

GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV2010/0198

BETWEEN:

DENISHA BARTHOLOMEW

Claimant

AND

LIONEL WALCOTT

Defendant

Appearances:

Mr. Anselm Clouden for the Claimant

Ms. Winnifred Duncan-Phillip for the Defendant

2012: July 4

JUDGMENT

[1] PRICE FINDLAY, J.: The Claimant claims as follows:

Special damages in the sum of \$6,900.00

General damages for pain and suffering

Interest

Costs

[2] She claims that the Defendant negligently drove his vehicle and knocked her down as she crossed the Pearls Main road on the 17th December, 2009. She suffered a close fracture of the tibia as a result and was off work for a considerable period of time.

- [3] Her evidence is that on the day in question she was on her way to Pearls. She and two friends both of whom gave evidence on her behalf took a bus from Grenville to reach Pearls. They all disembarked from the bus in front of Ben Jones building and the bus moved on.
- [4] She said that she and her friends stood up on the left side of the road. No vehicle was approaching and she started to cross the road. She admitted that the area where she was crossing was not a pedestrian crossing or an area designated for crossing. One of her friends stayed on the side of the road while she and the other friend crossed.
- [5] All of a sudden she heard one of her friends shouting and at the same time she was hit by the vehicle driven by the Defendant. The vehicle was PG909. At the time of the collision she said she was half way across the road.
- [6] The vehicle hit her on the left side of her body. She fell to the ground. The Defendant came out of the vehicle and assisted her. He took her to the Princess Alice Hospital, where she was seen by a doctor and referred to the General Hospital in St. George's.
- [7] X-rays were taken of her left leg and revealed a fracture of the left tibia mid shaft and an above the knee back slab was applied. She was in excruciating pain. She was discharged from the hospital on 23rd December 2009. The cast was removed on 12th January 2010. The Defendant came to the hospital and gave her \$300.00 and said that this was for medical expenses.
- [8] The medical report tendered by the Claimant came from Dr. Douglas Noel. It described the injury as a fractured to the left tibia, the fracture was not being open or displaced. He expected a full recovery.
- [9] Prior to the accident she was employed at the St. David's RC School as a cook earning \$700.00 per month. She was unable to work for 6 months after the accident. She claimed \$4,800.00 as lost salary.

- [10] She complained of still experiencing pain in the upper left leg especially when it rains.
- [11] It is her evidence that the accident was wholly due to the negligence of the Defendant.
- [12] In cross-examination she was adamant that the bus from which she alighted had moved off and the road was clear before she and her friend attempted to cross the road.
- [13] The next witness for the Claimant was Jorine Felix who in large part supported the version of events as set out by the claimant. She is a student at the St. David Catholic Secondary School and she is a long time friend of the Claimant.
- [14] She stated that after getting off the bus, the bus pulled away and they all stood on the left side of the road and watched left and right to make sure that no vehicle was approaching.
- [15] She watched as the Claimant and the other girl crossed the road. She was standing on the side of the road. All of a sudden she saw a green vehicle coming with speed, she called out to the other girl Monique to warn her. She saw Monique who was behind the Claimant try to warn her but to no avail.
- [16] In cross-examination, she testified that she looked left and right but she could not say that the other two girls had done so. She denied that the two girls proceeded to cross the road while the bus was still at a standstill at the side of the road.
- [17] Interestingly, she stated that she was putting a number into her cell phone when the two girls started to cross the road.
- [18] She further stated that the Defendant drove the vehicle with speed about 30-40 mph. She made this estimate even though she admitted that she is not and has never been a driver.

- [19] She testified that it was the left front of the vehicle that hit the Claimant. The Claimant was hit between her hip and her knee. She could not recall the first time she saw the vehicle that hit the Claimant.
- [20] She denied that at the scene she told the Claimant in the presence of the Defendant that she was wrong.
- [21] The last witness for the Claimant was Monique Alexander. She was 18 at the time of the trial.
- [22] She told basically the same story as the other two persons at the scene. They alighted from the bus, the bus moved on, they checked and she and the Claimant started to cross the road. No vehicles were coming. She heard Jorine call out "A vehicle coming". She tried to warn the Claimant but she was in the centre of the road and the vehicle hit her, the driver came out and assisted along with another person and carried the Claimant to the hospital.
- [23] In cross-examination she reiterated that the bus had left the area where they dropped off. She said that the bus had almost reached the corner about 15 feet away from where the accident took place. She did not see any vehicle coming when they came off the bus.
- [24] She said that when Jorine shouted out about the vehicle she had not seen the vehicle. She said that she warned the Claimant she had not seen the vehicle. She said that she warned her even though she did not see the vehicle coming herself.
- [25] She said that the Claimant was in front of her, she was in the centre of the road, she called out to the Claimant, she looked back at Jorine and she ran back towards Jorine who was standing on the left side of the road.
- [26] She saw when the Claimant got hit; the driver stopped the vehicle right where the Claimant was struck. She was on the left side of the road when the Claimant got

struck by the vehicle. She denied that she was unable to see the Defendant's vehicle because the bus was blocking her view.

- [27] She only saw the second vehicle on the scene at the time of the accident. This was the case for the Claimant.
- [28] The Defendant was not an impressive witness. In his evidence-in-chief stated that he is 55 years old and a police officer. On the day in question he was driving on the Pearls Main Road at around 5:30 pm.
- [29] Upon reaching the Pearls intersection as he was going around the corner he observed a bus parked on the opposite side of the road facing the opposite direction. The bus was parked to his right. The bus was parked at an angle so that the back of the bus was in the middle of the road.
- [30] He was driving at around 20 mph, as he was passing the bus the Claimant stepped out in front of his vehicle. She came from behind the parked bus. The front side mirror of his vehicle hit her, she spun and lost her balance and fell behind the parked bus. The bus drove off as soon as the Claimant fell.
- [31] He said it was his side mirror that hit the Claimant not the front of his vehicle. He admitted that she was injured by the fall she took.
- [32] He also stated that at the time of the accident there was another vehicle coming in the opposite direction which had stopped behind the bus. He did not know the driver before that day, his name was Ernest Hillaire.
- [33] The Defendant said that he got out of his vehicle and helped the Claimant into the SUV. He took her to the hospital. He observed that the Claimant had had two friends with her at the scene, they accompanied that the Claimant to the hospital.
- [34] He says that at the hospital her friends were telling the Claimant that he was wrong to step from behind the bus without checking for oncoming vehicles.

- [35] He spoke with Cpl. Bascombe about the accident but was never charged with any offence. On the 20th December 2009 he visited the Claimant at the General Hospital and gave her \$300.00 to assist with her expenses.
- [36] In cross-examination he said he did not know that the Claimant had suffered a leg fracture, he said she had an injury to her body. He said that when he took her to the hospital she was standing outside albeit on one leg. He said he did not gather that one of her legs was injured.
- [37] She had to be assisted in walking as she could not walk by herself.
- [38] He said that he did not see the Claimant get the impact and he did not see her fall to the ground, but he recalled picking the Claimant up from the centre of the road.
- [39] He did not see either the Claimant or her friends alight from the bus, as there is a slight incline heading into the corner. He did not see anyone crossing the road. He did not see the Claimant in front of his vehicle. The first time he saw the Claimant she was in the middle of the road.
- [40] He said that he did keep a proper look out but there was an obstruction in the road so he did not see the Claimant. The bus was parked on its left side of the road it was not in motion. After the collision the bus moved off, he did not speak to the driver of the bus.
- [41] He said that he had a passenger in the right front seat as his vehicle was a left hand drive. He said the passenger said 'watch out', but he did not look he just turned the steering wheel of his SUV, he pulled the steering wheel to the left. He pulled to the left because his vehicle was a left hand drive and he could see that the left side of the road was clear.
- [42] He did not see the Claimant fall to the ground or lose her balance. He first saw Hillaire when he came out of his vehicle. Hillaire said that he should take the Claimant to the hospital. Hillaire was not driving, he had stopped. Hillaire's vehicle had not passed his own.

- [43] He then stated that the Claimant had made contact with the back right section of his vehicle, but admitted that he did not say this in his witness statement. He admitted that in his witness statement he had said that it was the right front side mirror that impacted the Claimant. He also said that his rear view mirror was in the centre of his vehicle, a somewhat strange thing to say.
- [44] Ernest Hillaire gave evidence for the Defendant. He did not know the Defendant prior to the date of the accident. He testified that on the 17th December, 2008 at about 5:30 p.m. he was driving along the Pearls Main Road, he was heading to Sauteur. He was going up an incline on the left side of the road. As he approached the corner there was a stationery bus ahead of him. He came to a stop, he could not pass the bus as there was a vehicle approaching in the opposite direction.
- [45] He saw three ladies at the back of the bus. They were speaking to each other, he saw the Claimant proceed to cross the road, she walked from the back of the bus and stepped into the centre of the road. She stepped quickly from behind the bus. As she stepped into the centre of the road one of her companions called out to her, the Claimant was turning when the impact occurred. At the point of impact the Claimant was on the defendant's side of the road. She stepped into the path of the Defendant's vehicle.
- [46] She did not impact the vehicle head on but with the side of the Defendant's vehicle and she fell to the ground. The Defendant's vehicle swerved to the edge of the road and stopped.
- [47] He got out of the vehicle and went to help. The Defendant also got out of his vehicle. The Claimant was gesturing that her foot was hurting her. The Claimant and her companions got into the Defendant's vehicle and left the scene.
- [48] He had clear sight of the accident as he was behind the stationery bus and the accident was only a few yards ahead of him. The Defendant was not driving fast at approximately 25 mph, and he had just passed a corner.

- [49] On cross-examination he testified that the bus began to roll forward before the Claimant attempted to cross the road, the bus moved 3-5 feet away. As the bus moved off he observed a vehicle coming in the opposite direction.
- [50] He observed that there was some gesturing and talking by one of the ladies, but he could not hear what was being said. The person trying to cross attempted to turn back but then the vehicle was upon her.
- [51] It appeared that it was the left side of the vehicle that hit her, the wing of the vehicle. The vehicle reacted by moving to the right of the road, his right.
- [52] The lady collapsed in the road, her legs gave way. The vehicle stopped about 12-15 feet away from where impact took place. The lady was struggling to get up.

LAW

- [53] The law of negligence is well know, the three elements of negligence which have to be proved by any Claimant are as follow:
- A duty of care owed by the Defendant to the Claimant.
 - Breach of that duty by the Defendant, and,
 - Damage to the Claimant arising from the breach
- [54] A driver on the road has a duty of care to other used of the road to drive carefully.
- [55] 'The burden of proof in an action for damages for negligence rests primarily on the Claimant who to maintain the action must show that he was injured by a negligent actor omission for which the Defendant is in law responsible. This involves the proof of some duty owed by the Defendant to the Claimant, some breach of that duty and an injury to the Claimant between which and the breach of the duty a casual connection must be established.' Halsbury's Laws 4th Edition at paragraph 622.

- [56] In determining whether the duty of care has been breached, it is for the Court to consider whether or not a reasonable man placed in the position of the Defendant would have acted as the Defendant in this case did.
- [57] It is for the Claimant to prove facts from which a proper inference is that the injury complained of was the result of the negligence of the Defendant.
- [58] Halsbury's Laws 4th Edition at paragraph 658 states:
- "Persons on foot have a right to be on the highway and are entitled to the exercise of reasonable care on the part of the persons driving vehicles on it, but they must take reasonable care of themselves and may be answerable if they occasion accidents to vehicles, the amount of care reasonably to be required of them depends on the usual and actual state of traffic, and whether or not the foot passenger is at an approved indicated pedestrian crossing."
- [59] The pedestrian will be held either partially or wholly responsible for the collision if they step off the walkway so as to give the driver of the vehicle no reasonable chance of avoiding the pedestrian.
- [60] Alternatively, the driver must not drive in fear that pedestrians will step into the road from the rear of vehicles either parked or in motion on the opposite side of the road.
- [61] Here, the Claimant and her witnesses insist that they were not crossing the road from behind the bus that dropped them off. They say the bus had driven off and was some distance away when they started to cross the road.
- [62] There is difficulty with that position, as the only independent witness, Hillaire, a man who knows none of the principles states that when the Claimant and her companion started to cross the road the bus was just moving off. He further states that they cross the road from behind the bus.
- [63] He was behind the bus in his vehicle so he had a clear view of the girls as they attempted to cross the road. He saw the girl who tried to warn the others of the approaching vehicle, he saw Monique Alexander turn back and return to the left

side of the road. In fact he supports much of what the Claimant and her witnesses have said.

[64] Except, importantly, he is firm that they crossed from behind the bus which was still very much on the scene at the time the girls began to cross the road.

[65] I prefer his evidence to that of the Claimant and her witnesses. In particular, I have great difficulty with the evidence of Jorine Felix as to what she saw and when she saw it. She admits that as they alighted the bus she had her cell phone in her hand and she was taking down the number of a friend which she had gotten while on the bus. Her concentration must have been centred on the task of entering the phone number that she had just received and not on her two friends crossing the road. This may explain why she could not recall when the vehicle driven by Hillaire came to the scene.

[66] I do not doubt that at some time she would have completed her task and looked to see what her friends were doing but I cannot accept that her focus was on her friends immediately as they left the bus and began crossing the road.

[67] Much has been made of the speed of the Defendant's vehicle, either 20 or 25 mph, but no evidence is before the Court that this exceeds the speed limit for the area.

[68] A pedestrian on the road owes a duty of care to other users of the road and just like the driver of a vehicle, if he fails to fulfil that duty he will be liable for any damage caused.

[69] I quote from Ward, LJ in the case of *James v Farley* 2002 EWCA CW 162:

“Even if I were inclined to find the Defendant negligent in failing to keep a proper look out and to observe this child stepping off this pavement the moment she did so, the unfortunate fact seems to be that she stepped out into his path without giving him time to avoid hitting her the motorist cannot be held responsible for the sad consequences which followed”.

[70] He further stated, "I do not think that given the very short time scale of less than two seconds, that that sort of lack of observation should be regarded as negligent. I think it is a counsel of perfection to say that he ought to have seen and reacted the very second she stepped off the curb."

[71] The situation here is similar; the Claimant appeared from behind a bus without warning, at an area which was not a pedestrian crossing. It would be a 'counsel of perfection' for this Defendant to have anticipated that the Claimant would come out from the rear of the bus and attempt to cross the road.

[72] In *Moore v Poyner* 1975 RTR 127 (CA), the Court stated as follows:

"The test to be applied to the facts was this: would it have been apparent to the reasonable man, armed with common sense and experience of the way pedestrians, particularly children, are likely to behave in the circumstances such as were known to the Defendant to exist in the present case, that he should slow down or sound his horn or both? What course of action would he have to take if he was going to make quite certain that no accident would occur? Ought he to have slowed down to such an extent that there would be no possibility of a child's running out at any moment in front of him and his being unable to stop without striking the child? To do so he would have had to slow down to something like 5 mph such a duty of care would be unreasonable; the chance that a child would run out at the precise moment that he was passing the coach was so slight as to not require him to slow down to that extent. As for sounding his horn, drivers in traffic are constantly exposed to the danger of pedestrians stepping out in front of parked vehicles. It would be an impossible burden for drivers to sound their horns every time they passed a parked vehicle."

[73] While this case dealt with a child, the principles are applicable to the instant case, more so as the Claimant in this matter emerged from the rear of a vehicle. Was this Defendant using common sense expected to anticipate that this Claimant was

going to attempt to cross this road at this point from behind a moving bus? Ought he to have slowed down merely because a bus with passengers had stopped on the opposite side of the road?

[74] I think to ask this of him, would be to place too great a duty of care on the Defendant.

[75] In the circumstances, I find that the Claimant was the sole person responsible for the accident, and while I have sympathy with her for the injury which she has suffered, I cannot find that the Defendant bears any responsibility for this sad state of affairs.

[76] I find that the payment of \$300.00 made by the Defendant to the Claimant was not an admission of liability but a payment made as a good will gesture.

[77] I therefore find for the Defendant and would dismiss the Claimant's claim.

[78] Costs to the Defendant in the sum of \$4,000.00.

[79] The Court acknowledges the assistance of Counsel.

Margaret Price Findlay
High Court Judge