

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division**

2021/CLE/gen/00552

BETWEEN:

GIOVANNI CARTWRIGHT

Claimant

AND

AETOS HOLDINGS LIMITED

Defendant

Before: The Honourable Justice Darron D. Ellis

Appearances: Sherita Forbes for the Claimant
Cheryl Whymms for the Defendant

Hearing Dates: 4th and 5th June 2024

Negligence – Occupiers’ Liability - Duty of occupier at common law – Claimant a paying customer on Defendant’s premises and an “invitee” – Claimant driving on premises and collided into a pole - Duty to exercise reasonable care – Protection against “unusual danger” – Defendant in breach of duty of care.

The Claimant was a customer of the Defendant and entered the Defendant’s premises via the drive-through lane to purchase food. While in the drive-through lane, the Claimant drove his vehicle into a pole affixed to a fence bordering the lane. As a result, the Claimant commenced proceedings seeking damages for personal injury and damage to his vehicle.

The Claimant alleged that the accident was caused by the Defendant’s negligence. He further alleged that the Defendant was in breach of its common law duty of care and that the Defendant:

(i) failed to adequately light or mark the pole and concrete wall; (ii) failed to give any, or any sufficient, warning to users of the dual-lane drive-through of the presence of the said obstructions, or to take other reasonable steps to prevent collisions; (iii) further or in the alternative, the said pole and concrete wall constituted a nuisance at all material times, created or permitted by the Defendant, which caused the collision.

The Defendant denied breaching any duty of care and contended that the accident was wholly caused, or alternatively contributed to by the Claimant's negligence, in that he failed to take reasonable care for his own safety in the circumstances. The Defendant submitted that the accident occurred in circumstances over which it had no control, notwithstanding the exercise of all due reasonable care.

The Defendant further contended that the Claimant (i) failed to observe the clearly visible pole and wall and collided with both; (ii) drove too fast in all the circumstances; (iii) failed to properly negotiate the bend in the drive-through as he made his turn; (iv) failed to exercise due care and attention while proceeding through the drive-through.

HELD: The Court finds that the Defendant is not liable for the personal injuries or damages sustained by the Claimant. Accordingly, the claim is dismissed with costs awarded to the Defendant. It is incumbent upon the Claimant to prove, on the balance of probabilities, that the Defendant was guilty of negligence or in breach of its common law duty as an occupier. This must be established through evidence, and, on the evidence presented, the Claimant has fallen well short of discharging that burden.

1. An occupier is under a duty to take reasonable care to ensure that their invitees are reasonably safe while on the premises; however, the occupier does not guarantee their safety. The duty is to exercise reasonable care to prevent injury arising from an unusual danger: **Wheat v Lacon** [1966] AC 552; **English Heritage v Taylor** [2016] EWCA Civ 48 referred to.
2. A driver remains under a continuing duty to exercise due care and attention, even while operating a vehicle on an occupier's premises. The applicable standard is whether the

driver had driven with the standard of care expected of a reasonably, prudent, and competent driver or that of an experienced, skilled, and careful driver: **Nettleship v Weston** [1971] 2 QB 691. **Simpson v Peat** [1952] 2 QB 24 relied upon.

3. The Claimant's evidence failed to establish the existence of an unusual danger or that the Defendant was in breach of its duty to take reasonable care to ensure the safety of invitees. The Court is satisfied that, had the Claimant driven with the standard of care expected of a reasonably prudent and competent driver, the accident would not have occurred. Furthermore, the mere fact that an injury occurs to an invitee on the premises of another does not, without more, amount to proof of negligence. Every driver bears a personal responsibility to take reasonable care for their own safety and to be alert to hazards that exist on the premises: **McKenzie v Kerzner London Graving Dock Co. v Horton** [1951] 2 All ER 1; **Cox v Chan** (1991) Supreme Court; The Bahamas (No. 755 of 1988) (unreported); **Charlene Rahming v Bahamas Ferries Limited** 2016/CLE/gen/00112 **Nettleship v Weston** [1971] 2 QB 691; **Simpson v Peat** [1952] 2 QB 24 relied upon.

JUDGMENT

Ellis J

- [1.] This is a claim for damages arising from a single-vehicle accident in the drive-through lane of Wendy's Restaurant, Carmichael Road ("Wendy's"). The action was commenced by a Specially Endorsed Writ of Summons filed on 25 May 2021 and subsequently amended by a Statement of Claim filed on 22 March 2024.
- [2.] On 9 February 2021, at approximately noon, the Claimant drove his vehicle into the drive-through lane at Wendy's to purchase food. As he entered the lane, he collided with a pole affixed to a fence bordering the outer edge of the drive-through.
- [3.] The Claimant commenced these proceedings, seeking damages for personal injuries and property damage allegedly suffered as a result of the accident. He averred that the

Defendant failed to provide adequate warning of the presence of the unlit and unmarked pole and that, as a consequence, the accident was caused by the Defendant's negligence. The particulars of negligence were pleaded as follows:

Particulars of Negligence

- a) Failing to light or mark the said silver pole and concrete wall sufficiently or at all;
- b) Failing to give any or any sufficient warning to traffic on the said dual lane drive-through of the presence of the said silver pole or concrete wall or take any other steps to prevent traffic from colliding with the obstructions while using the dual lane;
- c) Further, or in the alternative, the said pole and concrete wall were at all material times a nuisance, which had been created or permitted by the Defendant, and, as a consequence, the said collision happened;
- d) By reason of the Defendant's said negligence, the Claimant sustained personal injuries and has suffered loss and damage.

[4.] The Claimant claimed special damages, general damages to be assessed, interest pursuant to the Civil Procedure (Awards of Interest) Act, and Costs.

[5.] The Defendant opposed the claim in its Defence filed on 30 December 2021. It was contended that while the Claimant was travelling in the right lane of the dual-lane drive-through at Wendy's, he, without due care and attention, attempted to negotiate a bend in the drive-through and collided with a metal pole and concrete wall. The Defendant submitted that the accident was either solely caused, or alternatively contributed to, by the Claimant's own negligence. The Defendant pleaded as follows:

Particulars of Negligence / Contributory Negligence

- a) Failing to observe the presence of the pole and the wall, which were both clearly visible and colliding into them both;
- b) Driving too fast in all the circumstances;

- c) Failing to properly negotiate the bend of the drive-through as he made his turn;
- d) Failing to exercise due care and attention while proceeding through the drive-through.

[6.] At paragraph 5 of the Defence, the Defendant put the Claimant to strict proof of the allegations of injury, loss, and damage as pleaded.

The Issues

[7.] In the Court's view, this is a case concerning occupiers' liability. The following issues arise for determination:

- (i) Whether the Defendant took reasonable care to ensure that the Claimant was reasonably safe while on the premises?
- (ii) Whether the accident was caused by an unusual danger or alternatively, by the negligence of the Claimant?

[8.] At trial, the following witnesses gave evidence: the Claimant, Joshua Pennerman, Raquel Davis, and Kenneth Williams.

The Claimant

[9.] The Claimant's evidence, which was subjected to cross-examination, was contained in his witness statement. He stated that on 9 February 2021, he was driving his 2017 silver Honda Accord, accompanied by a female passenger, Ms. Kylisa Edwards, whom he had agreed to transport to work. Prior to dropping her off, they elected to stop for lunch at Wendy's. It was a sunny, clear day at approximately 1:00 p.m.

[10.] Upon arrival, the Claimant joined the left lane of the restaurant's drive-through, which was heavily congested, with the queue extending onto the main roadway. According to the Claimant, a drive-through attendant directed him and other vehicles to switch to the right-hand lane in order to alleviate the obstruction to traffic.

[11.] While proceeding in the right-hand lane and having reached approximately the halfway point and while going around a bend, the Claimant's vehicle stopped abruptly,

accompanied by a loud impact. The Claimant stated that he struck his head on the steering wheel while Ms. Edwards injured her hand on the dashboard. Upon regaining his composure, the Claimant realized that his vehicle had collided with a pole within the drive-through lane. He described the pole as unlit, unmarked, and unpainted.

[12.] Following the collision, the Claimant attempted to drive away but realized that the vehicle emitted mechanical noises and eventually became immobile. He then telephoned the police and arranged for a wrecker. A driver of the vehicle immediately behind him—now known to be Mr. Joshua Pennerman—approached and offered assistance. The Claimant informed him that he was experiencing pain in his head and neck.

[13.] Approximately 15 to 20 minutes after the incident, a police officer arrived at the scene. The Claimant stated that he informed the officer of the collision and indicated that several individuals—including the restaurant's security guard, Joshua Pennerman, and a drive-through attendant—had witnessed the event and were willing to provide statements. He further advised the officer that both he and his passenger had sustained injuries.

[14.] The Claimant further testified that the police officer, expressed that the matter did not warrant a formal report or emergency medical assistance and categorized the incident as a civil matter. The officer declined to request surveillance footage, citing the private nature of the establishment, and advised the Claimant to raise the matter with the Defendant's corporate office.

[15.] The Claimant added that the officer reviewed his insurance documents, confirmed that the vehicle was comprehensively insured, and suggested that he obtain an estimate for replacing the pole. The Claimant expressed disappointment at this response.

[16.] Mr. Pennerman subsequently offered to transport Ms. Edwards to her workplace while the Claimant remained at the scene until the arrival of the wrecker. Before departing, the Claimant was issued with a Notice of Intended Prosecution from the police officer, although no explanation for its issuance was provided.

[17.] In the days following the accident, the Claimant testified that he started to experience increased pain, swelling, and recurring headaches. On 11 February 2021, he sought medical attention at Princess Margaret Hospital, where he was diagnosed with a mild concussion, head trauma, and whiplash. He was prescribed medication and advised to rest, resulting in his absence from work for the remainder of the week.

[18.] The Claimant stated that, during the week following the accident, he made repeated attempts to contact the Defendant's corporate office and was advised to speak with either Mr. Smith or Mr. Hart. Despite multiple calls and messages, he received no response. He contended that his concerns were disregarded and not treated with the seriousness he expected as a patron of the Defendant's establishment.

[19.] There was no medical report produced to confirm the injuries suffered by the Claimant.

[20.] Under cross-examination, the Claimant noted that a Wendy's employee was standing between the left and right lanes and that, while driving at approximately five m.p.h., he turned to the right to avoid hitting her as he entered the right-hand lane. Shortly thereafter, he collided with the pole.

[21.] When it was put to him that he could have come to a complete stop—given his low speed—the Claimant responded, “I wasn't at a speed where I thought anything was damaged.”

[22.] The Claimant was also asked whether anything had obstructed his view of the fence (to which the pole was attached), and he stated that he clearly saw the fence. Counsel for the Defendant suggested that the pole formed part of the fence and that, had the pole not been there, the Claimant would have collided with the fence instead. Accordingly, it was put to the Claimant that he had not been paying proper attention.

[23.] The Claimant also submitted photographs depicting the drive-through and the adjacent pole and fence. From these images, it was evident to the Court that the pole formed

part of the fence and that the fence and pole were not positioned within the drive-through lane but rather bordered its outer edge, beyond the area intended for vehicular passage.

Joshua Pennerman

[24.] Mr. Joshua Pennerman was at Wendy's drive-through on 9 February 2021. He was driving a 2002 blue Nissan Skyline and was positioned immediately behind the Claimant's vehicle in the left lane of the drive-through. Mr. Pennerman confirmed that the drive-through was heavily congested, with long queues forming. He stated that a drive-through attendant instructed him and other patrons to switch to the right-hand lane due to the traffic backlog.

[25.] In order to facilitate the Claimant's movement into the right-hand lane, Mr. Pennerman reversed his vehicle. While the Claimant was maneuvering, Mr. Pennerman observed that the Claimant's vehicle stopped and remained stationary. After a brief delay, Mr. Pennerman exited his vehicle to investigate and discovered that the Claimant's vehicle had collided with a pole located within the drive-through lane. He noted that the pole was visually indistinct, being the same colour as the wall and fence behind it, and therefore not readily noticeable.

[26.] Upon approaching the Claimant, Mr. Pennerman observed that the Claimant and his female passenger were outside the vehicle. The Claimant reported experiencing pain in his head and neck, having struck his head on the steering wheel.

[27.] Shortly thereafter, employees of the Defendant approached and instructed the parties to move their vehicles. Mr. Pennerman stated that he informed a female employee that an accident had occurred and that the Claimant required assistance. A brief exchange then occurred between the Claimant and an employee regarding the incident, during which the Claimant suggested that the Defendant review its surveillance footage.

[28.] As the Claimant's mobile phone battery was nearly depleted, Mr. Pennerman offered to assist and contacted Prince Wrecking Service on the Claimant's behalf.

[29.] A police officer later arrived at the scene on a motorcycle and briefly spoke with the Claimant. Mr. Pennerman confirmed that he was present during this exchange and offered to provide a witness statement but was informed by the officer that no such statement was necessary. The officer expressed the view that the Claimant would be fine and that no further action was required at the time.

[30.] Following this, Mr. Pennerman offered to transport the Claimant's female passenger to her destination, as the Claimant remained visibly shaken and unable to continue driving.

[31.] The witness testimonies of Raquel Davis and Kenneth Williams were not helpful in establishing liability for the accident.

Submissions of the Claimant

[32.] Counsel for the Claimant submitted that, in accordance with the common law, the Defendant was the occupier of the premises where the accident occurred and was therefore responsible for the condition of the premises, as established in **Wheat v Lacon** [1966] AC 552. It was further submitted that, as the occupier, the Defendant owed a duty of care to the Claimant, a lawful visitor, to ensure that he was reasonably safe while using the premises, especially from unusual dangers.

[33.] Counsel contended that the Defendant breached this duty by failing to mark or illuminate a pole located within the drive-through lane, which the Claimant collided with, thereby sustaining personal injury and damage to his vehicle. It was submitted that the pole's appearance was not easily detectable and, therefore, constituted an unusual danger. Counsel further noted that the pole was positioned adjacent to a fence and that the pole and the fence were grey, making the pole difficult to distinguish. Counsel emphasized that the pole constituted an unusual danger.

Submissions of the Defendant

[34.] Counsel for the Defendant submitted that having regard to all the circumstances, the Claimant had failed to establish that the Defendant was negligent and, accordingly, the claim for damages must fail.

[35.] Counsel submitted that the evidence before the Court demonstrated that the pole and the fence against which it was erected ought to have been clearly visible to the Claimant at all material times, had he been exercising the requisite due care and attention while traversing the drive-through. Counsel further submitted that the pole did not constitute an unusual danger, and, in any event, the Defendant had discharged its duty to ensure that the premises were reasonably safe for visitors. It was argued that the accident was attributable to the Claimant's own fault in failing to negotiate the bend with the requisite due care and attention. It was emphasized that if the Claimant did not hit the pole he would have collided with the fence in any event.

Occupier's Liability

[36.] In The Bahamas, the liability of occupiers is governed by common law principles. In his treatise **Commonwealth Caribbean Tort Law** (3rd edition), Gilbert Kodilinye states at page 64:

“There are a number of common situations in which it is well established that a duty of care exists, for example:

(a).....

(b) the occupier of premises owes a duty of care to lawful visitors to ensure that the premises are reasonably safe...”

[37.] At common law, an occupier is required to take reasonable care to ensure that visitors are reasonably safe while on the premises. The occupier does not guarantee their safety. In **Wheat v Lacon** [1966] AC 552 – it was stated that an occupier is someone with

sufficient control over the premises. But even if they are an occupier, they are only liable if **they fail to act reasonably** to prevent foreseeable harm.

[38.] *Lord Goddard CJ* expressed the principle in **Turner v Arding & Hobbs Ltd** [1949] 2 All ER 911 at 912 as follows:

"It may be said to be a duty to use reasonable care to see that the shop floor, on which people are invited, is kept reasonably safe, and if an 'unusual danger' is present of which the injured person is unaware, and the danger is one which would not be expected and ought not to be present, the onus of proof is on the defendants to explain how it was that the accident happened."

[39.] An unusual danger was defined in **London Graving Dock Co. v Horton** (1951) 2 All E.R. 1 as follows at para 13:

"I am not conscious that it has been stated in plain terms, but it is noticeable that what is declared to be the duty is not to prevent unusual danger but to prevent damage from unusual danger... I think 'unusual' is used in an objective sense and means such danger as is not usually found in carrying out the task of fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises..."

[40.] The dictum of *Charles J* (as she then was) in **Charlene Rahming v Bahamas Ferries Ltd** 2016/CLE/gen/ 00112 at Para 21 is very instructive:

"Sawyer J. pointed out that the occupier's duty is "not an absolute duty to prevent any damage to the plaintiff, but is a lesser one: to use reasonable care to prevent damage from an unusual danger of which the defendant knew or ought to have known, and of which the plaintiff was unaware or could not reasonably have been aware."

[41.] From the case law, the Court is of the opinion that the Claimant was an invitee. For invitees, the occupier owed a duty to **prevent damage from unusual dangers** they knew

or ought to have known about as in **Indermaur v Dames** L.R. 1 C.P. 274 1866. **The test as to whether the occupier is in breach, particularly for invitees, can be paraphrased from the above-mentioned cases as:**

Did the occupier take reasonable care, in light of the visitor's status and the known (or reasonably foreseeable) risks, to prevent harm?

[42.] I make the following factual findings based on the evidence, including photographs of the fence and drive-through lanes.

[43.] At approximately midday on 9 February 2021, the Claimant was driving his four-door 2017 silver Honda Accord, accompanied by his friend, Ms. Kylisa Edwards, whom he intended to drop to work. En route, they agreed to stop for lunch at Wendy's.

[44.] Upon arrival, the Claimant entered the drive-through, which comprised two lanes: a left and a right lane. Customers were being served on the left lane; however, this lane was congested and had begun to back up onto Carmichael Road. As a result, a Wendy's employee directed certain vehicles in the left lane to switch to the right lane. The Claimant was among those instructed to do so and he accordingly entered the right lane.

[45.] Approximately halfway through the right lane, the Claimant's vehicle came to an abrupt stop while driving around a bend in the lane. The Claimant struck his head on the steering wheel while Kylisa Edwards struck her hand on the dashboard. The Claimant briefly lost consciousness but later regained awareness and exited the vehicle, at which point he discovered that he had collided with a pole. He attempted to drive the vehicle, but it was no longer operable.

[46.] From the photographs adduced at trial, it was clear to the Court that a chain-link fence bordered the lane on which the Claimant was driving. The pole in question was positioned just in front of this fence—at the point where the edge of the drive-through lane ends. To the Court's mind, this is a critical fact. The pole was neither in the middle of the roadway nor even partially obstructing the path of travel. Instead, it was located at the periphery, where the drivable surface ended.

[47.] In the Court's view, the pole did not constitute an unusual danger. The Court firmly believes that a driver exercising the standard of care and skill expected of a reasonably prudent driver in the circumstances would not have collided with the pole especially while driving at five m.p.h.

[48.] Even if the pole was somewhat difficult to see, its location—off the main driving path—and its lack of inherent danger support the conclusion that the Claimant's injuries resulted from inattention rather than any breach of duty by the Defendant.

[49.] The duty of an occupier is not to guarantee absolute safety but to take reasonable care to ensure that the premises are reasonably safe for lawful visitors. The evidence before the Court does not establish a breach of that duty. The pole was not an unusual danger, and it certainly was not in the anticipated path of travel. It appears to the Court that the Claimant deviated from the driving path or misjudged his movement. But for the pole, he may well have collided with the fence itself.

[50.] In the Court's view, as per **White v Blackmore** [1972] 2 QB 651, the Claimant failed to drive with the requisite degree of care and attention. A claimant cannot recover damages for injuries and loss caused by his misjudgment, particularly where the premises remain reasonably safe for their intended use (as in the present case).

[51.] Furthermore, I also rely on the statement made by *Hall J* (as he then was) in **Sturup v Resorts International (Bahamas) 1984 Ltd** [1991] BHS J No. 103. In that case, he dismissed the claim and noted in paragraphs 53 to 55 of his judgment that:

“53. The mere fact that an injury – even a severe injury – is sustained by a person on the premises of another does not, without more, establish negligence. Even in the work place, in my judgment, an employer would have to be in breach of his common law or statutory duty or there would have to be some unusual dangers (as in *Jennings v. Cole* [1949] 2 All ER 191) to ground liability for injuries so sustained. 54. Each person, even while performing his duty as an employee, has to assume a measure of responsibility for his own safety and, by way of example, the plaintiff upon her daily circuit of the kitchen would

have to be alert to several potential hazards – not from any breach of duty on the part of the defendant – but because such hazards would exist in the kitchen as would not exist at the Plaintiff’s work station or in other parts of the hotel and only from the mere fact that it is a hotel kitchen. 55. In my judgment, the plaintiff has failed to show that her injury was caused other than by the style of shoe she chose to wear having become caught in a mat properly placed by the Defendant for the safety of its workers.”

[52.] *Charles J* (as she then was) stated in **Adrianna Thompson v Clearview Management Ltd d/b/a Sandals Grande Emerald Bay** 2016/CLE/gen/01031 at paragraph 74:

“Each person while performing his duty as an employee has to assume a measure of responsibility for his own safety and has to be alert to hazards which exist in the workplace.”

[53.] While the above cases concerned an employee who was injured in the course of employment, the underlying principle remains applicable. A claimant, while on the occupier’s premises, must assume a measure of responsibility for his safety and remain alert to hazards that may exist on the premises. Relying on **Charlane Rahming Supra** and the above-mentioned cases the Court is of the opinion that the Claimant has failed in this regard.

CONCLUSION AND DISPOSITION

[54.] In the Court’s view, this was an isolated and unfortunate accident. While I accept that the Defendant, as occupier, owed the Claimant a duty to take reasonable care to prevent injury from unusual dangers of which the occupier knew or ought to have known, the Claimant also bore a concurrent duty to drive with due care and attention.

[55.] It appears to the Court that, had the Claimant discharged his duty, the accident would not have occurred. In the circumstances, I attribute full responsibility for the accident to the Claimant. On a balance of probabilities, the Claimant has not adduced sufficient evidence to establish that the pole constituted an unusual danger or that the

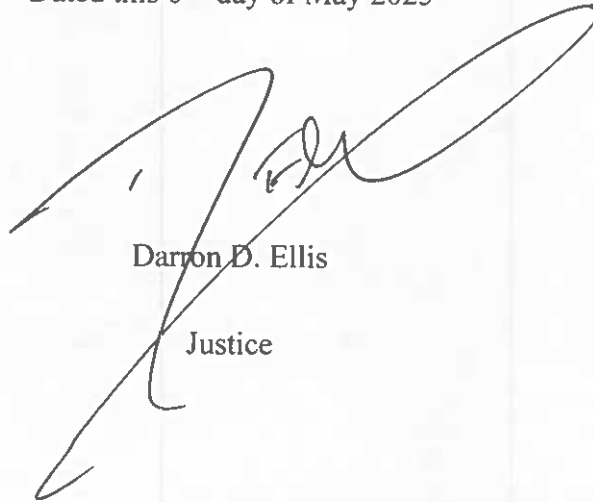
Defendant breached its duty to take reasonable care to prevent injury from such a danger. Accordingly, the Court finds that the Defendant is not in breach of its duty of care to the Claimant.

[56.] In the premises, I find that the Defendant was not negligent. Every driver is expected to adhere to a reasonable standard of driving. In this case, the Court is satisfied that the Claimant failed to do so and drove without the requisite care and attention. Therefore, the Claimant's claim is dismissed, with costs awarded to the Defendant to be taxed if not agreed.

[57.] For the reasons given above, I make the following order:

- (I) The claim of the Claimant is dismissed with costs to the Defendant to be taxed if not agreed.

Dated this 6th day of May 2025

A large, stylized handwritten signature in black ink, appearing to read 'D. Ellis', is written over the printed name and title.

Darron D. Ellis

Justice