[2018] JMSC Civ.3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV06208

BETWEEN	**LLOYD BELL**	**CLAIMANT**
AND	**ALCAR CONSTRUCTION & HAULAGE CO. LTD.**	**1ST DEFENDANT**
AND	**DEON BARKER**	**2ND DEFENDANT**

Mr. Lemar Neale instructed by Bignall Law for the Claimant.

Messrs. Linton Gordon and Obiko Gordon instructed by Frater, Ennis & Gordon for the Defendants.

Heard: November 6 & 7, 2017 and January 10, 2018

Negligence – Motor vehicle collision – personal injury – whether contributory negligence – whether res ipsa loquitur applies – damages

Wint-Blair, J

Agreed facts

[1] The parties agree that the date of the collision was July 4, 2011 at approximately 6:15 am. The claimants were travelling in a Mitsubishi Lancer registered 4416EE driven by Lloyd Bell while the second defendant was driving a Ford Ranger motor truck registered CH 7643. The second defendant was driving as the servant and/or agent of the first defendant. A collision occurred between both vehicles along the access route to the Spanish Town toll road, in the parish of St.

Catherine. All claims for special damages have been deemed by the defendants to be conditionally admissible subject to proof. The medical reports filed by Drs. Sangappa and Dundas were also agreed. There was no issue taken with the physiotherapy report filed by Sathya Gogineni or the X-ray or MRI reports filed by the claimants.

Mr. Lloyd Bell

[2] Mr Lloyd Bell, 36 year old Senior Warehouse Supervisor, gave evidence in chief by way of a witness statement filed on February 19, 2015. He said that on July 4, 2011 at about 6:15 am he was driving his Mitsubishi Lancer ("the Lancer") registered 4416EE from his home in Spanish Town, St. Catherine along the toll access road in St. Catherine. He was wearing his seatbelt and going to Kingston with his wife Michelle Bell, seated in the front left passenger seat and his daughter Narshaqune Mason, seated in the left rear seat. There was wet weather and the road was smooth. He was driving at 40 to 45 kilometres per hour in the left lane in minimal traffic. He observed a stationary Ford Ranger ("the Ford") motor truck registered CH7643 on the left soft shoulder facing the direction in which he was driving its park lights were on. He noticed that the Ford was at an angle with its rear inclined more to the left than its front.

[3] Mr. Bell said when he was passing the Ford when he suddenly heard a loud bang coming from the left of his vehicle. On impact, he was shaken aggressively to the right and then the left. The right side of his body collided with the inside of the driver's door. The Lancer was pushed from the left lane stopping in the middle of the roadway on the unbroken white line.

[4] Mr. Bell said he was in shock, and felt a sticking pain to his shoulder and back. He enquired of his wife and daughter whether they were okay. He observed that his daughter was clutching her chest. A man came to his door repeating that he was "so sorry, I checked my rear view mirror and didn't see you." Mr. Bell said he saw that the Ford had come to a stop on the right side of the road. He slowly

exited the Lancer and helped his wife out through his door as hers was stuck. His daughter also alighted from the vehicle.

[5] Mr Bell claimed special damages of $271,500 which counsel, Mr. Neale reduced in his submissions to $242,990.00, as well as damages for pain and suffering and his handicap on the labour market. To prove his claim Mr Bell relied on the medical report of Dr. Ravi Prakash Sangappa who examined him on the day of the collision at Oasis Health Care, 7a Oasis Plaza, March Pen Rd., Spanish Town, St. Catherine. Dr. Sangappa conducted an examination and prepared a report dated October 2, 2011 which concluded that Mr Bell had sustained the following injuries: *"severe right shoulder strain, lower back strain, soft tissue injury to abdomen wall on the left side."*

[6] Mr. Bell was referred to physiotherapy for his right shoulder and lower back, treated with an analgesic injection and prescribed analgesics and muscle relaxants. Radiological evaluation on July 5, 2011 at the Nuttall Hospital revealed a normal lumbar spine and right shoulder.

[7] Mr Bell was reviewed by Dr. Sangappa on September 23, 2011. Mr. Bell then complained of frequent lower back pain and difficulty sitting for more than 15 to 20 minutes. An examination revealed tenderness over the L3 to L5 vertebral region with paraspinal muscle tenderness over the lower back. The range of movement was painful and restricted. There was mild tenderness over the right shoulder and terminal movement was painful. The prognosis was a partial recovery with expected full recovery in six months. Mr. Bell was advised to continue physiotherapy and take analgesics.

[8] Dr. Sangappa prepared an addendum to his initial report dated January 13, 2012 which stated that having reviewed Mr Bell on January 13, 2012:

> *"Mr Bell reported that his right shoulder pain had subsided significantly. However he had occasional episodes of pain to his right shoulder especially when doing routine activities. He also*

stated that the pain to his abdomen and lower back had subsided completely."

Dr. Sangappa's prognosis was that Mr Bell had shown fair recovery from his injuries. He recommended physiotherapy for frequent episodes of right shoulder and lower back pain.

[9] Sathya Gogineni registered physiotherapist at Oasis Health Care first saw Mr. Bell on July 11, 2011 and prepared a report dated February 7, 2012. That report stated that Mr Bell completed six sessions and was discharged on August 16, 2011 *"as he had no pain and the muscle strength was achieved to normal. He was advised to continue the exercises at home."*

[10] On June 27, 2012 Mr. Bell was seen by Dr. Grantel Dundas. Dr. Dundas in a report dated June 29, 2012 stated that Mr Bell was accompanied by a medical report signed by Dr. Sangappa dated January 13, 2012 as well as a physiotherapy report from Sathya Gogineni dated February 7, 2012.

[11] Dr Dundas found that Mr. Bell's shoulder range had improved compared to the early post injury status albeit he could not elevate without discomfort, there were diminished rotary movements but no tender spots. His diagnoses were right shoulder strain, he queried rotator cuff injury and lumbar disc prolapse. He noted having reviewed the X-rays of the shoulder and lumbar spine done at Nutall Hospital that there was no pathology in the shoulders. He noted that in the lumbar spine there was a mild left sided scoliosis with the apex at L4. He recommended that a MRI be performed. This MRI was conducted on July 24, 2012 and confirmed degenerative disc disease with disc bulges and exit foramen narrowing.

[12] Dr Dundas reviewed this MRI report and in a further report dated September 19, 2012, he opined that there was a rotator cuff tear to Mr. Bell's right shoulder which was more severe than the clinical impression. As regards the lumbar spine the report stated: *"Mr Bell's physical signs exceeded the description*

presented in the MRI scan." Based on this further review he assessed Mr Bell's upper extremity impairment as *"a rotator cuff injury full sickness tear Class 1 residue loss functional with normal motion: Median 5% upper extremity impairment or 3% whole person impairment."* He assessed the lumbar spine as Class 3, 19% whole person impairment and sum 21% whole person impairment. (In my view, while arithmetically incorrect, the doctor's conclusions are not substantially affected.) What remains unclear from Dr Dundas' conclusions are what portion of the lumbar spine impairment is attributable to degenerative disc disease having regard to his earlier diagnosis of mild left sided scoliosis and his statement that Mr Bell's physical signs exceeded the description presented by the MRI scan. There was no indication whether this earlier diagnosis bore any relationship to the trauma.

[13] There was also the physiotherapist's report which concluded that upon discharge Mr. Bell was free from his burden of pain and could continue exercises at home. As well as the final report of Dr Sangappa in which Mr Bell classified his pain as *" the pain to his abdomen and lower back had subsided completely."* These varied conclusions present a discrepant picture of Mr Bell's case.

[14] Mr. Bell claimed and gave evidence of needing household help for 10 weeks at $4,000 per week. In cross examination he gave evidence that for the first two days after the accident he was assisted with walking by Mrs. Bell and then by his cousin Omar Nelson who came to render household assistance for ten weeks. This evidence is absent from the evidence of Mrs Bell. Special damages proven total $159,010.00.

Michelle Bell

[15] This claimant, a 42 year old warehouse associate, gave a witness statement dated February 10, 2015 which stood as her evidence in chief, in it she stated that she was a passenger seated in the front seat of the vehicle driven by her husband, Lloyd Bell. Her daughter Narshaqune Bell was seated in the rear of that vehicle. The weather was wet and the road smooth. There was miminal

traffic as they proceeded in the left lane. She saw the Ford in a stationary position on the left shoulder facing the same direction as her vehicle. She observed that the front of that vehicle was inclined towards the road suddenly she heard a loud bang to the left of her vehicle which was pushed from the left lane onto the white lane in the middle of the road. She was shaken and in shock. She felt pain to her neck, lower back and shoulders. Her door was stuck. The Ford stopped on the right side of the road. Mr. Barker came to her vehicle, apologized for the accident and asked her husband if he was okay. Her husband helped her out through the driver's door, her daughter also exited the vehicle.

[16] She said Mr. Barker came over and said that he was at that location because his wife was supposed to get her work bus at another location but she had been in the house "spinning up and down" and thus she was late. A woman then came from the motor truck and apologized in tears. That this lady apologized was challenged, that she was present was not.

[17] Mrs Bell in chief spoke of her pain which persisted to the date of trial, she said in her witness statement that she was unable to sit or stand for long periods of time and her household duties were affected, she gets depressed, cries uncontrollably and suffers from panic attacks. She doesn't sleep well at nights and wakes up gasping for air. She goes outside to get air to feel better.

[18] She hired a helper, to assist her as she then had two young children. There was no evidence that she stopped working during her recovery. Mrs Bell similarly claimed household help for ten weeks at $4,000 per week, for a separate helper than her husband's cousin, this was Janice Rowe. She gave no evidence in her witness statement of the duties this helper was to perform or her name. In cross examination it was unearthed that both helpers stayed in the house, they assisted with the two younger children, washed and cleaned, her helper did only her laundry. There is no evidence that this helper was paid, though there is a claim for payment.

[19] Mrs Bell attended upon Dr. Sangappa on the date of the collision. He diagnosed whiplash injury to the neck and lower back strain. She was treated with analgesics, muscle relaxants and referred to physiotherapy. She was reviewed on July 14, 2011 and found to have tenderness over the cervical and lumbar spine. She was expected to experience occasional episodes of lower back and neck pain for the next three months. It was recommended that she continue physiotherapy for her neck and lower back. An x-ray done on July 5, 2011 and a report prepared by Dr. Richard Bullock, Consultant Radiologist dated July 6, 2011 stated that the x-ray showed no fracture or subluxation.

[20] Mrs Bell was reviewed by Dr Sangappa on January 13, 2012 and she was diagnosed in a report dated January 12, 2012 as showing fair improvement from her injuries but likely to experience occasional episodes of neck and lower back pain for the next three months with another course of physiotherapy for recurrent episodes of neck and back pain.

[21] She attended for physiotherapy on July 14, 2011 and received five sessions with Sathya Gogineni, registered physiotherapist. She was discharged on August 16, 2011 with intermittent minimal pain in her lower back, the active movements and muscle strength were normal. She was to continue the exercises at home.

[22] Mrs Bell was examined by Dr Grantel Dundas on September 6, 2012. She complained of pain across the neck and shoulders and lower back pain. She admitted that she had not worn the collar prescribed by her doctor. In a report dated September 10, 2012, Dr Dundas diagnosed depression/anxiety, cervical strain and lumbar strain. He found that her x-ray showed mild right sided scoliosis and that she had not reached maximum medical improvement. He recommended an MRI scan of the cervical spine, physical therapy to the back and psychiatric consultation to evaluate and manage her depressive state.

[23] Dr. Dundas' qualifications do not indicate any training in the field of psychiatry or other related discipline. The diagnosis of depression is therefore viewed as a clinical observation which warranted further enquiry, to this end. Dr Dundas

made a referral for psychiatric consultation. This claimant led no evidence of acting on that referral. There is therefore nothing before the court upon which to make a finding.

[24] An MRI report from the University of the West Indies dated April 17, 2012 was produced by this claimant. This report preceded her visit to Dr. Dundas and gave clinical details of tinnitus, imbalance and vertigo without nausea. The report concluded that no abnormality was demonstrated.

[25] Dr. Dundas reviewed Mrs Bell and came to a diagnosis of cervical strain in a report dated October 28, 2012. He referred to a MRI scan reported on October 16, 2012 which was not before the court. He concluded that Mrs Bell had degenerative long standing disease which bore no relationship to her trauma. He found her whole person impairment to be 2%.

[26] In her particulars of special damages Mrs Bell claimed the sum of $302,500.00, the evidence proved $106,000.00

Narshaqune Mason

[27] This claimant was a 19 year old student at the time of the collision. She was a rear seat passenger on July 4, 2011 in the vehicle driven by her father, Lloyd Bell. She gave evidence in chief in a witness statement filed on February 19, 2015. In that statement she said that the weather was wet, the road smooth and that the vehicle was travelling in the left lane when she saw the Ford in a stationary position on the left shoulder. The front of the motor truck was inclined towards the road. When the Lancer was passing it she heard a loud banging sound coming from the left of her vehicle. She was shaken aggressively and her vehicle was pushed out of the left lane, stopping in the middle of the road on the unbroken white line. She was in shock, felt pain to her head, shoulders and back. She exited and saw a man who apologized for the accident.

[28] She visited Dr Sangappa on July 4, 2011 who diagnosed that she suffered from right shoulder strain and lower back strain. She was treated with analgesics and

referred to physiotherapy for her right shoulder and lower back. She was reviewed on January 14, 2012. Dr Sangappa concluded that she had shown fair recovery from her right shoulder and lower back pain. She was advised to continue physiotherapy in future should she experience recurrent episodes of pain. An x-ray done on July 5, 2011 showed no fracture or dislocation.

[29] Miss Mason attended five sessions of physiotherapy and was discharged on August 27, 2011 as she had no pain and her muscle strength was normal.

[30] Miss Mason was examined by Dr. Dundas on July 6, 2012. She ought to by then have been 20 years old albeit the report dated July 25, 2012 says she was 19. In an updated report dated September 17, 2012, the final diagnosis made by Dr Dundas was right shoulder strain, lower back strain, idiopathic adolescent scoliosis and 1% whole person impairment.

[31] She claimed the sum of $180,500 as special damages which have been reduced by the sums paid to Oasis Health Care in 2013 which have no nexus to the case at bar. Her claim for special damages has been reduced to $81,500.00.

[32] Each claimant claimed separate sums for transportation though they all attended the same places on the same dates. It is logical to accept that they would have travelled together and not incurred this expense separately. Each claim for transportation is reduced to $10,000.

[33] Each claimant also claimed for extra help for ten weeks. There were two helpers according to Mrs Bell, in cross examination it was unearthed that both helpers came from Brandon Hill in Clarendon, one was a cousin of Mr Bell, the other was Janice Rowe. There was no explanation as to why there was a need for two helpers particularly as Mr Bell said in evidence that it was Mrs Bell who helped him for the first two days after the accident. The claim for extra help will be awarded to Mrs. Bell only.

[34] Common to all claimants is the report of Dr Sangappa which stated that there was a significant reduction in pain, supported by the report of a physiotherapist. The reports of Dr. Dundas are reviewed by the court against this background.

[35] The second defendant gave evidence that admitted the collision. He said that though visibility was poor it did not affect seeing his ability to see outside of vehicle, it was visibility inside of his vehicle which had been affected. He gave these responses in cross-examination:

> *"Q Visibility inside of vehicle was affected that morning*
> *A Yes*
> *Q You were on shoulder at time of collision*
> *A I was coming off it to make a U-turn*
> *Q Collision just happened*
> *A It just happened I did not see your vehicle*
> *Q Don't know how it happened*
> *A I was making a U - turn and the vehicles just collide."*

Submissions

[36] It was submitted on behalf of the claimants that the evidence presented demonstrated that the claimants were witnesses to fact were truthful and consistent, in relation to the cause of the collision. Mr Neale argued that there was credible evidence from Mr Barker that visibility was an issue inside his vehicle and the court should act on this evidence as it meant his visibility was affected as opposed to that of Mr Bell. Further, Mr Barker did not know how the collision took place, and he offered no explanation as to how the collision which he admitted occurred. The claimants rely on res ipsa loquitur in this regard. The issue of contributory negligence was pleaded in that Mr Bell overtook two stationary vehicles, whereas no evidence of overtaking was led. The evidence was that those two vehicles had passed before he made the U- turn. The defendant led no evidence of contributory negligence.

[37] Mr Gordon submitted on behalf of the defendants that on the claimants' case, none of them saw how the accident occurred. The essence of the case for the defendants was that the claimants only became aware of the collision when they heard an impact. Mr Bell, the driver did not maintain a proper lookout for other users of the road, Mr Barker did not know how the accident occurred, The second defendant said when he got out visibility was better than from inside vehicle. The claimant's evidence is identical in terms of what occurred. As credibility is the issue the court should find that there has been significant concoction on the part of the claimants. All agreed medical reports state that each claimant saw Dr Sangappa in 2011 on the day of the collision. Dr Dundas saw the claimants one year after and is not in the ideal position to say whether the injuries alleged are as a result of the accident. In addition, Dr Dundas set out in his initial report a narrative of the collision and evidence of damage not given in evidence by Mr. Bell. Mr Bell embellished his account to Dr Dundas with a view to creating a certain impression unsupported by the x - ray and ultrasound report done on the day after the accident. The case of the defendants is that this is a minor accident with no connection from the x-ray showing no significant injuries, to the claimants all attending upon Dr Dundas one year later. Dr Dundas without any scientific analysis merely ordered further tests MRI or x-rays after speaking with the claimants. The bases for Dr Dundas' conclusions have to be weighed carefully. In his report of September 19, 2012, he makes reference to the UWI MRI report which showed degenerative disc disease with disc bulge, this is unrelated to the accident. Page one of this report contradicts Dr Dundas's report regarding degeneration. Medical reports and similar evidence should be viewed against the claims for extra assistance for ten weeks. Liability and credibility go to the root of determining liability.

The Law

[38] *"To prove negligence there are four requirements namely:*

1. *The existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that*

the careless infliction of the kind of damage in question on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.

2. *Breach of the duty of care by the defendant, i.e. that he failed to measure up to the standard set by law;*

3. *A causal connection between the defendant's careless conduct and the damage.*

4. *That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.*

When these four requirements are satisfied, the defendant is liable in negligence.[1]*"*

[39] The test of whether a duty of care exists in a particular case is, set out by Lord Bridge of Harwich, in the leading case of **Caparo Industries plc v Dickman** [1990] 1 All ER 568, 573-574:

> *"What emerges is that, in addition to the foreseeability of damage, 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 characterised 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 upon the one party for the benefit of the other."*

[40] Morrison, J.A. (as he then was) in **Shtern v Villa Mora Cottages Ltd and Another** [2012] JMCA Civ 20 discussed the duty of care as follows:

> *"As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof, on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case (see Clerk & Lindsell, op. cit., para. 8-149; see also, Ng Chun Pui v Lee Chuen Tat [1988] RTR 298, per Lord Griffiths at page 300). But the actual proof of carelessness may often be problematic and the question in every case must be "what is a reasonable inference from the known facts?" (Clerk & Lindsell, op. cit., para. 8-150)."*

---

[1] Clerk & Lindsell on Torts, 19th edn, 2006, p.383

[41] [51] The court may also infer carelessness in cases covered by the so-called "doctrine" of res ipsa loquitur. In the seminal case of **Scott v The London and St Katherine Docks Co**. (1865) 3 H & C 596, 601, in which bags of sugar being lowered by a crane from a warehouse by the defendants' servants fell and struck the plaintiff, Erle CJ said this:

> *"But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care."*

Look out

[42] It is the duty of the driver or rider of a vehicle to keep a good look out. A driver who fails to notice in time that the actions of another person have created a potential danger is usually held to be negligent. (See **Foskett v Mistry** [1984] R.T.R. 1, CA.) He must look out for other traffic which is or may be expected to be on the road, whether in front of him, behind him or alongside him, especially at crossroads, junctions and bends.[2]

The Road Traffic Act

[43] The Road Traffic Act places certain duties on users of the road. The sections of particular importance which are self-explanatory are section 51(1)(a), (d), (e) and (f). Sections 95 (3) and section 57 speak to the duty of a driver when turning or changing direction.

[44] Section 51(1) and (2) of the Road Traffic Act State:

"51 (1) The driver of a motor vehicle shall observe the following rules - a motor vehicle –

---

[2] supra 660

(d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;

(e) proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road;

(f) proceeding from a place which is not a road into a road or from a place which is not a road, shall not be driven so as to obstruct any traffic on the road."

[45] The Island Traffic Authority Road Code (1987) at Part 2 Rule 6 states:

> *"Before you slow down, stop, turn or change lanes, check your rear view mirror, signal your intention either by hand or indicator light signals and make sure you can do so without inconvenience to others. Never make a sudden or last minute turn; it is very dangerous."*

[46] Any failure to slow down, stop, to check the rear view mirror or signal would constitute a breach of the Road Code. The Road Code exists to guide the actions of motorists therefore in my view, evidence of a breach of the Road Code can be considered cogent evidence to buttress an allegation of negligence. the The Road Traffic Act provides 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 collision, 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."

"57(1) The driver of a motor vehicle constructed to be steered on the right or off-side thereof, shall, before commencing to turn to, or change direction towards, the right, give the appropriate signal so as to indicate that direction."

"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."

[47] In **James Mitchell and Aaron Gordon v Leviene McKenzie and Dorrell Gordon** SCCA 104/91 delivered on October 21, 1992, a decision of the Court of Appeal decision delivered by Wolfe J.A. (Ag.), as he then was, stated as follows:

> *"He concluded that the cause of the accident was due to the 4th defendant/appellant attempting to cross the northern section of the highway without stopping, at a speed of 5 mph when it was unsafe to do so and adjudged the 4th defendant/appellant to be the sole cause of the accident.*
>
> *…*
>
> *The question remains what was the cause of the accident. The learned judge accepted the evidence of the bus driver, the plaintiff and Miss Farquharson that the truck driver came across the main road from the soft shoulder without any indication that he intended so to do and afforded the bus driver no opportunity of avoiding the collision. That was the manoeuvre which caused the collision. In the absence of any evidence that he was acting as an automaton, then clearly he must be adjudged negligent and solely to blame for the resultant collision, since in the circumstances, the other driver did nothing to contribute to the accident."*

[48] The case of **James Mitchell** is instructive on the facts and law and I adopt the above statements of the law enunciated by the Court of Appeal and apply them to the facts of the case at bar.

[49] It was submitted that it has been long established that the driver of a vehicle who is changing direction bears the greater duty of care before undertaking his manoeuvre. Support for this principle was found in the case of **Pratt v Bloom** (1958) Times 21 October, Div Ct[3]: Per Streatfield J:

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

---

[4]Bingham and Berrymans' Personal Injury and Motor Claims Cases,1994, 10th edn., p.85

Res ipsa loquitur

[50] The maxim is not a rule of law it merely describes a state of the evidence from which it is possible to draw an inference of negligence. It is based on common sense, its purpose being to enable justice to be done when the facts bearing on causation and the standard of care exercised are unknown to the claimant but ought to be within the knowledge of the defendant. It will not assist where there is no evidence to support an inference of negligence and a possible non-negligent cause of the injury exists.[4]

[51] The requirements of which are:

I. That the thing causing the damage was under the management or control of the defendant or his servants, and

II. That the accident was of such a kind as would not in the ordinary course of things have happened without negligence on the part of the defendants. An essential element for the doctrine to be applicable is the fact that the claimant does not know how he came to be injured."

[52] In **Shtern v Villa Mora Cottages Ltd and Another** [2012] JMCA Civ 20, Morrison JA, assessed the application of the doctrine of res ipsa loquitur. He cited the leading cases on the doctrine and, at paragraph [57], summarised the relevant principles as follows:

[53] "[57] Res ipsa loquitur therefore applies where (i) the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Linell, [19 Ed], para. 8-152 provide an illustrative short-list from the decided cases: 'bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns'); (ii) the thing that inflicted the damage was under the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place.

---

[4] Charlesworth & Percy on Negligence, 10th edn, 2001 p. 351

[54] As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on Henderson v Jenkins & Sons [[1970] RTR 70, 81 – 82], that *'Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine'."* (Emphasis supplied)

[55] In the seminal case of **Scott v The London and St Katherine Docks Co.** (1865) 3 H & C 596, 601, in which bags of sugar being lowered by a crane from a warehouse by the defendants' servants fell and struck the plaintiff, Erle CJ said this:

> *"But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care."*

[56] In **Ng Chun Pui v Lee Chuen Tat** [1988] UKPC 7, Lord Griffiths considered (at page 300) that the phrase res ipsa loquitur was "no more than the use of a latin maxim to describe a state of the evidence from which it is proper to draw an inference of negligence". While the operation of the rule does not displace or lessen the claimant's burden of proving negligence in any way, its effect is that –

> *"...in an appropriate case the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident."*
>
> *Lord Bridge then went on to adopt dicta from two earlier cases as to the true meaning and effect of the maxim. The first is Henderson v Henry E Jenkins & Sons [1970] RTR 70, 81 – 82, in which Lord Pearson observed that "...if in the course of the trial there is proved a set of facts which raises*

a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference". The second is Lloyde v West Midlands Gas Board [1971] 1 WLR 749, 755, in which Megaw LJ said that the maxim does no more than describe a "common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances...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".

[57] In other words, if the "facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether on the facts as established, negligence is to be inferred or not."[5] The more credible and probable of the facts raised is a matter for the court. Res ipsa loquitur does not apply in the instant case.

Discussion

[58] The claimants have all filed identical pleadings which state that Mr. Barker drove at an excessive and improper speed. The claimants have led no evidence to support this aspect of their case.

---

[5] (See Barkway v South Whales Trasnsport Co. Ltd [1950] 1 A.E. Report 392 at page 395 per Lord Porter.)

[59] It was suggested in cross-examination of Mr. Bell that he had not turned his headlights and in light of the poor visibility, he caused the accident, Mr. Barker not being able to see him. These were suggestions which Mr Bell denied, while there was no objection to this evidence which had not been pleaded as part of the statement of case of the defendants, it offends Rule 10.5(1) which provides that :

> *"The defence must set out all the facts on which the defendant relied to dispute the claim."*

[60] No permission was sought to rely on this particular allegation which had not been set out in the defence but which could have been pursuant to rule 10.7. No weight shall be placed on this evidence. Similarly affected was the suggestion that the claimant's vehicle had airbags which failed to deploy as the accident was minor in nature.

[61] It was suggested to Mr. Bell that it had been a rainy morning with poor visibility, with which he disagreed. The defendant Deon Barker testified that though visibility was poor it did not affect seeing his ability to see outside of vehicle, it was visibility inside of vehicle which was affected. His responses in cross-examination that he did not see the Lancer is evidence upon which the court can make a finding.

[62] In cross examination it was suggested to Mrs Bell that visibility was so poor that she heard the collision rather than saw it. She responded that she had felt the collision and not seen it but disagreed that poor visibility was the reason as it was neither dark, raining nor were there dark clouds. This is interesting as it was the defendant's evidence that the poor visibility was not outside his vehicle but inside of it.

[63] Mr. Barker's responses appear to demonstrate that at the time he commenced his manoeuvre he did not see the vehicle driven by Mr. Bell. There was no evidence that Mr. Barker signalled his intended manoeuvre, thereby giving Mr. Bell a warning that he desired to re-enter traffic and to change direction. Mr.

Barker said that he had checked his mirror there was no evidence that Mr. Barker checked his mirror again before fully leaving the shoulder and embarking on the turn. He did not look over his shoulder as the evidence was that visibility inside his vehicle, was poor nor did he turn his window down to clear the air inside his vehicle, for there was no evidence that he had. There was no evidence that Mr. Barker took any steps to keep a proper lookout. There was a duty on Mr. Barker to ensure that the way was clear and that he could change direction without risk to other users of the road. He failed in this duty. Therefore the cause of the accident was due to Mr. Barker attempting to change direction when it was unsafe to do so. He afforded Mr Bell no opportunity of avoiding the collision. It was the manoeuvre of Mr. Barker which caused the collision and in those circumstances the other driver did nothing to contribute to the accident. Mr. Barker is solely liable for the collision.

[64] Mr. Gordon argued in respect of Lloyd Bell that this was a minor accident and in so doing, he challenged the findings of Dr Dundas. The parts of the agreed medical evidence which were in dispute and the nature of the dispute were not set out in the defence pursuant to Rule 10.6(2)(b). The overriding objective dictates that the defendants case nonetheless be dealt with justly as Mr Gordon's central argument was that this was a minor collision with exaggerated claims filed on behalf of each claimant to profit from the defendants.

[65] Mr Gordon submitted that the claimants should not be believed based on what they told Dr. Dundas happened in the collision. Counsel argued that the court should use this evidence to find that all three claimants were unreliable and untruthful witnesses who should not be relied upon, as the veracity of their evidence had been critically undermined as regards their evidence to the court and their narrative to their doctors.

[66] Mr. Lloyd Bell submitted two reports signed by Dr. Sangappa as part of his statement of case. In a report dated January 13, 2012 the doctor said Mr. Bell had been unable to work for a few weeks. There was no medical or other

evidence as to how the injury affected Mr. Bell's occupation or the dates on which he would have been so affected.

[67] What is noteworthy is the distinction between the reports of Dr. Sangappa and the physiotherapist. By the date of the second review, Mr. Bell had been discharged from physiotherapy with no pain on August 16, 2011. This was approximately a month and a half after the collision. The report of Dr. Sangappa suggests that Mr. Bell was still in considerable pain on the 23rd of September, 2011. There was no indication that he had returned for physiotherapy sessions in his witness statement. There was also no explanation in the evidence for the distinction between the reports of Dr. Sangappa and the Sathya Gogineni after August 16, 2011.

[68] Almost a year after the collision, Mr Bell saw Dr. Dundas on June 27, 2012 who diagnosed right shoulder strain. The doctor queried a possible rotator cuff injury and lumbar disc prolapse and to this end referred the claimant for MRI scans of the right shoulder and lumbo-sacral spine having reviewed X-rays of the shoulder and lumbar spine.

[69] The MRI report dated July 4, 2012 was reviewed in a further consultation with Dr. Dundas. In a report dated September 19, 2012, Dr. Dundas diagnosed a rotator cuff tear which was more severe than the clinical impression. The lumbar spine showed some correlation to the scan in terms of the spinal discomfort and the lower limb deficits. The physical signs exceeded the description presented in the scan. Dr. Dundas assessed the upper extremity impairment at 3% of the whole person and the lumbar spine impairment at 19% whole person and a 21% total whole person impairment.

[70] While I am not entirely in agreement with Mr Gordon that this was a minor collision, there is an element of exaggeration and inflation of the claims which weakened the case of each claimant. There was no referral to Dr Dundas whom each claimant saw one year after the accident. Each claimant has produced a medical report and further medical report from Dr Sangappa in which he states

that his initial diagnosis had changed and each claimant was considerably improved and had reduced pain from the injuries sustained. Any additional pain could be managed with physiotherapy. The physiotherapist found that each claimant was discharged pain free and with normal muscle movement. Mr Bell suffered the most serious injury and it was Dr Dundas who diagnosed the rotator cuff tear. There was no evidence to connect the need for orthopaedic intervention to the collision one year before on the part of Mrs Bell and Miss Mason. It is the claimants who have produced these reports which have raised discrepancies on each claim as to the medical evidence before the court.

Assessment of damages

[71] Both counsel cited many cases in order to assist the court to arrive at the appropriate figure for pain and suffering. They have all reviewed and considered only the most appropriate have been set out as that upon which the findings were based.

General damages – Lloyd Bell

[72] In the case of Merdella Grant v Wyndham Hotel Company Limited. Suit No. C.L. 1989 G045 a decision of Walker, J on July 7, 1996 in which the claimant was hospitalised for seven days in traction. She had severe pain throughout her entire body particularly in the back and legs. She was unable to walk on being discharged and remained in bed at home for three weeks. She was found to have suffered a fracture of the transverse process of 5th lumbar vertebra. Further reviews led to a diagnosis of median hernia at L4 – L5 with degeneration at L3 – L4. The claimant was treated for sciatic pain which improved immediately with injection at each of those levels. Her lower back pain improved gradually. The last review showed a herniated disc at L5 – S1 level. She was assessed as having a 25% permanent partial disability with a prognosis of continued lifelong physiotherapy and semi-annual doctor's visits. She had to retire from her present employment and opt for a more sedentary job in the future. She could not longer lift, standing and sitting would aggravate her condition.

[73] Mr Bell was assessed as having a 25% whole person impairment of 21%. The back injury was assessed at 19% and the shoulder injury 3%. Mr Bell's assessment was in the reverse order with his shoulder assessed at 3% and his lumbar spine at 19%. Merdella Grant had an impairment rating of PPD 25%. Mr. Bell had a whole person disability of 21% with a comparable back injury, greater impairment was ascribed to the back – 19% and 3% to the shoulder. Merdella Grant had injuries which required hospitalisation, severe pain throughout her body and she was immobile on discharge. She remained at home in bed for three weeks. Her injuries were considerably more serious than those of Mr. Bell, with a 4% higher whole person rating. The award of $1,400,000 updates to $8,495,356.07. That award will be reduced by 50% taking into account the severity of the injuries suffered by Merdella Grant, the lack of a sufficient nexus in the evidence to the rotator cuff tear diagnosed one year later, the presence of degenerative disc disease and the clinical findings of Dr Dundas which exceeded the clinical details presented by the MRI scan, the dichotomy presented in the statement of case as the pain in the shoulder which had subsided in the reports of Dr Sangappa and the physiotherapist. Taking all these factors into account. The sum of $4,000,000.00 is awarded as general damages for pain and suffering.

Special damages proven total $219,510.00 and that will be the award made under this head.

Handicap on the labour market

[74] The case of **Moeliker v. A Reyrolle and Co Ltd** (1977) 1 All E.R. 9 sets out the principles that are to guide a trial judge when assessing an award for handicap on the labour market. The court first considers, where the claimant is employed at the time of the trial, what is the risk that he will at some point before the end of his working life, lose his job and be thrown on the labour market. The court is to determine if this is a substantial or real risk based on the facts of each particular case. If the court comes to the conclusion that there is no substantial or real risk,

then no damages are recoverable under this head. If, however, the court decides that this risk exists, it must assess and quantify it in damages.

[75] Some of the factors that the court are to take into account when determining the existence of this real or substantial risk includes the age and qualifications of the claimant, his length of service, his remaining length of working life, the nature and prospects of the employer's business, the nature of his disability and any statement of intention or undertaking by his employers as to his future employment. There has been no evidence from any of the claimants upon which to base a finding under this head.

General damages – Michelle Bell

[76] In the case of St. Helen Gordon v Royland McKenzie reported at Khan Volume 5 page 152, the claimant sustained whiplash injury and with pain centred around her neck and shoulder. The disability rating assessed was 3% of the whole person. Mrs Bell did not wear the surgical collar prescribed and in so doing, has not mitigated her loss despite attending physiotherapy. The award of $400,000.00 made by Harrison, J on July 10, 1998 updates to $2,045069.25 and will be reduced to $1,700,000.00 as a result. Special damages proven amount to $167,500.00.

General damages - Narshaqune Mason

[77] In Dalton Barrett v Poinciana Bowen the claimant suffered from mechanical lower back pain, mild cervical strain, pain to left shoulder and left wrist. This claimant did not have a 1% whole person disability. The award updates to $1,844,879.52.

[78] In Melford Ricketts v Claudius Dennis which claimant sustained injuries similar to Miss Mason's without a whole person disability. The award updates to $1,821,205.00.

[79] The award for general damages for pain and suffering is $1,800,000.00.Special damages proven total $120,500.00.

Conclusion

[80] 1. Judgment for the claimants Lloyd Bell, Michelle Bell and Narshaqune Mason.

Lloyd Bell

2. General damages for pain and suffering: $4,000,000.00 with interest at 3% from November 28, 2012 to November 6, 2017

3. Special damages: $219,510.00 with interest at 3% from July 4, 2011 to November 6, 2017.

Michelle Bell

4. General damages for pain and suffering: $1,700,000.00 with interest at 3% from November 28, 2012 to November 6, 2017.

5. Special damages: $167,500.00 with interest at 3% from July 4, 2011 to November 6, 2017.

Narshaqune Mason

6. General damages for pain and suffering: $1,800,000.00 with interest at 3% from November 28, 2012 to November 6, 2017.

7. Special damages: $120,500 with interest at 3% from July 4, 2011 to November 6, 2017.

8. Costs to each claimant to be taxed if not agreed