

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

No. 2036 of 2008

BETWEEN:

STEPHANIE HUSBANDS

CLAIMANT

AND

**THE TRANSPORT BOARD
SYLVESTER DRAKES**

**FIRST DEFENDANT
SECOND DEFENDANT**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

**Dates of Hearing: 2017 October 2nd & 3rd
2018 January 18th
February 2nd**

Date of Decision: March 9th

Appearances:

Mr. Chester L. Sue in association with Mr. Philip Gaskin Attorneys-at-Law for the Claimant

Ms. Destinie Simmons in association with Ms. Tamara Simmons Attorneys-at-Law for the Defendants

DECISION

Introduction

- [1] Plaintiff Stephanie Husbands filed suit on December 16th 2008 under the **RSC** 1982 against the two Defendants, Barbados Transport Board and its driver Sylvester Drakes, in this matter which later transitioned to the Civil Procedure Rules 2008.
- [2] The Plaintiff, now Claimant, claims damages, interest and costs arising from injuries received as a result of an accident occurring on the 29th January 2006.
- [3] The First Defendant is a Statutory Corporation established pursuant to the **Transport Board Act Cap 297** of the **Laws of Barbados**, and the owner of motor omnibus BM589.
- [4] At all material times, this vehicle was being driven by the Second Defendant Sylvester Drakes, in the capacity of servant and/or agent of First Defendant.

The Facts Outlined

- [5] The Claimant was a passenger on a bicycle, registration number A1512 being ridden by a Mark Collymore, its owner.
- [6] The accident occurred in the Roundabout (unnamed) in the vicinity of the St. Andrew's Parish Church, and in the general area known as Ermy Bourne Highway.

- [7] There are three arteries feeding into this roundabout, Walkers Road, a road to Speightstown (Doughlin Village), and a road to Belleplaine. Between Walkers Road and the road to Speightstown, is situated the St. Andrew's Parish Church entrance.
- [8] The time of the accident may have been significant: it occurred at 18.25 hours on January 29th 2006. The road condition was dry. In Barbados, 6.30 pm in the month of January is dark. No evidence was given as to the lighting in and about the roundabout, or of the lighting on the vehicles involved in this accident. Nonetheless, the evidence of the bus driver shows that at all times he was aware of the presence of the bicyclist having followed him along Walker's Road and into the roundabout.
- [9] Bicyclist Mark Collymore approached from Walkers Road. There is only one lane from Walkers Road leading into the Roundabout. Motor omnibus BM589 was directly behind the bicycle on the same road. The bicyclist exited Walkers Road into the Roundabout. BM589 followed, and started to overtake the bicyclist. The two vehicles collided before the Second Defendant could complete this manoeuvre.
- [10] The Claimant fell to the ground sustaining soft tissue injury to her back as a consequence of this collision. Bicyclist Mark Collymore was not injured and

is not a party to this action. It also appears that there has been no claim of damage to either the bus or the bicycle.

The Pleadings

[11] The Claimant's Statement of Claim alleges that the cause of the accident was as a result of the Second Defendant's negligence, the Particulars of which are as follows:

"PARTICULARS OF NEGLIGENCE"

- (a) Driving at a speed which was too fast in the circumstances.
- (b) Failing to keep any or any proper look-out or to have any or any sufficient regard for other road users;
- (c) Failing to see the Plaintiff in sufficient time to avoid colliding with her at all;
- (d) Failing to give any or any adequate warning of his approach;
- (e) Failing to stop, to slow down, to swerve, or in any other way so to manage or control the omnibus as to avoid colliding with the Plaintiff;
- (f) Driving too close to the Plaintiff."

[12] The Defendants' Defence filed May 2009 denies that the accident was caused by the negligence of the Second Defendant. It alleges that Plaintiff's injuries were "caused or contributed to by the person in control of the bicycle in, *inter alia*, allowing the Plaintiff to travel as a passenger thereon and by the Plaintiff herself". The alleged negligence of the Plaintiff was particularized as follows:

"PARTICULARS OF NEGLIGENCE OF THE PLAINTIFF"

- (i) Sitting on the handlebar of the bicycle while it was traveling along the said road at the material time;
- (ii) Exposing herself to the risk of injury by sitting on the handle bar of the said bicycle;
- (iii) Travelling as a passenger on a vehicle manufactured for the carriage of one rider only;

- (iv) Restricting the bicycle rider's control of the steering mechanism of the bicycle to wit the handlebars;
- (v) In the circumstances, restricting the bicycle rider's control of the bicycle along the said road;
- (vi) Limiting the bicycle rider's ability to react to traffic exigencies with which he may have been presented along the said road at the material time;
- (vii) Obstructing the bicycle rider's view of the road;
- (viii) Obstructing the bicycle rider's peripheral vision of the road on which he was travelling thereby affecting his appreciation of the position of the bicycle in relation to other vehicles traveling along the said road including the Defendant's omnibus."

Issues Arising

[13] The parties agreed that four issues arose from the circumstances of this matter.

They are as follows:

1. Whether there was a collision between the bus and the bicycle;
2. Whether the rider of the bicycle being obstructed and hampered in his control thereof by the presence of the Plaintiff on the handlebar, lost control of the bicycle causing it to fall to the ground;
3. Whether the First Defendant's act of overtaking the bicycle was negligent and in breach of the duty owed by one road user to another;
4. Whether the Plaintiff caused or contributed to her own demise by travelling on the bar of the vehicle which is not manufactured for passenger transport but for the rider only.

The Evidence

Witness Statements

[14] There were two Witness Statements for the Claimant, her own and that of the bicyclist Mark Collymore.

[15] Her statement places the bicycle in the roundabout, travelling in what she called the "outer lane", outside the Saint Andrew's Parish Church. Her

evidence speaks to the bus hitting the bicycle, her boyfriend losing control and of her being knocked out of the bar and falling to the ground. She ended up on the ground at the entrance of Saint Andrew's Parish Church and the bicycle some feet away from where she was lying.

[16] Bicyclist Mark Collymore also places the bicycle in the roundabout. In his words, he was "riding on the left side and was coming around on the left side to go into Belleplaine". According to this Statement, the bus was behind him when he got to the entrance of the Church. He continues:

"When I was getting ready to go around the roundabout the motor omnibus overtook me and pulled in to go towards the sand hole. In doing so the motor omnibus struck the right side of the handle bar."

[17] It was at this point that he lost control and the Plaintiff, (his girlfriend) was "knocked off the bicycle handle bar."

[18] The Defence provided two Witness Statements, that of the driver Sylvester Drakes and Accident and Complaints' Officer Carlyle Husbands, who went to the scene.

[19] Driver Sylvester Drakes confirms his position as being behind the bicycle as it headed into the roundabout; he speaks to the cyclist entering the roundabout with him following. This is his explanation of the critical event:

"He entered the roundabout and proceeded straight ahead on his far left side of the road. In those circumstances I proceeded to overtake the bicycle. I did not overtake him immediately. When I observed that he was proceeding straight ahead and to his far left I then proceeded to overtake. I was proceeding in a straight line as I entered the roundabout."

- [20] It was his statement that more than half of the bus had passed the bicycle before the collision: “the bicycle collided with the left side of the bus just past the side door.”
- [21] He stopped as soon as he became aware of the collision, he called the police station and remained in the bus until they arrived, because of the aggressive behaviour of the bicyclist Mark Collymore.
- [22] Carlyle Husbands arrived at the scene by 6.50 p.m. and recorded the driver’s recital of the accident. He was present when the investigating officer took measurements at the scene. There is no evidence that these measurements were disputed.

The Oral Evidence

- [23] In his cross-examination, Mark Collymore established that he has been a cyclist for about 33 years, he is a prudent cyclist familiar with roundabouts and the use of the road, and that there is only one lane approaching the roundabout from any of the three arteries. He kept to the left of the roundabout, it being his intention to go all the way around as he was going to Belleplaine. He thought that the bus behind him was the St. Andrew Church bus which would have made the right turn at the roundabout, that is, go around

the roundabout in the same direction as Belleplaine. This is his explanation as to why as a frequent user of that roundabout he generally stayed to the left:

“I would not have pick up the right side of the lane because vehicles coming from Belleplaine, because the corner is so narrow they usually open up wide to come round the corner, so it is best that the person coming from Walkers pick up the left side of the lane, so that you would not cause no accident... The corner is kind of narrow that persons does open up wide to come round the corner.”

[24] This comment speaks to this Court’s observation (below) as to the size (smallness) of the roundabout and is directly relevant to the Court’s assessment to as why the cyclist kept to the left of the roundabout, and why the bus driver ‘opened up’ in order to turn left towards Doughlin’s Village (Speightstown).

[25] Second Defendant Sylvester Drakes amplified his evidence in two areas: by speaking further on the location of the vehicles in the roundabout; and secondly, providing an explanation as to why he did not exit the bus.

Other Evidence

The Road Traffic Report

[26] The Police Traffic Report dated 2007-02-19 states as follows:

“Investigations revealed that the motor omnibus was travelling along Walkers Road, St. Andrew going towards Doughlin Village. The pedal cyclist was proceeding along the outer circle of the Ermy Bourne Highway going towards Belleplaine. The driver of the motor omnibus attempted to overtake the pedal cyclist who was conveying a female Stephanie Husbands of Belleplaine, St. Andrew. They were knocked to the ground. Husbands received injuries to her lower back. She was taken to the Queen Elizabeth Hospital, treated and discharged. The driver of the motor omnibus said, “I came up the road, there I saw a bicycle, so I came behind him at the major road and stop. He rode off

from the major stop close there on the left, so I presumed he was going towards Shorey, cause he ain't signal he was turning so I came out from behind him. So whilst I was overtaking, he decided to turn and hit onto the side of the bus". The pedal cyclist said, "I was on my way approaching the roundabout. I thought the bus was the church bus so I came to the left so the bus could pass. The driver slow down behind the bicycle, then as he drew closer, he overtake. When I was turning to go around the roundabout, he was turning to go to the sand-hole and the bus collided with the bicycle". Investigations revealed that the driver of the motor omnibus caused the accident. Charges of (1) driving without due care and attention and (2) driving without reasonable consideration for other persons using the road have been preferred against him. He was found guilty for driving without due care and attention by Magistrate Fredericks in the Belleplaine Court on 2006-09-16 and was fined \$300.00 forthwith or one (1) week imprisonment."

[27] Second Defendant Sylvester Drakes reluctantly admitted that he was found guilty by the Magistrate for District F of Driving without Due Care and Attention, but disputed the fact put to him that he pleaded guilty to two (2) charges, and that he was in fact also found guilty or pleaded guilty to the charge of Driving without reasonable consideration for other persons using the road.

The Site Visit

[28] At the request of the parties, this Court visited the site of the accident. The following areas were pointed out by prior agreement: the point of impact; the direction the vehicles came from (Walkers); the direction the vehicles were travelling in (Doughlin's Village/Speightstown and Belleplaine); the location of the bicycle immediately before collision; location of bicycle after collision; location of omnibus immediately before collision; location of omnibus after collision; location of St. Andrew's Parish Church entrance; the direction to

Walkers/Bawdens; the direction to Speightstown/Doughlin Village; the direction to Belleplaine, and the lanes at the roundabout from Walkers, Speightstown and Belleplaine.

Observations

- [29] The point of impact as pointed out by Sylvester Drakes, Mark Collymore and Stephanie Husbands was not largely different; it was outside the entrance to the St. Andrew's Parish Church at a point that could be described as the left lane of the roundabout.
- [30] The distance between the 'move off' point at Walkers Road, and where the impact occurred, just outside the Church entrance, was not measured, but was observed in the context of the size of the roundabout.
- [31] The location of the bicycle immediately before collision, as pointed out by Sylvester Drakes was on the roundabout.
- [32] The parties' identification of the location of the bicycle before the collision, by and large, coincided.
- [33] The location of the bus after the collision as pointed out by both parties places it close to the left side of the road. This coincides with the Police measurements at the scene, which records the width of the road at point of impact as 8.30 metres, the left front wheel to left edge of road as 3.20 metres and left rear wheel to left edge of road 2.60 metres; the bus was at an angle.

The Alternative Plea of Contributory Negligence

[34] Contributory Negligence as defined by the learned authors Charlesworth & Percy on Negligence “means that there has been some act or omission on the Claimant’s part, which has “materially contributed to the damage caused, and is of such a nature that it may properly be described as negligence, only in the sense of careless conduct”. ‘Contributory’ is regarded as ‘expressing something which is a direct cause of the accident.

[35] In order to establish the defence of contributory negligence the Defendant, must prove first, that the Claimant failed to take ‘ordinary care for himself’ or in other words, such care as a reasonable man would take for his own safety; and second, that his failure to take care was a contributory cause of the accident: per du Parcq LJ in **Lewis v Deyne [1939] 1 KB 540**. See also **Charlesworth & Percy on Negligence, ed 3.14** on the Burden of proof of contributory negligence.

[36] In the words of *Lord Wright* in **Caswell v Powell Duffryn Associated Collieries Ltd [1940] A.C. 152**:

“If the defendant’s negligence or breach of duty is established as causing the [damage], the onus is on the defendants to establish that the plaintiff’s contributory negligence was a substantial or material cooperating cause.”

[37] See also Halsbury’s Laws of England (3rd Edn) paras 92 to 95.

Findings of Fact

1. That cyclist Mark Collymore made an error in judgment in assuming that the bus was the St. Andrew Church bus and therefore going right, when in fact it turned left. He may have been mistaken in this regard by the manoeuvre taken by the bus driver (discussed below) of pulling right then left. This Court's view is that the cyclist's error of judgment, did not in the circumstances amount to an act of negligence
2. The greater responsibility lay with the driver of the bus in overtaking. The roundabout is a small one. I do not accept the driver's evidence that he waited to see where the bicyclist was going before overtaking. In the opinion of this Court he exited Walkers Road and immediately proceeded to overtake the bicyclist. See **Road Traffic Regulations, Rules of Driving Rule 31** and the responsibilities of a driver who is overtaking other vehicles. I find that he tried to cover his error in failing to properly establish where the bicyclist was going before attempting to overtake. When asked to explain, this was his evidence:

“When he move off from the giveaway, I stop or give away, I drove up behind him to the giveaway sign in the roundabout, he rode off, went to the left and I proceed to overtake him. He went far left which is a part of the church entrance, so I proceed to overtake him ... When he say he pull to the far left, he pull, I would say in the church entrance so I proceed to go pass him.”

3. It is noted that it is made clear in cross-examination that the witness never saw the bicyclist pull into the church entrance, and when challenged said:

“I didn’t say I see the collision, passengers in the bus told me the bicycle swing back out the driveway and touch the side of the bus, ma’am”.

4. The accident occurred when the driver of the motor bus turned left to go to Doughlin Village; the ‘little angle’ according to Sylvester Drakes.

“No ma’am it ain’t turn left. It is just a little angle. I would not say turn left.”

5. In executing the turn towards Speightstown, the bus has to pull right then left so as to avoid its back wheels butting the wall at the side of the road, what the driver referred to as “open up a little”.

“You got to open up a little to the front, so that when you turn the back wheel would not butt up pun de sidewalk.”

6. This Court accepts that there is credibility in the submission made to the Second Defendant as follows:

“that on that evening you miscalculated the degree of your “open up” as you put it. I am putting it to you, that as a result of your miscalculation, you came too close to the bicycle, the middle of the bus came too close to the bicycle.”

Second Defendant Sylvester Drakes in fact agreed when this proposition was put to him in this exchange:

“Mr. Sue: But do you agree with me, that if you are pulling, if the bicycle is on your left that you would come close to the bicycle.

Mr. Drakes: Yes, ma’am.”

7. Driver Sylvester Drakes was lying when he said the bicyclist pulled into the churchyard, then pulled back out and hit the bus. In spite of saying that he

never saw this, and that a passenger in the bus told him this, he later says, inconsistently:

“He ride in the drive way cause me to overtake him ... He swing back out before the bus pass.”

He lied in an attempt to cover himself.

Conclusion

[38] There is a duty on the driver of a motor vehicle, in this case the driver of the motor bus, to observe ordinary care or skill towards persons using the road whom he see as likely to be affected. The **Road Traffic Act** and **Road Traffic Regulations** place a special duty of care on the overtaking driver, to do so, only where it is possible without danger to others or himself. An overtaking driver is expected to be especially cautious at twilight, in the dark, in smoke, in mist or in heavy rain.

[39] Driver Sylvester Drakes failed to exercise an acceptable level of care, he failed to exercise reasonable care in the use of the road and was the direct, and only effective cause of this accident.

[40] The Defendants have failed to establish any contributing act or omission on the part of the Claimant and the bicyclist that was a substantial or material cause of this accident. There is no finding of contributory negligence on the

part of the Claimant. This Court is guided by the following statement of principle in the Halsbury extract above-mentioned at paragraph (93) thereof:

“If negligence on the part of the defendant is proven and contributory negligence by the plaintiff is at best a matter of doubt the defendant alone is liable: **M Martin v Hannay 1872.**”

The Measure of Damages

[41] 1. **Special Damages**

Damages in the sum of \$1233.00 are claimed in the Writ. This sum is not disputed by the Defendants.

2. **General Damages**

[42] The assessment of General Damages Pain and Suffering and Loss of Amenities in accordance with the guidelines laid down by Wooding CJ in **Cornilliac v St. Louis (1965) 7 W.I.R 491** poses a challenge. The paucity of medical evidence is the source of this challenge and this impacts fundamentally on an assessment of the nature and extent of the injuries sustained.

[43] Counsel for the Claimant on the authority of **Morrison v Fillford Kemp & Kemp [2001] K 2-030.3** proposes the sum of £3450 as fair compensation. In

this case a 42 year old male suffered soft tissue injuries to the neck and back. The back pains were at their worst for a period of ten (10) days.

[44] Counsel for the Defendants on the authority of **Lukhat v Grote [2007] C.L.Y. 3134 Kemp & Kemp [2008]** proposes the sum of £1600 as fair and reasonable, given the Claimant's injuries. In this case a 38 year old male suffered a whiplash injury to the lower spine when his stationary vehicle was struck from behind.

[45] The challenge arises as follows and is evidential: this accident occurred in January 2006. There is exhibited a Queen Elizabeth Hospital Report dated 2007 and a Physiotherapy Report dated February 2008.

[46] The Queen Elizabeth Hospital Report is cursory. It records tenderness in the area of the 4th and 5th lumbar vertebrae with an assessment of "soft tissue injury to the lower back secondary to motor vehicle accident." The Claimant was given painkillers and discharged.

[47] The Physiotherapy Report details the failure/refusal of the Claimant to follow the four (4) week treatment plan designed to address her injury from as long ago as March 2006. The Report shows that prior to self-discharge her progress was good (evidenced by decreased pain at each session).

[48] Stephanie Husbands in her Witness Statement dated November 2010 speaks to her injury and treatment. Her statement that the physiotherapy made her

condition worse directly conflicts with the Physiotherapy Report. There are references of visits to Sandy Crest, but no accompanying bills or medical reports. Her Witness Statement dated 2010, and her oral evidence before this Court in 2017 is to the effect that she still experiences pain in her back, but there is an absence of corroborating evidence.

[49] Her evidence is that in 2010 she changed her job from Shop Assistant to Kitchen Assistant in a restaurant and at the end of the day she has a lot of pain in her back which she alleges is a direct result of the accident. As a Kitchen Assistant she has to stand on her feet for eight [8] hours straight. She is forced to take sick leave as a result. No medical or other evidence was provided in support. She alleges that her back pain continues as a result of the accident. This Court could pay little regard to this evidence in the face of the medical evidence before the Court.

[50] It is noted that there are no medical reports and/or bills past February 2008.

[51] There is no evidential basis to support any claim other than Pain and Suffering and Loss of Amenities.

Loss of Amenities

[52] Prior to the injury, the Claimant was a netballer and stopped playing after the injuries. In addition, the Claimant would wash and cook for her children and do the grocery shopping. After the injury, her oldest daughter had to assist her

with the cooking and washing and her boyfriend had to do the grocery shopping.

[53] In addition, the Claimant stated that sexual relations were affected as a result of the pain in the lower part of the back.

Mitigation

[54] An injured litigant has an obligation to mitigate, that is, to use reasonable care to minimize all health problems or financial loss arising from the accident, see **Charlesworth & Percy on Negligence 12th Edition page 437 at para 6-79 and McGregor on Damages, 15th Edition page 168 at para 275.**

[55] Where a Claimant refuses to accept medical advice or treatment, such refusal may in all the circumstances be unreasonable. Should there be a finding of fact of unreasonableness on the part of the Claimant, in such circumstances, the burden of proving reasonableness shifts to the Claimant: see **Selvanayagan v University of the West Indies [1983] 1 WLR 585.**

[56] Where the Claimant has been found to have acted unreasonably, damages should be assessed on the basis that the Claimant had undergone the treatment

and it has been successful to the extent opined: See **Morgan v T Wallis [1974] 1 Lloyd's Rep 165.**

[57] In the instant case, it was recommended by the physiotherapist that the Claimant have a course of therapy for a four-week duration with twice weekly visits. The physiotherapist stated that the conclusion of treatment prior to attaining the goals of therapy is associated with an increase in the likelihood of symptoms returning in the future.

[58] The Claimant did not comply with the course of treatment and discharged herself. In addition, the physiotherapist indicated that the Claimant reported benefits to her condition and this was evidenced by decreased pain at each session. However, there was no further intervention from the clinic. Consequently, the physiotherapist indicated that it was unlikely that the Claimant would require future care as a result of the injury. This was supported by the Claimant not requesting further intervention for just under two (2) years.

[59] This Court finds that the Claimant failed to mitigate her loss on the principles discussed above and must assess her damages on the assumption that her pain would have been relieved.

Disposal

[60] Taking into account the authorities submitted by the Claimant and Defendant and having taken into the account the further authorities of **Straw v Young Kemp & Kemp [2002] F5-044; Burton v M. S Thompson Plant Hire Limited Kemp & Kemp [2004] F5-046; Daniel Cumberbatch v Craig Alkins CV0816/2011 (Unreported)** and the evidence before this Court, it finds that the Defendants are the cause of the accident of January 2006 and must pay the Claimant damages as follows:

General Damages	\$9,500.00
Special Damages	<u>\$1,233.00</u>
Total	<u>\$10, 733.00</u>

[61] Interest shall be calculated at the rate of 6% from the date of the filing of the Writ until payment.

[62] The Defendants shall pay the Claimant’s costs to be agreed or assessed.

MARGARET A. REIFER
Judge of the High Court