there were other vehicles, she stated that those vehicles had passed sometime before.

**[77]** When the 5<sup>th</sup> Defendant was cross-examined by Counsel for the Claimants, it was stated that the 5<sup>th</sup> Defendant was travelling at a speed of 10-15 kmph and one vehicle length away from the sixth vehicle in the convoy. At the time the 1<sup>st</sup> Defendant inserted himself into the convoy. The 5<sup>th</sup> Defendant says he was still travelling a vehicle length away but at this time, he was going at a speed of 5 kmph. On the evidence of the 1<sup>st</sup> Defendant, he was travelling at a speed of 15 to 20 kmph.

**[78]** If there was a convoy that the 5<sup>th</sup> Defendant was a part of it can only be concluded that at the time of the incident, the 5<sup>th</sup> Defendant was definitely not traveling closely with the convoy of other service vehicles who I have accepted had gone ahead sometime before.

**[79]** Despite the evidence of the 5<sup>th</sup> Defendant as to speed at which he was traveling it is my view that if I was to accept that he was traveling between 10-15 kmph there is no way the incident would have occurred as it did. It goes without saying therefore that one or both parties are not being truthful. I find on a balance of probabilities that the account of the 5<sup>th</sup> Defendant is untruthful. I am assisted in arriving at this conclusion by two portions of the evidence: (1) the point of impact on both motor vehicles and (2) the force with which the accident occurred.

**[80]** The 1<sup>st</sup> Defendant says he put on his right indicator signal, checked his mirrors to see that it was clear of oncoming vehicles, drifted to the middle of the road, rechecked his mirrors and proceeded to turn onto Wellside Crescent.

**[81]** The 5<sup>th</sup> Defendant states that he signalled to the 1<sup>st</sup> Defendant to exit the convoy by tooting his horn and using the blue light on the vehicle to get the 1<sup>st</sup> Defendant to pull over to the left side of the road. At this time, the 5<sup>th</sup> Defendant says he still

maintained a speed of 15 kmph. He attempted to overtake and at that time, the 1<sup>st</sup> Defendant turned right and collided with him.

**[82]** When asked by way of amplification what the point of impact was, the 5<sup>th</sup> Defendant said it was the left rear of the vehicle. Under cross-examination however, when asked if the front of the Hiace bus was damaged after the impact, he answered by saying 'yes some damage'. When re-examined by his Counsel, he was asked whether the damage to the front was because of the collision with the 1<sup>st</sup> Defendant's vehicle or another collision and he indicated that it was as a result of the collision with the 1<sup>st</sup> Defendant's motor vehicle. The 1<sup>st</sup> Defendant's account on the other hand was that he felt an impact to the right side of his vehicle starting from the right rear wheel arch to the right front door. The evidence was the same throughout the trial.

**[83]** It is clear on the evidence therefore that the front of the 5<sup>th</sup> Defendant's vehicle collided with the rear of the 1<sup>st</sup> Defendant's vehicle. I find that it is not practical either to be pushed with a force so great after the collision that the vehicle ends up on the other side of the road unless, one is speeding or being very reckless in controlling their vehicle.

**[84]** The point of impact is indicative of the lack of due care. The minute the 1<sup>st</sup> Defendant drifted into the road, it should have been easy for the 5<sup>th</sup> Defendant to slow down, stop or swerve to prevent the accident at a speed of 15 kmph. In any event, if his reflexes are delayed and he could not swerve at the time, he still would not have been pushed with such a force to cause him to lose control of the vehicle and collide with the Claimants in the way he did. I find that the 1<sup>st</sup> Defendant must have been travelling much faster than he would have the Court believe.

**[85]** In addition to this, given place at which the incident occurred, it is clear that the 5<sup>th</sup> Defendant attempted to overtake at a 'T-juncture' which is prohibited by law.

**[86]** In light of the foregoing, I accept that it is more likely for the accident to have occurred as stated by the 1<sup>st</sup> Defendant. I accept that the 5<sup>th</sup> Defendant is liable

therefore and caused the accident that resulted in the injury to and subsequent death of one of the Claimants.

[87] The damages will be assessed against the 3<sup>rd</sup> 4<sup>th</sup> & 5<sup>th</sup> Defendants for the Claimants. I note that the 1<sup>st</sup> Defendant has put estimation of repairs before this Court. His evidence is that he made a claim on his policy and that the car was subsequently sold. There is nothing before me that would suggest that this claim was not honoured, also special damages are required to be specifically pleaded. In the absence of this any such claim must fail.

### **CLAIM UNDER THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT**

#### **Miss Rosemarie Williams**

##### Special Damages

[88] According to the rule set out in **Bonham-Carter v Hyde Park Hotel** [1948] 64 TLR 177, special damages must be specifically pleaded and proven. The Claimant submitted documentary evidence in proof of medical expenses and domestic help and pleaded Special Damages in the sum of \$265,549.76. This sum is accepted by the Court.

##### General Damages

[89] The injuries of the Claimant were listed according to the medical report of Dr. George Lawson as:

- a) Mild tenderness in right lower quadrant of abdomen
- b) Abrasions to the right- thigh, leg and foot
- c) Abrasions to the left foot
- d) Cervical strain/whiplash injury
- e) Mechanical lower back pain
- f) Left shoulder strain
- g) Right ankle sprain
- h) Right knee sprain
- i) Multiple lacerations and abrasions to lower limbs

[90] Having regard to the authorities relied on by Counsel, and the medical receipts proffered by the Claimant, I find that the appropriate guide for the Court was found

in the case of **Elaine Graham v Daniel James & Ezra Nembhard** at page 154-155 of Khans, Vol. 5, where the award of the sum of \$600,000.00 was awarded in September 2000. This figure updates using the CPI of October 2019 to \$2,752,941.18

### **The Administrator General (on behalf of the estate of Annmarie Newman)**

[91] The Law Reform (Miscellaneous Provisions) Act (hereinafter referred to as LRMPA) by virtue Section 2 provides that:

*2.---Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:*

*Provided that this subsection shall not apply to causes of action for defamation.*

[92] Against this background, an award is usually made for special damages, funeral expenses, other special damages and the 'lost year' for the benefit of the deceased's estate.

[93] The Claim under the Law Reform Miscellaneous Provisions Act was filed on December 10, 2018. This is outside of the limitation period and the Claim is deemed to be statute barred and the claim is struck out. I rely on the case **Maureen Lewis v. Marcia Hall Walker et.al** [2016] JMISC Civ 60

### **CLAIM UNDER THE FATAL ACCIDENTS ACT (FAA)**

[94] Section 3 of the **Fatal Accidents Act** states:

*'Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.'*

[95] Section 4(1) provides as follows:

*4.-(1) 'Any action brought in pursuance of the provisions of this Act shall be brought-*

*(a) by and in the name of the personal representative of the deceased person; or*

*(b) where the office of the personal representative of the deceased is vacant, or where no action has been instituted by the personal representative within six months of the date of death of the deceased person, by or in the name of all or any of the near relations of the deceased person, and in either case any such action shall be for the benefit of the near relations of the deceased person.'*

[96] Section 2(1) provide:

*'near relations' in relation to a deceased person, means the wife, husband, parent, child, brother, sister nephew or niece of the deceased person.'*

[97] Section 4(4) provides:

*'If in any such action the court finds for the plaintiff, then, subject to the provisions of subsection 5, the court may award such damages to each of the near relations of the deceased person as the court considers appropriate to the actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person and the amount so recovered (after deducting the costs not recovered from the defendant) shall be divided accordingly among the near relations.'*

[98] The claim before this Court was brought by the Administrator General being the Administrator for and on behalf of the estate of Annmarie Newman. By way of the witness statement of Paul Newman filed September 1, 2019, there were five listed dependents of the deceased namely, Johnross Walker, Sewanski Williams and Tyieoh Walker, sons of the deceased, and Jaheem Perch, Christina Perch and Vanessa Reid, nephew and nieces of the deceased.

[99] Having regard to the definition of 'near relations' advanced under section 2(1) of the **FAA** and the capacity in which the dependents were listed, it is obvious that they would stand to be near relations of the deceased and entitled to bring this action for recovery of damages under her estate. There was no documentary proof furnished to this Court of the near relations as pleaded. However, the evidence of Paul Newman in this regard has not been challenged by the 3<sup>rd</sup>-5<sup>th</sup> Defendants and

I have found him to be a credible witness. I am further strengthened in my view given that the Administrator-General represents the estate.

**[100]** I am satisfied that at the time of death these six (6) named persons were in receipt of a benefit from the deceased and death has deprived them of said benefit. The claim hereunder can thus succeed as this Court is satisfied that there is sufficient evidence to substantiate the relationships between the deceased and her dependents.

*Johnross Walker*

**[101]** His annual dependency is stated as being \$201,000. At the time of the deceased death he was 22 years old and 10 months. His annual dependency includes lunch money and transportation. There has been no evidence given regarding his education and/ or school enrolment. Given that at the time of death he had passed the age of majority, I will reduce his annual dependency in regard to each item by 50%, that is, \$100,500.

Between July, 2012- September 2019 is 7 years and 2 months

Annual average contribution (7 years and 2 months) x \$100,500=\$720,250

*Sewanski Williams*

**[102]** His annual dependency is \$175,000. He was 18 years old and 6 months at the time of death. I make similar observations in regards to his annual dependency as I did in relation to Johnross Walker. I will reduce his annual dependency in regards to each item by 30%. Thus his annual dependency is \$122,500.

Between July, 2012- September 2019 is 7 years and 2 months

Annual average contribution-( 7 years and 2 months) x \$122,500=\$877,917

*Tyieoh Walker*

**[103]** His annual dependency is \$232,700. He was 12 years old and 4 months at the time of death. I will discount his annual dependency by 10% given that throughout



the year, there are varying school holidays and thus non-attendance. His annual dependency is \$209,430.

Between July, 2012- September 2019 is 7 years and 2 months

Annual average contribution-( 7 years and 2 months) x \$209,430=\$1,500,915.

Post-Trial:

The remainder of the years -(5 years and 8 months) x \$209,430=1,186,770

Total: \$1,500,915+\$1,186,770=\$2,687,685.

*Jaheem Perch, Christina Perch and Vanessa Reid*

**[104]** Jaheem's annual dependency is \$131,300. He was 8 years old and 5 months at the time of death. Christina's annual dependency is \$159,700 and she was 11 years old and 1 month at the time of death. Vanessa's annual dependency is \$136,500 and she was 17 years and 8 months at the time of death. The evidence is that these children are the nieces and nephew of the deceased and that she helped to raise them with school and medical expenses. Their annual dependency does include food, clothing and shoes, which suggest that the deceased had full responsibility for them as oppose to just assisting. In any event, considering all the circumstance including the deceased nature of employment as well her full responsibility for her three children, I will discount the claim of the nieces and nephews by 40%.

*Jaheem*

Thus, Jaheem's annual dependency is  $40/100 \times \$131,300 = \$52,520$ .  $\$131,300 - \$52,520 = \$78,780$ .

Between July, 2012- September 2019 is 7 years and 2 months

Annual average contribution-( 7 years and 2 months) x \$78,780=\$564,590.

Post-Trial:

The remainder of the years (9 years and 7 months) x \$78,780=754,975.

Total:  $\$564,590 + \$754,975 = \$1,319,565$ .

*Christina*

**[105]** Christina's annual dependency is  $40/100 \times \$159,700 = \$63,880$ .  $\$159,700 - \$63,800 = \$95,820$ .

Between July, 2012- September 2019 is 7 years and 2 months

Annual average contribution-( 7 years and 2 months) x  $\$95,820 = \$686,710$

Post-Trial:

The remainder of the years (6 years and 11 months) x  $\$95,820 = \$662,755$

Total:  $\$686,710 + \$662,755 = \$1,349,465$

*Vanessa*

**[106]** Vanessa's annual dependency is  $40/100 \times \$136,500 = \$54,600$ .  $\$136,500 - \$54,600 = \$81,900$ .

Between July, 2012- September 2019 is 7 years and 2 months

Annual average contribution-( 7 years and 2 months) x  $\$81,900 = \$586,950$ .

Post-Trial:

The remainder of the years -(4 months) x  $\$81,900 = \$27,300$

Total:  $\$586,950 + \$27,300 = \$614,250$ .

**DISPOSITION**

**[107]** As a result of the foregoing, the Court makes the following orders:

**2014 HCV 05208**

Judgment in favour of the Claimant Rosemarie Williams against the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants as follows:

Under the Law Reform (Miscellaneous Provisions) Act

- i. Special Damages awarded in the sum of  $\$265,549.76$  with interest at a rate of 3 % from 23<sup>rd</sup> July 2012 to the 23<sup>rd</sup> June 2021.

- ii. General Damages in the sum of \$2,752,941.18 with interest at a rate of 3 % from 4<sup>th</sup> November 2014 to 23<sup>rd</sup> June 2021
- iii. Costs to the Claimants against the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants

**2015HCV 03571**

Judgment in favour of the Claimant against the 3<sup>rd</sup> 4<sup>th</sup> & 5<sup>th</sup> Defendant as follows:

Under the **Fatal Accidents Act**

- i. Total Loss of Dependency - \$7,569,132.

The apportionment is as follows:

Johnross Walker- \$720,250

Sewanski Williams-\$877,917

Tyieoh Walker- \$2,687,685

Jaheem Perch- \$1,319,565

Christina Perch- \$1,349,465

Vanessa Reid- \$614,250.

- ii. Costs awarded to the Claimant against the 3<sup>rd</sup> 4<sup>th</sup> & 5<sup>th</sup> Defendant to be taxed if not agreed.

.....  
**Hon. S. Wolfe-Reece**  
**Puisne Judge**