



[2025] JMSC Civ.138

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 02230

BETWEEN	AUDREY JOHNSON	CLAIMANT
A N D	OWEN MASSEY	1ST DEFENDANT
A N D	JERMAINE BUTLER	2ND DEFENDANT

IN OPEN COURT

Ms. Shanique Scott instructed by Bignall Law for the Claimant

Ms. Althea Wilkins instructed by Dunbar & Co for the Defendants

HEARD: October 15, and November 14, 2025

Tort – Negligence – Personal Injury – Motor Vehicle Collision

Tort – Negligence – Breach of Duty of Care – Whether Claimant has proven that the 2nd Defendant Driver Caused Any Part of the Truck to Hit the Claimant.

Civil Practice and Procedure – Pleadings – Particulars of Claim – Rule 8.9A – Whether or not the Claimant’s Amended Particulars of Claim are Supported by the Evidence at Trial.

STAPLE J

[1] On the 30th September 2014, the Claimant alleges that she was hit down and her foot run over by the 2nd Defendant whilst driving a motor truck owned by the 1st Defendant. This unfortunate incident, she asserts, occurred along Cumberland Road in the Old Capital of Spanish Town in St. Catherine.

- [2] The Claimant asserts that as a consequence of the foregoing, she has suffered quite serious injuries, suffered other losses and incurred expenses. She is seeking to recover Damages from the Defendants.
- [3] The 1st Defendant denied any wrongdoing on his part and asserted that it was the Claimant who contributed to her own demise by coming into the road into the lawful pathway of the truck and so she was hit.
- [4] It is my duty to now determine whether or not the Claimant has satisfied me, on the balance of probabilities, that the Defendants are liable to her as she asserts.

THE LAW ON NEGLIGENCE

- [5] I remind myself that it is the Claimant who must satisfy me that it was more likely than not that the 1st Defendant owed her a duty of care and that her fall and injury was the consequence of the 1st Defendant's breach of that duty to her.
- [6] Lord Griffiths, in the case of ***Ng Chun Pui and Ng Wang King v Lee Chuen Tat et al***¹ reminds us of the burden and standard of proof in a negligence matter. He stated at pages 3 and 4 of his judgment that:

“The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred..... it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established.”

¹ [198] UK PC 7

- [7] Contrary to the assertion of the Claimant at paragraph 49 of their submissions, the Defendant has no burden to **prove** that he was not at fault or that he took steps to avoid the collision.
- [8] Negligence is proven by establishing that the 1st Defendant owed the Claimant a duty of care; that the 1st Defendant breached that duty; and that the breach led to loss, injury or damage to the Claimant that was foreseeable².
- [9] In establishing this duty of care, the damage to the Claimant caused by the Defendant's negligent act must have been foreseeable and there must exist a sufficient proximate relationship between the Claimant and the Defendant to make it just to impose this duty of care on the Defendant to the Claimant.

PLEADINGS – THEIR IMPORTANCE.

- [10] It is exceedingly important for the Claimant to set out all the material facts upon which they rely to ground their claim.
- [11] Rule 8.9 sets out the requirement for the Claimant to plead their case fully:

(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.

(2) Such statement must be as short as practicable.

(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.

....

- [12] This is given further power by rule 8.9A, which says that a Claimant cannot rely on any allegation or factual argument not set out in the particulars unless the Court gives permission.

² See the case of *Glenford Anderson v George Welch* [2012] JMCA Civ 43 at para 26.

- [13] The case of ***Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack***³ is instructive. This was an appeal to the Privy Council from the Court of Appeal of Trinidad and Tobago, regarding the interpretation to be placed on provisions in the Civil Proceedings Rules of Trinidad and Tobago. That case held, speaking generally, that the claimant's duty in setting out his or her case to include a short statement of all facts relied on, meant that each head of loss the claimant was seeking to recover should be identified in the statement of case. Where that was not done, an amendment is required.
- [14] The Privy Council had regard to the case of ***McPhilemy v Times Newspapers Ltd***⁴ and Lord Woolf's observation that even in the new CPR era, the Witness Statement was no substitute for a properly pleaded case and that parties were required to set out a short statement of **all the facts** being relied on by the pleader.
- [15] A pivotal case on this point is ***Rasheed Wilks v Donovan Williams***⁵. In that case, the Respondent (Defendant in the court below) failed to properly set out the facts in his defence that would show why the driver of his car, at the time of a fatal collision, was not acting as his servant and/or agent as asserted by the Claimant in her pleadings.
- [16] However, the Defendant/Respondent, inserted in his witness statement, more detailed evidence to support his defence. Counsel for the Appellant/Claimant objected, at the trial, to the evidence on the basis that those facts were not present in the Defence. The trial judge overruled the objection and allowed the evidence to be presented and relied upon. The Claimant/Appellant appealed this decision.

³ [2010] UKPC 15

⁴ [1999] 3 All ER 775

⁵ [2023] JMCA Civ 15

[17] The Court of Appeal allowed the appeal and ordered that those aspects of the Claimant's evidence that purported to give evidence of facts not pleaded in the defence could not be relied upon and should be struck out.

[18] Edwards JA, delivering the judgment of the Court of Appeal, said as follows from paragraphs 38-40:

"[38] The case of McPhilemy v Times Newspapers Limited was also cited by the appellant. This case held that pleadings were not made superfluous because of the requirement for witness statements, but that pleadings were still necessary "to mark out the parameters of the case being advanced by each party and to identify the issues and extent of the dispute between the parties" (emphasis mine). In that regard, it said, no more than a concise statement is required. At page 793 of that case, it was said that:

"What is important is that the pleadings should make clear the general nature of the case of the pleader."

[39] It is clear, therefore, that although only a short statement of facts is required, a witness statement cannot be issued as a substitute for it. Although the authorities mostly deal with the inadequacies in a claimant's statement of case, the principles would, obviously hold true for a defendant's statement of case.

[40] I, therefore, agree with the appellant that the respondent having failed to plead facts or information in his defence to dispute that Mrs Williams was driving his car as his servant and/or agent at the relevant time, he cannot now seek to do so in a witness statement..."

[19] Although the **Wilks** case had to do with the Defence, the same principles apply to the Particulars of Claim.

[20] A case which illustrates the application of the rule from the perspective of the Claimant is **Vinnett White v Sandra Brown & Anor**⁶. In this case, the Claimant

⁶ [2021] JMSC Civ. 151

did not plead that there was negligence on the part of the Defendant, due to failure to maintain the vehicle, and as such, she was not allowed to rely that evidence.

[21] In examining rule 8.9A, it was the court's view that this rule did not lay down any absolute position and left same to the discretion of the Judge. Pettigrew-Collins J went on to elaborate as set out below:

*“[40] Rule 8.9A does not lay down an absolute position. Built into that rule is a discretion that the judge is able to exercise. The court should consider whether the allegation or factual argument on which the claimant is seeking to rely and which was not set out in the particulars of claim, is a matter which could **[and I would add should (emphasis mine)]** have been set out there. In deciding whether permission should be given to a claimant to rely on a particulars not pleaded, the court must consider the overriding objective.*

*[41] One can only include in one's particulars of claim information that is available or which with reasonable diligence, could have been available. Was it a matter that was within the knowledge of the claimant that the motor car was defective or was probably defective? There is no admissible evidence before this court that the claimant was aware that the vehicle had developed mechanical problems. She denied having said that much to the doctor. The doctor's report was not allowed in evidence. That the vehicle had developed mechanical problems was a matter put before the court on the defence's case as early as the time of the filing of the defence. **The claimant could in those circumstances have sought permission to amend her statement of case accordingly** (emphasis mine).*

[42] It would ordinarily, in my view, be absurd to say that in circumstances where evidence put forward by the defence in support of a particular defence demonstrates that the defence cannot be sustained, that the claimant should not be allowed to rely on that very evidence to conclude that the defendant was negligent. One conceivable reason for requiring that a claimant sets out any allegation or factual argument which is being relied on in the particulars of claim is so that the defendant is fully aware of the case that he or she is required to meet. The present circumstances do not lend to the defendant being taken by surprise. I note nevertheless, that even after the issue was raised towards the conclusion of the trial, no effort was made by the claimant to seek an amendment to meet the evidence. I do not in all the circumstances believe that she should be allowed to rely on the assertion that there was negligence by omission to maintain the vehicle, when that position was very clearly disclosed on the defendant's case and there was ample opportunity to seek an amendment to her statement of case, even at the very end.”

- [22] The point from my sister is well made. In the event, she found that the Claimant had failed to establish her pleaded case and she entered judgment for the Defendants. It was the judge's findings that in addition to the fact that the Claimant did not prove her own particulars of negligence (as pleaded), she could not rely on the Defendant's servant and/or agent's own admitted negligence in failing to properly maintain the vehicle (which led to the incident) as she did not plead this as part of her case.
- [23] Both parties placed reliance on a decision of this Court, as presently constituted, in *Jascinth Davis v Delroy Reid et al*⁷. In that case, the Claimant asserted that she had fallen down along the road way due to the fact that the 1st Defendant had placed steel in such a manner as to cause it to protrude in the roadway causing her to trip over same and fall. However, as it turned out, her evidence at trial revealed that it was not the 1st Defendant that had placed the steel in the road. Her evidence at trial was that the 1st Defendant knew that the steel was placed in the road in that manner, but did not take effective steps to remove same. Since this was not what was pleaded, the Court found that she had not proven her case.
- [24] The burden rests on a Claimant in civil proceedings to prove their **pleaded case** (emphasis mine). In the Supreme Court, a court of pleadings, pleadings are king. This is why rule 8.9A is so important. Your evidence must support your **pleaded case** (emphasis mine). So that if there is variance between the pleaded case and the evidence, the pleaded case ought to be amended (where possible) to comport with the evidence. This was the import of the *McPhilmey*⁸ decision as well as the *Wilks*⁹ decision.
- [25] Even where the pleadings are amended, the position as between the parties is reset and the Defendant(s) is/are at liberty to amend their defence to address the

⁷ [2025] JMSC Civ 97

⁸ Supra n. 4

⁹ Supra n. 5

new state of the pleadings¹⁰. Rule 20.3(1) allows a Defendant or a Claimant to amend their Defence or Defence to Counterclaim once without permission within forty-two (42) days of being served with an Amended Particulars of Claim or Counterclaim.

[26] In fact, if it is that the Claimant had obtained judgment in default on a set of pleadings, if the pleadings are amended, the judgment in default has to be set aside as a consequence, as the default is entered on the pleadings **in that state** (emphasis mine)¹¹. This emphasises the importance of the pleaded case as being the foundation of civil litigation in the Supreme Court.

[27] A court should be very hesitant to accede to a request to allow evidence that is at variance with pleadings. This is especially so where the evidence seeks to advance to different facts from what was pleaded. According to our Court of Appeal, a “cause of action” is, “...every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.”¹²

[28] So if the evidence being adduced, is at variance with the pleaded facts, and those pleaded facts form essential parts of the cause of action, then to allow the variance, is, in my view, tantamount to altering the cause of action. Now there may be instances when this is permissible. However, the matter is complicated if the evidence arises after the expiration of a limitation period.

[29] The Court of Appeal has stated that rule 20.6 cannot be used to amend particulars of claim after the expiration of the limitation period except in certain circumstances

¹⁰ See the decision of the Supreme Court of Appeal of South Africa in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 per Wallis JA at paras 14 and 15.

¹¹ See the case of *Pulane Qhamakoane (“PQ”) v Road Accident Fund (“RAF”)* High Court South Africa, August 12, 2024, Kruger AJ and see rule 20.3(1) as stated above.

¹² Per Harrison JA in *Medical and Immunodiagnostic Laboratory Limited v Dorrett O’Meally Johnson* [2010] JMCA Civ 42 at para 4, quoting with approval from the decision in *Read v Brown* (1888) 22 QBD 128, 131.

which do not apply here¹³. Therefore, my view is that the Court has no discretion, under rule 8.9A, to allow material into evidence, which is at variance with the pleaded factual elements of the cause of action, once it is outside of the limitation period, as that would be tantamount to amending the factual elements of the cause of action (and thus a new cause of action) outside of the limitation period, which is impermissible in my view.

THE CLAIMANT'S PLEADED CASE AFTER INITIAL AMENDMENT

[30] The Claimant had amended her pleadings once before the limitation period. The claim proceeded on this Amended Particulars of Claim.

[31] The material part of the claim comes in the form of the Particulars of Negligence. In particular, at paragraph j. I will set it out below:

j. Failed to keep the International Freightliner Motor Truck lettered CK 3526 he was driving at all material times, on a safe path along the roadway. Being that said Motor Truck was driven without due care and attention, and encroached upon the sidewalk and collided into the Claimant, who was a pedestrian, on the sidewalk when the collision occurred at all material times, causing the Claimant to suffer injury, loss and damage and incur expense.

[32] This is a material part of the Claimant's cause of action. It is part of setting out the breach of duty of care. Remember, the tort of Negligence is comprised largely of three (3) elements – duty of care; breach of duty; and damage resulting from the breach. I treated this section more as their requirement to comply with rules 8.9(1) and (2) (the duty to set out the facts). The rest of the Particulars of Negligence are really elaborating on this portion of the claim¹⁴.

¹³ *Jamaica Railway Corp v Mark Azan* (Court of Appeal, Jamaica, February 16, 2006, K. Harrison JA) at paras 27 and 29(i) (where 29(i) says that if the new pleadings introduces a new distinct allegation then it is a new cause of action). I also take issue with 29(iii) (where a new cause of action may be added if it arises out of the same facts) as we have no legislative basis for such an amendment and in any event our rule 20.6 does not allow for a new cause of action to be added. But, as it is a decision of the Court of Appeal, I am bound by same.

¹⁴ See my discussion on same in the *Jascinth Davis* case at n. 7 paras 41-42

- [33] This was traversed by the Defendant in their amended defence.
- [34] The cause of action arose on September 30, 2014. Therefore, at the time of filing and serving the witness statement, the limitation period would have long expired.
- [35] The cause of action therefore remained as it was on May 13, 2020. What is significant about this is that it crystalized the nature of the duty owed as being one owed between driver of a motor vehicle and a pedestrian walking on a sidewalk.

THE EVIDENCE AT TRIAL

- [36] In the Claimant's witness statement, at paragraphs 3 and 4, she gives a detailed account of what happened to her. She indicated that she was serving a customer in a vehicle on the right hand side of the road along Cumberland Road in Spanish Town. She said she saw the truck coming at a glance and then turned her attention to her customer again. The door of the truck then hit her as it passed.
- [37] On this evidence, there is actually no basis in law for *res ipsa loquitur* as pleaded in her Amended Particulars of Claim.
- [38] Before the Claimant's witness statement was allowed to stand as her evidence in chief, counsel for the 1st Defendant (Ms. Wilkins) applied to remove those paragraphs from her witness statement as being in violation of rule 8.9A. She argued that it was too vague. Ms. Scott argued that the paragraphs could be interpreted to be consistent with the pleading and was an elaboration of the pleading.
- [39] Having read the pleadings and read the witness statement, I was minded to agree and ruled accordingly to allow it to proceed. However, upon further reflection and having heard further evidence from the Claimant, it became apparent that the Claimant's evidence did not accord with the pleadings and as such, I have now determined that I cannot allow the Claimant to rely on it insofar as it is at variance with her pleaded case.

[40] This is because in questioning from the Court, the Claimant gave evidence that she was standing in the road beside the car when she was hit by the door and she was not on the sidewalk.

[41] The witness statement made absolutely no mention of the truck mounting the sidewalk and hitting her. Indeed, many salient facts were left out from the pleadings. The following exchange in cross-examination was telling:

8 **Q:** Do you see your signature on the Amended POC filed on the 13th May 2020?

A: Yes. I see my signature.

9 **Q:** It is correct to say you signed the Amended POC as being truthful?

A: Yes.

10 **Q:** [Paragraph 5j of Witness Statement shown to witness.] Would you agree that nowhere there did you say that the door of the truck hit you?

A: I agree. It is not there.

11 **Q:** Would you also agree with me that it does not say in that section that you fell to the ground?

A:No, it does not.

12 **Q:** Would you also agree with me that it does not say that the truck ran over your foot?

A:No, it does not.

[42] The evidence presented is at variance with the pleadings. In the pleadings, there was encroachment on the sidewalk and she got hit on the sidewalk. The evidence presents a different picture altogether. Indeed, it has changed the precise nature of the duty owed between the Defendant and the Claimant. In my view, the duty owed is broadly similar, but subtly different. Especially in the context of the 1st

Defendant's case that the Claimant exposed herself to the danger by stepping out into the road suddenly.

[43] The Claimant sought to argue, at paragraph 36 of her submissions filed on the 4th November 2025, that she was a pedestrian. But that is not true and flies in the face of the evidence. She was not a pedestrian. In this context, a pedestrian is a person **walking** (emphasis mine). She was a vendor and acting as such at the time of the incident on her own case.

[44] At paragraph 47 of the submissions, she asserted that there was no evidence from the 2nd Defendant to show that he did not encroach on the sidewalk. Firstly, it is my finding that the Claimant's evidence reveals she was not on the sidewalk. Secondly, and more importantly, it is her duty to satisfy me both evidentially and legally, on the balance of probabilities, of her case. So even if the 2nd Defendant produced no such evidence or I rejected his evidence, the Claimant must discharge her evidential and legal burden.

[45] The Claimant sought to rely on ***Shanagay Samules-Bennett v Maurene Adams***¹⁵ wherein this Court found that a Claimant had contributed 20% to her injury sustained as a result of a motor vehicle collision with the Defendant. In that case, the Claimant had properly and clearly pleaded that she was walking along the roadway when she was hit from behind by the Defendant who was driving behind her. There was no issue as to the location of the collision or how it occurred on the pleadings. So that case is clearly distinguishable from the case at bar.

[46] The Claimant has simply not proven her pleaded case.

¹⁵ [2025] JMSC Civ 87

CLAIMANT'S CREDIBILITY UNDERMINED

- [47]** The pleadings issue aside, the evidence also undermines the credibility of the Claimant in any event. One of the telling bits of evidence that emerged on cross-examination is the varying accounts of the same incident given by the Claimant to her treating physicians.
- [48]** She admitted to giving an account to the doctor at the Spanish Town Hospital (where she was treated on the same day of the incident) that she was hit down by a car.
- [49]** She then admitted to telling Dr. Howell that she was standing at a bus stop when she was hit down by a truck. She then explained that she was not standing at a bus stop. But then why give that account to the doctor?
- [50]** The account to Dr. Ameeraly was the first time she was setting out how the collision happened that accords with her evidence, but it still was at variance with her pleaded case.
- [51]** In short, none of her accounts to her treating physicians accords with her pleaded case and only one accords with her evidence. It was put to her by Ms. Wilkins that her account of the accident changed as the years went by. The Claimant agreed that some things did change.
- [52]** It is my finding that the Claimant has failed to prove that she was ever on the sidewalk at all. I cannot and do not find that the truck encroached on the sidewalk and hit her down as she pleaded.
- [53]** In cross-examination, the Claimant said the following,

52 **Q:** Do you agree that when you turned your attention back to the customer, that your back was now to the roadway?

A: No. My face was turned to where the truck was coming from.

53 **J**: the front of your body was facing where the truck was coming from?

A: Yes. **The vehicle that I was serving was to my left (emphasis mine).** The truck was pass on my right side.

[54] Later down she said this in answer to a question from the tribunal,

J : Which side of the car were you on?

A: I was on the left side of the car.

[55] Suffice to say that the Claimant cannot be in two places at once. She said at first that the vehicle was to her left. Then she said she was on the left side of the car. She also said that the car was facing the same direction as the truck and that she was on the right side of the road. She also said that Cumberland Road is a one way.

[56] Therefore, on one account, she would be on the sidewalk beside the car and on the other she would be in the road beside the car.

[57] It cannot be that she was on the sidewalk beside the car serving the customer when she got hit as there was no evidence that the car she was serving got hit. Bearing in mind that her evidence is that it was the door of the truck that hit her.

[58] The only account that would make sense is for her to have been on the left side of the car. But again, this inconsistency was never resolved despite the Court's best efforts to clarify same.

[59] I do not accept her evidence that she saw the door of the truck open before being hit. For one thing, there are several differing accounts of the same incident to which she has admitted giving, rendering any version unreliable. Secondly, if you saw the door of the truck open and approaching you, why would you simply remain where you are, exposed to being hit? Logic would suggest that you would take some evasive action. She said she saw the truck coming to her before it hit her. Presumably then she saw the opened door coming towards her yet did nothing but turn her attention back to her customer. This makes no sense. I reject it.

[60] The 2nd Defendant's evidence in this regard was preferred. He said the door was latched onto the truck. He was not even aware of the fact that the Claimant was hit. He was alerted to an incident by his assistant. In that regard, I cannot say that even he knew exactly what transpired. The Claimant, in her submissions, has attempted to rely on this evidence from the assistant as proof of the truth of what happened. This is hearsay evidence and I cannot rely on same. But even so, what the assistant said is that, "it looked as if¹⁶" the back wheel ran over a woman's foot. This evidence, by itself, does not automatically mean that there was a breach of duty on the part of the driver.

[61] In any event, there was no pleading about this door and this was not at all foreshadowed in the pleadings and so I would not rely on this aspect of her evidence.

CONCLUSION

[62] Despite the urgings of the Claimant, I am not satisfied, on the balance of probabilities, that she has established her case as pleaded. There was no collision on the sidewalk. She was not a pedestrian on the sidewalk.

[63] Her accounts to her treating physicians do not cohere with each other, with the pleadings (save one) or with her own evidence in the matter.

[64] I did not find her to be a credible and reliable witness as to how this collision occurred and she has not discharged, to my satisfaction, her legal and evidential burden.

[65] I therefore award judgment to the 1st Defendant.

¹⁶ See paragraph 5 line 7 of the 2nd Defendant's witness statement

DISPOSITION

- 1 Judgment to the 1st Defendant
- 2 Costs to the 1st Defendant to be taxed if not agreed.

.....
Dale Staple
Puisne Judge