



[2017] JMSC Civ 129

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007HCV01082

BETWEEN	DAVID VICKERS	CLAIMANT
AND	DEVON JOHNSON	DEFENDANT

IN OPEN COURT

Ms Marion Rose-Green and Ms Andrea Lannaman instructed by Marion Rose-Green & Co. for the Claimant

Mr Kwame Gordon instructed by Samuda & Johnson for the Defendant

HEARD: June 29 & 30 and October 10, 2017

NEGLIGENCE – MOTOR VEHICLE ACCIDENT – PEDESTRIAN CROSSING ROAD FROM IN FRONT OF PARKED BUS – COLLISION WITH MOTOR CAR PASSING PARKED BUS – CREDIBILITY OF PARTIES – LIABILITY

LINDO, J

- [1] On or about June 28, 2002, the Claimant, David Vickers, a landscaper, was crossing the Constant Spring Road in the vicinity of the intersection of Shortwood Road and Constant Spring Road when there was a collision with motor vehicle registered 4645BV, driven by the Defendant, Devon Johnson, and he sustained injuries.
- [2] He claims to recover damages against the Defendant for negligence as a result of injuries he sustained. On March 8, 2007, he filed a Claim Form and Particulars of Claim in which he alleges that the Defendant “so negligently managed and/or controlled his motor vehicle..., overtaking a line of traffic,

including other motor vehicles in front that had stopped..., causing same to collide with the Claimant and as a consequence the Claimant sustained serious personal injuries, suffered loss and damage and incurred expenses.”

[3] On January 12, 2016 he filed an Amended Particulars of Claim in which he contended that the Defendant was negligent for the following reasons:

- a. Driving at a speed which was excessive in the circumstances
- b. Failing to have any or any sufficient regard for pedestrians using the roadway, in particularly(sic) the Claimant
- c. Failing to keep any or any proper lookout along the roadway
- d. Overtaking a line of traffic at a time when and where it was dangerous so to do
- e. Failing to heed the presence of the motor vehicles that had stopped to allow the Claimant to cross the roadway
- f. Failing to give the Claimant any or any proper warning of his approach
- g. Overtaking the vehicles that had stopped to allow the Claimant to cross
- h. Failing to wait until the Claimant had crossed the roadway in safety before overtaking a line of traffic and/or the motor vehicles that had stopped to allow the Claimant to cross the roadway
- i. Colliding with the Claimant
- j. Failing to stop, slow down, to swerve, or in any other way so to manage or control the motor vehicle as to avoid the collision

[4] The Claimant filed a Further Amended Particulars of Claim on February 17, 2017, in which he contends, *inter alia*, that he “was using the pedestrian crossing at the material time”.

The Claimant's Evidence

- [5] The Claimant filed a witness statement on February 17, 2017 and a supplemental witness statement dated June 15, 2017. At the trial, the supplemental witness statement was allowed to stand as his evidence in chief after he was sworn and it was identified by him (paragraph 33 was struck as hearsay). The evidence contained in the supplemental witness statement is that the Jamaica Urban Transit Company (JUTC) bus in which he was travelling, stopped in the vicinity of Constant Spring Road and Shortwood Road and he exited on the sidewalk "close to a pedestrian crossing immediately above the said bus stop" and immediately went to the pedestrian crossing.
- [6] He states further that the bus was still at the bus stop, the driver held out his hand, there was a steady line of traffic coming down Constant Spring Road and he held out his hand for those vehicles to stop and they stopped. He also states that he "went a little in front of the JUTC bus and pushed [his] head around the said bus and [he] looked down Constant Spring Road and saw about four vehicles that came to a standstill behind the said JUTC bus". He adds that he looked up and down again and when he saw that vehicles travelling in both directions had come to a stop, he proceeded to cross the road and on reaching about the middle of the road, "he saw when the Defendant's vehicle overtook three of the vehicles, including the said JUTC bus..." and thereby collided into him.
- [7] He indicates that he felt an impact to the right side of his body and lost consciousness and when he regained consciousness he was in the motor vehicle that hit him down. His evidence also is that the driver transported him to his workplace and then to Shortwood Road where he put him on a taxi and paid the taxi man to take him to the University Hospital of the West Indies (UHWI) where he was treated and admitted for six days.

- [8] Under cross examination by Mr Gordon, the Claimant agreed that the bus stop was by a bus shed and there was a sign marked "bus stop" just before the bus shed. He said the distance between the bus sign and the bus shed was about five feet and he pointed out a distance of between 13 -15 feet to the court. He indicated that the bus stopped at the bus shed and he exited at the front left of the bus which he described as "double decker" and "chain bus". He stated that he attempted to cross the road in front of the bus which was to his left and that he was facing "up Constant Spring Road like going to Manor Park" and that his back was facing Half Way Tree. He also said his back was to the front of the bus and when confronted with his witness statement filed February 17, 2017, (which was admitted in evidence) he stated that the bus was behind him while he was on the pedestrian crossing. When asked if he could touch the front of the bus, he said he had no idea how far the bus was.
- [9] He indicated that the "second part" of the bus passed the bus shed before it came to a stop. He admitted to knowing the entrance to Queen's Preparatory School (QPS) and said it was above the bus stop, going to Manor Park. He agreed that the pedestrian crossing is above the bus shed heading to Stony Hill but disagreed that it is above the entrance to QPS, heading to the direction of Stony Hill.
- [10] When asked about a "big tree" on the other side of Constant Spring Road, he stated that he knew about it "since of late" and he maintained that at the time of the accident the pedestrian crossing was not above the entrance to QPS.
- [11] He agreed that being struck on a pedestrian crossing is serious and stated that he told his lawyer, but when it was suggested to him that nowhere in his claim was there any allegation that he was struck while on the pedestrian crossing, he failed to answer. He then stated that the pedestrian crossing was about three feet in front of the bus and when asked to point out the distance, he failed to do so. When pressed in relation to how far from the bus shed was the front of the bus, he said, "it is difficult to tell you", and when asked if the back of the bus was

at the bus shed, he said it was in line with the bus shed and then said he was not quite sure.

- [12] He was adamant that the distance from the bus shed to the entrance to QPS was "much more than that", when asked if it was approximately 10 feet, and he pointed out a distance of approximately 25 feet to the court. He indicated that he was not sure if the pedestrian crossing "that is there now" is at the entrance to QPS, but indicated that it is not where it was at the time of the accident. He said that at the time of the accident, the bus shed was "a good little distance" from the pedestrian crossing, heading up Constant Spring Road and when pressed, he pointed out a distance estimated at about 14 or 15 feet.
- [13] He stated that when the bus stopped and he disembarked, the bus did not move at any time before the accident, it did not block the entrance to QPS and that when he was on the last step to disembark, the entrance to QPS was to his left and he came "front way off the bus". He then stated that he did not think the direction of Stony Hill, would be to his right and when asked what would be to his right, he said "yes to the direction of Stony Hill". He then said to his left would be the direction of Half Way Tree Road and that the entrance to QPS would be to his right, but that he "couldn't tell" how far to his right it was. He then indicated that the pedestrian crossing was about 6 feet to his right and that he would reach the pedestrian crossing first, before reaching the entrance to QPS.
- [14] When asked how far the Defendant's vehicle was when he saw it, he said "I can't say". He said he lost consciousness and "gained some consciousness" while in the Defendant's vehicle which was stationary. He stated that he did not speak to the Defendant at that time and the Defendant did not speak to him when he took him to his workplace and that it is at his workplace he "gained some consciousness". He said he did not know the Defendant before and he did not know if the Defendant knew him before.

[15] When it was suggested to him that if anyone said he regained consciousness at the hospital it would not be the truth, he failed to respond and when other suggestions in relation to the Defendant's version of the accident were made to him in answer to each one, he abruptly said, "negative" and added that he did not know about the Defendant helping him to his feet and into his vehicle. He admitted that he was heading to work and that he did not have to cross the road to go to work. He also admitted that he was going across the road to purchase something to eat, but indicated that that was not what he told the Defendant after the collision.

[16] When questioned in relation to costs which he claimed to have incurred as a result of the accident, he said it was true he had to pay "A. Bedward" to take him to the hospital on the day of the accident and when asked whether he had to go to the hospital more than once, on any day, or if there was ever an occasion when he would use "A. Bedward" and "Pratt" on the same day, he said "my memory is not there now". When it was suggested to him that none of the medical reports speak to injury to his right hand, he said he did not know of it and stated that he could not recall if he had injury to his back or spine or if the medical reports mentioned injury to his back. He also said he could not recall who was 'J. Wilson', then said he did not know a 'J. Wilson' and admitted that he was employed to Health Corporation Limited in 2004.

The Defendant's Case

[17] By way of a Further Amended Defence, the Defendant admits that he was involved in a motor vehicle accident with the Claimant but denies that he was negligent. He also denies that the Claimant was on the pedestrian crossing and says that the collision was caused by the negligence of the Claimant. His allegations of negligence on the part of the Claimant have been particularized in the Further Amended Defence as follows:

- a. Failed to keep any or any proper look out or to have any or sufficient regard for his own safety while crossing the said road;
- b. Failed to pay any or any sufficient heed to the presence of the traffic along the said road particularly the said motor vehicle driven by the Defendant
- c. Suddenly and without warning ran from in front of a stationary motor bus into the path of the Defendant's said motor vehicle which was passing the said motor bus without giving the Defendant any or any reasonable opportunity to avoid the said collision;
- d. Crossed or attempted to cross the said road in a reckless (sic) and when it was unsafe and dangerous so to do;
- e. Failed to take any or any proper care in crossing the said road;
- f. Ran into the left front fender of the said motor vehicle being driven by the Defendant

[18] The evidence in chief of the Defendant is contained in his witness statement filed and dated March 7, 2017. His evidence is that he was driving in a line of traffic with three cars and a JUTC bus ahead of him along Constant Spring Road about 6:30 – 7 am. He states that the vehicles had stopped at the traffic light, they then drove through on the green light and the bus immediately thereafter stopped at the bus stop. He states further that the cars ahead of him passed the bus and just as the front of his car had passed the bus “the man ran from the front of the bus and collided with the front of my car and then rolled onto the bonnet”.

[19] He adds that he stopped immediately, he did not see him before he ran from in front of the bus and that he “stepped onto his brakes” and that it happened suddenly. He also states that after the accident the man was not unconscious and that he sat down in front of the car, and he pulled him up and put him in his car. He also states that the Claimant asked him to take him to his workplace and he did so and then he gave him \$500.00 and put him on a taxi to go to the hospital.

- [20]** In amplifying his statement, he gave evidence that he had been driving for about twenty years up to the time of the accident and that he used the Constant Spring Road very often and was familiar with that road. He also indicated that there is a pedestrian crossing at the QPS; there is the bus stop, a little gate leading into QPS and the pedestrian crossing, heading to Constant Spring direction. He added that the pedestrian crossing is about three to four feet from the little gate.
- [21]** When cross examined, as to what point on the journey he first saw the bus, he indicated that he was travelling behind the bus from Constant Spring Road, "corner of Eastwood Park Road and Constant Spring Road and that is where I catch up". He admitted that there were three vehicles between his vehicle and the bus "and me mek four". He indicated that before reaching Central Avenue, from the time he saw the bus, it did not make any stop, but that it stopped at the intersection of Central Avenue at the traffic light and then it pulled over letting off passengers.
- [22]** He admitted that a lot of vehicles were on the road and agreed that there were two lanes, one to Stony Hill and one to Half Way Tree. He said that the bus was not an articulated bus, but a single deck bus, as "you don't have those types of bus in Constant Spring".
- [23]** He agreed that when approaching a bus stop you have to take special precaution and stated that when the bus stopped, he had it in mind that somebody may be coming off and "you have to drive with caution". He admitted that he could not see a person in front of the bus and that at the point when the bus stopped, the cars in front of him were going up, and when it was his time to pass the bus, the Claimant hit onto the left side of the fender of his car, rolled over on the bonnet and when he stepped on his brakes, he rolled off in front of the car. He stated that vehicles were in the lane coming from Stony Hill and at the point of impact vehicles were passing in that lane.

- [24] He denied pulling out from a line of traffic and overtaking two cars and also denied that the bus driver had held out his hand. He stated that he lifted up the Claimant and put him in his car and that he looked at him and he had no "lick out" and "him talking strong and everything". He indicated that there was no one standing by, only the people who came out of the bus cursing "the man on the ground".
- [25] When asked if the Claimant was injured, the Defendant stated that he asked him and he said he was alright. He indicated that he was able to walk, but he just lift him up because "he sit right in front of the car". He said he did not tell him to get up but lifted him up on his two feet, lead him to the car door and that he did not appear to be injured. He agreed that "his second" helped him to lift him off the ground on his feet. He explained that when he said he lifted the Claimant, "like lift up something and put it, [he] didn't do that". He also indicated that when he took him to his workplace, the Claimant's boss said "probably him can be hurt" and that he should take him to the hospital.
- [26] The Defendant denied all the suggestions put to him by Counsel for the Claimant including that the claimant was on the pedestrian crossing and was emphatic in his denial that since the date of the accident the location of the pedestrian has changed.

The Submissions

- [27] At the end of the trial, Counsel for the parties were ordered to file closing submissions which they did. Although Counsel for the Claimant filed the submissions out of time on September 12, 2017, I allowed them to stand as if filed in time, and took them in consideration in coming to a determination in the matter.
- [28] Both Counsel, quite correctly, submitted that the issue to be determined was which version of the accident, on a balance of probabilities was more credible.

- [29] Counsel for the Defendant pointed out that the Claimant filed three sets of statements of case, and, save and except for the last set filed on February 17, 2017, he did not make mention that at the time of the collision he was on a pedestrian crossing, but indicated in cross examination that being struck on a pedestrian crossing was a serious matter.
- [30] Counsel expressed the view that the contention that the Claimant was on a pedestrian crossing was a recent fabrication. He critically examined the statements of the Claimant, pointing out that they contradict each other, and, as such, are unreliable and erode his credibility.
- [31] Mr Gordon further submitted that if the Defendant had overtaken the three vehicles and the JUTC bus, and strike the Claimant so quickly that he was unable to react, it would mean the Defendant was travelling at a considerable speed and if that were the case, the Claimant would have suffered far greater injuries than he claims. He also submitted that the evidence strongly suggests that the sole reason the collision occurred was because the Claimant ran into the roadway, from in front of the bus, and into the path of the Defendant's vehicle.
- [32] It was also pointed out by Counsel for the Defendant that the response of the Claimant, in cross examination, as it relates to him being unconscious and whether he spoke to the Defendant or the Defendant spoke to him, point to further inconsistencies in his evidence, as the Claimant was transported to his workplace by the Defendant although they did not know each other before the accident. He submitted that it was a reasonable and "very likely inference that the Claimant was conscious and had sufficient control of his mental faculties to direct the Defendant to his workplace".
- [33] Counsel submitted that the Defendant was at all times operating his vehicle within the parameters of the law and with the requisite care and skill when the Claimant sought to cross the road without ascertaining if it was safe to do so. He therefore urged the court to find in favour of the Defendant.

[34] Ms Rose-Green on behalf of the Claimant, pointed to the fact that the Defendant's counsel "made heavy weather" of the Claimant's failure to mention his use of the pedestrian crossing, in his first set of pleadings and first witness statement. She stated that the Claimant's position as to his use of the pedestrian crossing is not contrived and suggested that the Claimant was able to give clear and credible evidence of his use of the pedestrian crossing. She indicated that the Claimant's first witness statement did not detail "the exact mechanism of the accident" before he was struck down by the Defendant, but the Claimant was keen to mention the relevant details in his supplemental witness statement.

[35] Counsel examined the Defendant's evidence on cross examination and submitted that the Claimant's injuries are inconsistent with the Defendant's account, as the Claimant could not have ran into the side of the Defendant's "very, very slow" moving vehicle and receive such extensive injuries. She submitted further that from the evidence, it is reasonable to believe that the Defendant was speeding, and that it is reasonable to believe that the reason for him driving at such a fast speed would be because he had tight time constraints which necessitated him being in Saint Mary by ten that morning.

[36] On the issue of liability, Counsel indicated that where there are diverse accounts, as in this case, the court will need to look at independent physical evidence in making its determination. She pointed out that such a position was noted by Theobalds J in **Calvin Grant v David Pareendon and Augustus Pareendon**, Suit No. CL 1983 G. 108, unreported, delivered October 15, 1987 in which, at page 5, he said:

"Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious."

She noted that on appeal this approach was endorsed and upheld by the Court of Appeal in SCCA 91/ 87 (October 4, 1988). Counsel however, did not point to

any physical evidence save and except her reference to the injuries sustained by the Claimant and the particular areas of his body to which these were confined.

- [37] Counsel pointed out that in the use of a pedestrian crossing, pedestrians “are not expected to have a free and scant regard for other road users” and that motorists are asked to take care in approaching a pedestrian crossing. She submitted that from the Claimant’s evidence, he took due care in using the pedestrian crossing and “looked around the bus” before proceeding to cross the road.
- [38] She opined that “speed is considered to be a key component of the accident and the Defendant’s failure to see the Claimant in time so as to avoid the accident” and stated that when the speed at which the Defendant said he was travelling is set against the documented injuries sustained by the Claimant, “it undoubtedly raises the questions whether the Defendant was travelling “very, very slow” and whether it was the Claimant who hit into the Defendant’s vehicle”.
- [39] Counsel suggested that even with the Defendant challenging “loss of consciousness sustained by the Claimant, what is certain is that the doctors noted that he suffered head injury resulting in cerebral concussion, which is not consistent with a slow moving vehicle and a low impact collision”.
- [40] Ms Rose-Green urged the court to take into consideration the demeanour of the witnesses and their account of the accident as well as certain “other factors” which she listed, stating them as facts, but which I find are matters for the court’s determination.
- [41] Counsel also stated that the Defendant initially denied having a time constraint in reaching his destination but later admitted that he was required to be there by a certain time and from this one could infer that in his act of overtaking the vehicles and the bus, or his act of passing the bus, speeding was a factor. She made reference to the case of **Baker v Willoughby** [1969] 3 All ER 1528 at 1529-1530 where Lord Reid said:

“There were two elements in an assessment of liability causation and blameworthiness...A pedestrian has to look both sides as well as forwards. He is going at perhaps 3mph and at that speed he is rarely in danger to anyone else. The motorist has not got to look sideways although he may have to observe over a wide angle ahead; and if he is going at considerable speed he must not relax his observation, for the consequences may be disastrous...In my opinion it is quite possible that the motorist may be very much more to blame than the pedestrian.”

[42] Counsel also referred to **Davies v Swan Motor (Swansea) Co. Ltd** [1949] 2 KB 291 CA where Lord Denning noted that:

“when a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe any duty to a motorist who is going at an excessive speed to avoid being run down...”

[43] Counsel having made reference to the authorities above, pointed out quite correctly, that each case turns on its particular facts, and submitted further that if the court finds itself in a difficult position in arriving at a decision as to liability, the court “is required to find both parties equally liable...However, should the court find itself in such difficulty in the case at bar, the court is ask (sic) to find that the substantial cause...rest (sic) with the Defendant and apportion at least ninety percent of the blame on him”.

The issues

[44] The statements of case reveal that there is no dispute that the Claimant came into contact with the Defendant’s motor car on the date in question. What is in dispute is the manner in which the collision occurred and who is to be blamed, as both parties have advanced different versions of the events leading up to the collision and there is no independent eyewitness.

[45] Having examined the evidence of the two parties, and considered the submissions of Counsel, I agree that the resolution of this matter depends on credibility, and on which of the parties’ version of the events the court finds to be more probable, as I found several areas of factual dispute which have to be

considered in determining liability. These are whether the Claimant was crossing the road on a pedestrian crossing and was in the middle of the road and was hit by the Defendant; whether the Defendant was speeding excessively at the time of the accident, failed to see the Claimant in time and failed to take action to avoid the accident and whether the Defendant failed in his duty of care towards the Claimant and was negligent in all the circumstances of the case or whether the Claimant failed to take reasonable care when crossing the road.

The Law

[46] It is well settled that in every negligence claim, in order for the Claimant to succeed it must be established, on a balance of probabilities, that the Defendant owed to the Claimant at the material time a duty of care which has been breached and that damage to the Claimant resulted from that breach.

[47] It is also well settled that all users of the road owe a duty of care to other road users and that drivers of motor vehicles must exercise reasonable care to avoid causing injury to persons or damage to property. Reasonable care is the care which an ordinary, skilful driver would have exercised under all the circumstances. This includes avoiding excessive speed and keeping a proper lookout. (See **Bourhill v Young** [1943] AC 92) In this case, the Defendant, being the motorist, therefore owed a duty of care to the Claimant, the pedestrian.

[48] The standard of care required of the Defendant in exercising his duty of care is the care expected of a reasonable man. It was stated in the case of **Boss v Litton** [1832] 5 C& P 407 that:

“...all persons, paralytic as well as others, have a right to walk on the road and are entitled to the exercise of reasonable care on the part of persons driving carriages on it.”

[49] In the Privy Council decision of **Nance v British Columbia Electric Railway Co. Ltd.** [1951] AC 601, Viscount Simon, at page 611, said:

“Generally speaking when two parties are so moving in relation to one another so as to involve risk of a 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.”

- [50] Section 51(2) of the Road Traffic Act provides that a driver of a motor vehicle has a duty to take such action as may be necessary to avoid an accident. It states as follows:

“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”.

- [51] Although the standard of care required is the exercise of reasonable care there are circumstances in which the standard of care may be higher than usual. In **Charlesworth and Percy on Negligence**, 7th Edition, page 373 at paragraph 6-01, the learned authors state:

“For example, ‘the standard of care required from a motorist is to drive with reasonable care, but if he approaches a pedestrian crossing, he must take much more care than usual.’”

The issue of liability

- [52] As stated earlier, I find that based on the cases presented by the two parties, the resolution of the issue of liability rests on their credibility and the cogency of their respective case as the central issue is one of fact. The court has to determine whose account is to be believed and have regard to any physical evidence presented, as there was no independent witness. I have therefore assessed the parties as they gave evidence and were cross examined and must note that their demeanour played a significant role as I assessed their evidence. I have taken into account all the evidence and have considered the relevant legal principles and the submissions of Counsel for the parties.

- [53]** Both parties were extensively cross examined and on the evidence it is not disputed that the Claimant was crossing the road in front of the JUTC bus from which he had exited when the collision took place.
- [54]** The Claimant was on his way to work but was crossing the road to go in the opposite direction of his workplace and indicated that it was to purchase something to eat. He did so from in front of the bus. He stated that he pushed his head around the bus, held up his hand, looked up and down, and as he was crossing, he was hit by the car which he said was speeding.
- [55]** The Defendant agreed that the accident took place. He has been consistent in his account of how the accident occurred. The Claimant, on the other hand, has given contradictory versions of how he claims the accident occurred and whether or not he saw the Defendant before the collision.
- [56]** I note that the Claimant gave evidence that the car was speeding and during cross examination he indicated that he saw the car before it hit him. I find it significant that he states that he looked around the bus and proceeded to cross the road when he was hit, although he also states that he was crossing on the pedestrian crossing and had reached in the middle of the road. I find however that it is more likely that the Defendant's motor vehicle would have been very near and that it hit the Claimant as soon as he ran out from in front of the bus. It therefore follows that I do not believe that the Claimant was on the pedestrian crossing which I find on the evidence, to be further up on Constant Spring Road. I do not believe that having exited the bus he walked up Constant Spring Road to go on the pedestrian crossing in order to cross the street. I find that his story that he was crossing on the pedestrian crossing at the time of the accident is a recent fabrication to bolster his case.
- [57]** The Claimant claims that he was unconscious and did not speak to the Defendant, and the Defendant did not speak to him. I find it significant therefore, that a person he did not know before the incident, and who did not know him

before was able to take him to his workplace immediately after the incident and must therefore agree with Counsel for the Defendant that it is more likely that he was conscious to have been able to direct the Defendant to his workplace. I am of the view that if the Claimant had appeared to be seriously hurt, he would not have been first taken to his work place but would have been rushed directly to the hospital.

[58] The Claimant had also alleged that the Defendant was driving at a speed which was excessive. In considering this allegation, I note that in cross examination he was unable to say how far the Defendant's vehicle was when he first saw it or give any idea of the speed at which he was travelling although he said the other vehicles stopped for him to cross and while he was crossing, the Defendant overtook the three vehicles that had stopped, and hit him. He said he "looked around the bus" and the other vehicles stopped for him to cross and while he was crossing, the Defendant overtook those vehicles and hit him.

[59] I find it difficult to believe the Claimant's version that he was in the middle of the road, crossing on the pedestrian crossing when he was hit. The Defendant has maintained that he was travelling slowly passing the stationary bus. I prefer and accept the Defendant's evidence that he was not speeding and that the Claimant ran from in front of the bus into the path of his vehicle as he was about to pass the bus and that it is the Claimant's right side which collided with the front left fender of his car and he fell on the bonnet. It is my view that this evidence is consistent with the Claimant approaching from the left side of the motor vehicle and the right side of his body coming into contact with the left front fender of the Defendant's motor vehicle as stated by the Defendant. This evidence in my view is also consistent with the injuries noted in the medical reports of Dr Waite.

[60] The medical report of Dr Phillip Waite dated July 30, 2004 indicates that the Claimant was seen by him "for the first time on 29th July 2004 for the purpose of evaluation of injuries he sustained in a motor vehicle accident of the 28th June

2002...” This report shows inconsistencies in the Claimant's case. In relation to the 'history of presenting complaints', Dr Waite states, *inter alia*,

“...he was allegedly hit down by a motor vehicle....suffered loss of consciousness and awoke to find himself at the University Hospital of the West Indies...he complained of pain to the right shoulder, right leg and inability to weight bear. It was noted that he had loss of consciousness for about 10 minutes after the accident...”

[61] Dr Waite also states that *“his right leg was placed in a below knee half cast...he was given analgesia/anti-inflammatory medications. He was sent home with advice to elevate the limb...he was given an appointment for a two weeks (2/52) review in the Orthopaedic Clinic...”* and there is no documentary evidence to show that he was admitted in hospital for 5 or 6 days, as he claims.

[62] Counsel for the Claimant submitted that the Defendant “gives the impression of a slow speed and low impact collision...however, the injuries itemized in the medical reports do not support such position” and that the Defendant's version of the accident implies minor impact with the Claimant, but she was of the opinion that the Claimant's injuries are consistent with a person being hit by a fast moving vehicle. There was no direct evidence of the speed or any estimation of the speed at which the Defendant was travelling although the Defendant stated that he was travelling very slowly. There is therefore no evidence from which I can find that the Defendant was driving at an excessive speed and I find that it is hardly likely that the Defendant's motor vehicle, while passing the stationary bus, could have been speeding when there I accept that there were other vehicles travelling ahead of it which had passed the bus.

[63] I accept that the nature of injuries sustained in an accident can give an indication of the likely speed at which the motor vehicle was travelling at the time of the accident. In this case, it appears from the medical reports that the Claimant was initially assessed as having sustained “multiple soft tissue and bony contusion to the right lower limb and head injury with cerebral conclusion (sic)”. I note also that there is no documentary evidence to show that he was admitted in hospital

for five or six days as he has stated and find that based on the facts proved, there is nothing from which I can find that the Defendant was driving at an excessive speed. Further, I note that the Defendant's evidence, which has not been contradicted, is that he "stopped immediately... stepped onto my brakes..."

[64] I have also considered whether the Defendant could have seen, did in fact see, or should have seen the Claimant before he attempted to cross the road in front of the bus or whether he could or should have done anything to avoid the collision and have considered this in the context of the evidence which I accept as true, that the Claimant was crossing the road from in front of the parked bus.

[65] I find that in the circumstances as existed that morning, the Defendant while in the process of passing the bus, could not have anticipated that the Claimant would have run from in front of the bus and into the path of his vehicle. He would not have been able to see the Claimant in time and in my view he was presented with a situation in which he did not have sufficient time to react and this would have prevented him from being able to take any steps to avoid the collision. Apart from stopping immediately, I find that the Defendant could do nothing to avoid the accident as he did not have sufficient time to react to the risk of collision posed by the unexpected action of the Claimant of running from in front of the parked bus.

[66] I therefore do not find that the Defendant is negligent for failing to see the Claimant in time to avoid the accident or failing to take the necessary care, and neither do I find, on the evidence, that he failed to keep a proper lookout as I find it difficult to conclude that he was driving at an excessive speed.

[67] Although I accept his evidence that there were two lanes, "one going up and one coming down", and there was no evidence presented to the court as to the width of the road at the point where the accident happened, I find that it is hardly likely that the Defendant could have been overtaking vehicles which would have stopped alongside the bus, resulting in two lanes going up, thereby making a

third lane going up, when, on the evidence of both parties, traffic was coming down from the Stony Hill direction, albeit, according to the Claimant, he had put out his hand and they had stopped. I do not believe his story that vehicles coming from the opposite direction had stopped for him to cross and vehicles overtaking the bus had also stopped and therefore reject his contention that the Defendant overtook a line of traffic and collided in him.

[68] In view of the erosion of the credibility of the Claimant by the inconsistencies in his evidence, I find it difficult to rely on his evidence and note that I was not impressed with his testimony. He was very shaky during cross examination and the differing accounts presented by him raise significant questions regarding the overall cogency. I do not believe that vehicles had stopped to allow him to cross the road and the Defendant overtook those vehicles, and neither do I believe that he was attempting to cross on a pedestrian crossing. I find as a fact that he, having exited the bus, crossed in front of the bus and ran in the path of the Defendant's vehicle while he was in the process of passing the bus, which was still at the bus stop. I believe the Defendant that he did not see the Claimant prior to the collision. I find as a fact that the Claimant was hit as he ran from in front of the bus and that he had not reached the middle of the road at the time he came into contact with the Defendant's vehicle. I find that he did not ensure that it was safe to cross at the time as he claims, and that he failed to keep a proper lookout.

[69] I have placed no reliance on the evidence that the Defendant is a driver who had twenty years experience at the time of the accident and that he knew the area well or that he paid the sum of \$500.00 for the Claimant to be transported by taxi to the UHWI. He has admitted that he did not see the Claimant and that he could do nothing in order to avoid the accident. I found him to be frank. Additionally, he remained unshaken during cross examination. I therefore have no reason to doubt his version of how the accident happened and find that he in fact could have done nothing to avoid the collision.

- [70]** I must add that I have also noted that there have been inconsistencies on his evidence as well. These include his evidence as to the time he was to get to Saint Mary and whether the Claimant was injured or was conscious and was 'lifted' into his vehicle or whether he walked to it. Notwithstanding these inconsistencies, however, I find that the Defendant's account is more plausible and these inconsistencies do not affect my finding in relation to the cause of the accident.
- [71]** On the evidence which I accept, the Defendant could not reasonably have anticipated that the Claimant would run from in front of the bus and would not have been able to see the Claimant in time and this would have prevented him from being able to take any steps to avoid the collision. It follows that I do not find that the collision was caused by any negligence on his part, neither can he be said to be contributorily negligent as I am of the view that there was nothing that he could have done to avoid the accident .
- [72]** It is the Claimant who has a duty to prove his case on a balance of probabilities. Mr Vicker's evidence has been discredited. He gave evidence and answers in cross examination which demonstrated that his version of how the accident happened or his recollection of the accident could not be accepted or relied upon and neither could his evidence in relation to the injuries he alleged to have sustained or costs he claimed to have incurred.
- [73]** I accept the demonstrated positions of the vehicles traversing the roadway at the time just prior to the accident as stated by the Defendant. I believe vehicles were coming down Constant Spring Road at the time the vehicles which were behind the bus were passing it, as it stopped at the bus stop. I also accept the evidence that he was not speeding and the evidence as to the point of impact as stated by him as being more plausible as in my view that would be more probable to result in the type of injuries sustained by the Claimant.

- [74] I therefore prefer and accept the evidence of the Defendant as being more reliable than that of the Claimant as the Defendant manifestly has a clearer recollection of the material facts and I find that the accident was caused, wholly, by the negligence of the Claimant.
- [75] I find that it is the Claimant's act of suddenly crossing the road in front of the parked bus at a time and place when it was unsafe to do so which caused the accident and in the circumstances the Defendant cannot be held liable in negligence, as alleged, or at all.
- [76] There will therefore be judgment for the Defendant with costs to be taxed if not agreed.