

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT**

**COMMON LAW & EQUITY DIVISION  
2011/CLE/gen/01083**

**BETWEEN**

**CURLEAN DORCASE GIBSON**

**And**

**ALBON GIBSON**

**(As Executors of the Estate of John Gibson Sr, Deceased)**

**AND**

**CURLEAN DORCASE GIBSON**

**And**

**ALBON GIBSON**

**(Spouse and Executors of the Estate of John Gibson Sr. Deceased)**

**Plaintiffs**

**AND**

**SIDNEY JONES**

**First Defendant**

**AND**

**THE LYFORD CAY MEMBERS CLUB LIMITED**

**Second Defendant**

**Before:** Stephen G. Isaacs J.

**Appearances:** Donovan Gibson for the Plaintiffs  
Genell Sands and Howard Thompson with her for the Defendants

**Hearing Dates:** 29 September and 8 October 2014

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**JUDGMENT**

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1. This matter is a fatal accident action commenced by the Plaintiffs in their capacity as executors of the estate of John Gibson Sr. (deceased), against the Defendants for damages as a result of the negligent driving of the First Defendant while under the employ of the Second Defendant. The accident occurred on 18 June 2011 in the Southern district of New Providence at the junction of Cow Pen Road and Refuge Court.

2. Having considered the evidence before this Court, the Plaintiffs' claim is dismissed with costs to the Defendants to be taxed if not agreed for the reasons that follow:

### **Background**

3. The Plaintiffs commenced this action on 12 August, 2011 by generally indorsed Writ of Summons and subsequently filed its Statement of Claim on 19 March, 2012. The Statement of Claim was later amended on 26 November, 2013. The Defendants entered an appearance on 25 October, 2011 and filed its defence on 27 April, 2012 which was subsequently amended and filed on 10 December, 2013.

4. The Plaintiff by its Amended Statement of Claim pleads:

#### **Particulars of Negligence of First Defendant**

- a. Overtaking on the roadway when it was manifestly unsafe to do so.**
- b. Eating and not paying attention while driving the said motor vehicle.**
- c. Entering the Plaintiff's lane when it was manifestly unsafe to do so.**
- d. Driving on the wrong side of the roadway.**
- e. Failing to swerve or in any manner to so manage control of the said motor vehicles as to avoid the collision.**
- f. Failing to see or heed the presence of the Plaintiff's motor vehicle.**
- g. Failing to keep any or any proper lookout or to have any or any sufficient regard for other road users particularly the Plaintiff.**
- h. Driving in a reckless and dangerous manner.**

5. The evidence as to the circumstances of the accident are at extreme variance between the parties. The facts which are agreed between the parties is that there was a traffic collision between a 1998 Silver Dodge Stratus driven and registered to John Gibson Sr. and a 2002 Red

Ford F-150 truck, driven by the First Defendant and registered to the Second Defendant. The accident occurred at the four-way intersection of Williams Street (north intersection of Cow Pen Road), Cow Pen Road (which runs east to west) and Refuge Court (south of Cow Pen Road and directly adjacent to Williams Street).

### **The Plaintiffs' Case**

6. The case for the Plaintiffs relied solely on the evidence of Mrs. Travia Major, a resident of Williams Street and Cow Pen Road. According to Mrs. Major on the 18 June 2011, she was walking south at the junction of Williams Street and Cow Pen Rd where she then crossed the intersection to patronize a local store called "Ben & Son" on the corner of Refuge Street and Cow Pen Road. She testified that prior to the collision she observed the deceased reversing in a Silver vehicle out of the parking lot of the same store she had patronized, onto Refuge Court, and began to head north in an attempt to cross over Cow Pen Road onto Williams Street. Mrs. Major, after leaving "Ben & Sons", went back onto Williams Street when she was stopped by a friend a few feet away from the intersection. She observed a red F-150 truck being driven in an eastern direction by a person who appeared to have been leaning forward as if he was attempting to reach for something.

7. At the same time Mrs. Major said that the truck overtook about three vehicles, thereby leaving the east bound lane and entered into the west bound lane when it collided with the silver Dodge vehicle driven by the deceased.

8. Mrs. Major further indicated that she later ran towards both vehicles and stopped firstly at the red truck. She said that the driver was slouched over in the vehicle and she observed a partly eaten mango on the vehicle floor. She said that she asked the First Defendant, who was conscious, if she could inform anyone in particular of his condition. The First Defendant then gave her his phone, according to the witness, and she then called a number that he told her was his wife's, and she informed the female who answered about the accident.

9. Further in her testimony, Mrs. Major testified that an off duty nurse also rendered assistance to these victims and gave her some gloves to assist in medical care.

10. Mrs. Major stated that later a light skinned female came to the scene and aided the First Defendant. Mrs. Major then presumed the female to be the wife of the First Defendant and eventually handed her his cell phone, and went on to assist the male in the silver vehicle who was alive but unresponsive.

11. Mrs. Major did not stay at the scene until the Police arrived. It wasn't until days later, after the deceased had succumbed to his injuries, that the Plaintiffs came searching for eye witnesses when Mrs. Major offered the information to them and agreed to testify.

### **The Defendants' Case**

12. The Defendants relied on three witnesses, the First Defendant, his fiancé Ms. Alisa Lockhart and PC 3353 Brown.

13. The First Defendant said that he was traveling east on Cow Pen Road at about 35 to 40 miles per hour when the accident occurred, and at no time did he overtake any vehicles. He insisted that the deceased darted out of the corner in front of him, without any warning, onto a major road.

14. After the collision the First Defendant recalled a male approaching him at his vehicle and he asked the male to render assistance by calling his fiancé. He described the male as being brown skinned, of medium height and slim built. He said that no female approached him as stated by Mrs. Major.

15. He conceded that there were mangoes in his truck including a partly eaten one which he said had been left in the truck from earlier that morning.

16. The evidence of Ms. Alisa Lockhart is that on the date of the incident she received a phone call from an unfamiliar number by a male who informed her that the First Defendant was involved in an accident. She said that upon arrival at the scene of the accident, she was approached by a brown skinned slim male who handed her the First Defendant's cell phone and pouch containing his personal belongings. Under cross examination Ms. Lockhart maintained that she was never approached by a light skinned female who handed her the First Defendant's cell phone.

17. Lastly, Police Constable 3353 Brown testified that he was the investigating officer at the scene of the accident. PC Brown stated that he arrived at the scene of the accident sometime around 2:36pm and observed both vehicles on the northern side of Cow Pen Rd. Based on his investigations, officer Brown determined that the point of impact was in the east bound northern lane of Cow Pen Road.

18. Brown stated that the visibility during the day was clear and sunny and there were no eye witnesses at the time of his enquiries, and there was no evidence that the First Defendant was overtaking during the time of the collision.

### **The Law**

19. In my view the starting point to determine liability was properly highlighted by the **Court of Appeal of Hong Kong** in the case of **Lau Shun Ing v Ng Ching Hung** [1991] 1 HKC 179 where the court cited with approval **Lord Dunedin** in the case of **Fardon v Harcourt-Rivington** (1932) 146 LT 391 at 392 where he said:

**“The root of this liability is negligence and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then, to take no precautions is negligence but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.”**

20. This principle is widely accepted and I will apply it to these circumstances to determine if the First Defendant acted negligently, and if so, whether or not the Second Defendant would be vicariously liable for his actions. These two issues are fact based, specifically, the Court must determine firstly whether the First Defendant, in all of the circumstances, acted with reasonable care whilst driving, and secondly whether or not the First Defendant was acting in the course of his duties to his employer at the time of the accident.

21. Having considered the evidence before this Court, there are some questionable evidential issues in the First Defendant’s testimony, for example, the fact that he was unable to describe an attending nurse who provided medical care until emergency services arrived, yet his recollection of a male who phoned his fiancé appears to be so vivid. However I do bear in mind that he had

been in a serious accident and that he gave his evidence more than three (3) years after the accident.

22. Counsel for the Plaintiff astutely cited the importance of credibility when there are competing witnesses. In the **House of Lords** case of **Onassis and Calageropoulos v Vergottis** (1968) 2 Lloyds Law Rep. 403. where **Lord Pearce** said:

**“Credibility involves wider problems than mere demeanour which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be... It is a truism often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred.”**

23. The witness for the Plaintiffs, Mrs. Major appeared confident and steadfast in her testimony, but there were circumstances that created much doubt in the accuracy of her evidence. She explained that she was able to run north across the intersection from Refuge Court onto Williams St., when she spoke to her friend “Ronald”, who stopped her at the same time that she witnessed the accident.

24. Mrs. Major has described her version of events as she recalls them, but she did not remain on the scene to inform the Police. In the circumstances the witness made it impossible for the police to take a contemporaneous statement from her, as her statement was taken only after the deceased passed away.

25. After careful consideration of the evidence given I prefer the evidence of PC Brown, that the accident occurred on the northern side of Cowpen Road, which contradicts the evidence of Mrs. Major that the First Defendant was overtaking . PC Brown made contemporaneous notes.

26. Counsel for Plaintiffs during cross examination took issue with PC Brown for the absence of measurements taken at the scene of the accident, however I accept that the point of impact occurred on the northern side of Cow Pen Road as PC Brown's opinion was based on the debris field left in the northern lane after the accident.

27. Further, PC Brown observed that the deceased's car was found on the northern side of Cow Pen Rd in the lawn of the green house identified in photograph 5 exhibited in the agreed bundle of documents. This appears to be consistent with PC Brown's testimony that the point of impact was in the northern lane of Cow Pen Road.

28. Despite Mrs. Major's testimony on behalf of the Plaintiffs, there is no corroborating evidence to determine that the First Defendant did in fact overtake any vehicle. The Plaintiffs reliance on this evidence to establish negligence by the First Defendant therefore cannot be sustained.

29. It is important to consider the words of **Adams, J.** in **Moxey v Hillier** [1984] BHS J. No. 30 at para. 9 where he stated:

**"The Plaintiff had the right of way on a major road. The defendant was emerging from a minor road and was negligent. The plaintiff was driving on the northern side of the road, which was his correct side and the road which was 27 feet wide was open to two-way traffic at that point.**

**This was according to the evidence, a 25 mile per hour speed zone and the plaintiff was slightly exceeding the speed limit but his speed was not the cause of the accident. The accident was caused by the defendant's attempted manoeuvre when it was not safe to do so."**

30. Whenever a motorist is emerging from a minor road onto a major road, as the deceased did in this case, the onus is on him to keep a look-out. For the First Defendant the possibility of the deceased emerging out of a minor road onto a major road, as he did, was remote, and he cannot be adjudged negligent if he did not take extraordinary precautions. Conversely, danger was reasonably apparent for the deceased when he emerged onto a major road, and in my judgment the deceased took no precautions and was the negligent driver.

31. I am compelled to conclude on the evidence that the deceased emerged out of a minor corner onto a major road without ensuring that his way was sufficiently clear to make it to the other side. There is no reliable evidence of negligence on the part of the First Defendant. It follows that there is no need to consider whether or not the Second Defendant is vicariously liable.

32. The Plaintiffs' claim is therefore dismissed with costs to the Defendants to be taxed if not agreed.

**Dated the 9<sup>th</sup> day of March, A.D. 2016.**

  
**Stephen G. Isaacs**  
**Senior Justice**