



[2021] JMSC Civ 158

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2013 HCV 01505

BETWEEN	TREVOR SOUTH	CLAIMANT
AND	ONIEL CARTER	1 ST DEFENDANT/ ANCILLARY CLAIMANT
AND	HOPETON STONE	2 ND DEFENDANT/1 ST ANCILLARY DEFENDANT
AND	CLIVE MORGAN (T/A MORGAN'S TRUCKING MORGANS TRUCKING LTD.	3 RD DEFENDANT/2 ND ANCILLARY DEFENDANT
AND	MORGAN'S TRUCKING COMPANY LIMITED	4 TH DEFENDANT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016 HCV 03472

BETWEEN	DAWNALEE MORGAN	CLAIMANT
AND	MORGAN'S TRUCKING COMPANY LIMITED	1 ST DEFENDANT/1 ST ANCILLARY CLAIMANT
AND	CLIVE MORGAN	2 ND DEFENDANT/2 ND ANCILLARY CLAIMANT
AND	HOPETON STONE	3 RD DEFENDANT/3 RD ANCILLARY CLAIMANT
AND	ONIEL CARTER	ANCILLARY DEFENDANT

AND

CLAIN NO. 2016 HCV 03473

BETWEEN	VERONCIA KELLY	CLAIMANT
AND	MORGAN'S TRUCKING COMPANY LIMITED	1ST DEFENDANT/1ST ANCILLARY CLAIMANT
AND	CLIVE MORGAN	2ND DEFENDANT/2ND ANCILLARY CLAIMANT
AND	HOPETON STONE	3RD DEFENDANT/3RD ANCILLARY CLAIMANT
AND	ONIEL CARTER	ANCILLARY DEFENDANT

Mr. Sean Kinghorn and Mr. Evrol McLeod instructed by Kinghorn & Kinghorn for the Claimant Trevor South

Mr. Obika Gordon instructed by Frater Ennis and Gordon for 2nd and 3rd Defendants

Mr. Reitzin instructed by Reitzen and Hernandez for Oniel Carter, Dawnalee Harrison and Veronica Kelly.

Negligence – Motor vehicle accident - Effect of a previous conviction on civil proceedings – Personal injuries – Damages - Wasted Costs- Ancillary Claim Form not filed/Waiver- Contributory negligence- Absence of parties

Heard: 14th, 15th and 16th December, 2020 & September 27, 2021

WILTSHIRE, J.

Background

[1] These are consolidated matters comprised of the claims of Trevor South filed on March 12, 2013, and Veronica Kelly and Dawnalee Harrison filed on August 18, 2016. Mr. South commenced proceedings against Mr. O'Neil Carter (1st Defendant), Mr. Hopeton Stone (2nd Defendant), Mr. Clive Morgan (3rd Defendant), and Morgan's Trucking Co. Ltd (4th Defendant). The Claimants, Ms. Kelly and Ms. Harrison, commenced separate proceedings against Morgan's Trucking Company Limited, Clive Morgan and Hopeton Stone.

- [2] The claims arise out of a motor vehicle accident which occurred on or about July 13th 2012 along the Colgate Main Road in the parish of St. Ann. Mr. South claims that the accident was caused by the negligence of Mr. O'Neil Carter, the driver of motor vehicle registered PD0322 in which Mr. South was travelling as a passenger, and the negligence of the servant and/or agent of Morgan's Trucking Co. Ltd, Mr. Hopeton Stone. Mr. Stone was an employee of Morgan's Trucking and the driver of front end loader owned by Mr. Clive Morgan. Mr. South relies on the doctrine of *res ipsa loquitur* in the alternative to negligence and claims damages for injuries he sustained as a result of the incident.
- [3] Mr. Carter, the driver of the vehicle Mr. South claims he was travelling in, filed a Defence to his claim on June 4, 2013 denying negligence and asserting that the collision was caused solely by negligence on the part of Mr. Stone who drove the frontend loader directly into the path of Mr. Carter's taxi. He also asserted that there was no scope for the operation of the doctrine of *res ipsa loquitur* since direct evidence of causation was capable of being adduced. Mr. Carter also denied that Mr. South sustained serious personal injuries since his medical report only states that he had mild tenderness over the back of his neck.
- [4] Mr. Stone and Mr. Morgan filed their Defence to Mr. South's claim on September 18, 2014. Therein they assert that Mr. Carter negligently drove and/or operated and/or managed motor vehicle registered at PD0322 so as to cause the collision and deny negligence on the part of Mr. Stone. They further assert that Mr. Carter was driving at excessive speed while Mr. Stone was lawfully and safely maneuvering the front end loader into a residential driveway at the time of the collision. They deny that the doctrine of *res ipsa loquitur* applies in the instant case.
- [5] Subsequently, on June 4, 2013 Mr. Carter filed an Ancillary Claim against Hopeton Stone, Clive Morgan and Morgan's Trucking Co. Ltd. where Mr. Carter claimed contribution or indemnity from the Ancillary Defendants. The Ancillary Defendants filed Ancillary Defence and Counter Claim on September 18, 2014 where they sought contribution and/or indemnity from Mr. Carter, a declaration that Morgan's

Trucking Co. Ltd was not a proper party to the proceedings, an order that Mr. Carter discontinue the proceedings against Morgan's Trucking Co. Ltd., and costs against Mr. Carter for the Ancillary Defendants in the Claim and Ancillary Claim.

- [6] Ms. Kelly and Ms. Harrison claim that Morgan's Trucking Company Limited is vicariously liable for the negligent acts and omissions of Mr. Hopeton Stone. They claim that Mr. Stone drove the front end loader when he was not fully licensed to do so. Further or in the alternative they claim that the accident was caused by Mr. Clive Morgan who, among other things, permitted his front end loader to be driven by Mr. Stone who was not licensed to do so and failed to provide a flagman to warn motorists of the presence of the front end loader. They too claim damages for the injuries they sustained as a result of the incident
- [7] After being served with Claim Form and Particulars of Claim of Ms. Kelly and Ms. Harrison, Mr. Stone, Mr. Morgan and Morgan's Trucking filed Ancillary Claims to include Mr. Carter in those proceedings as Ancillary Defendant. In response to the claims filed by Ms. Kelly and Ms. Harrison the 1st, 2nd and 3rd Defendants filed their Defence on December 2, 2016 denying any negligence and asserting that Mr. Carter was driving at an excessive speed at the time of the collision and was therefore the cause of the accident.

Preliminary Matters

- [8] On the day of the trial, in the matter 2013 HCV 01505, Claimant Mr. South and 1st Defendant and Ancillary Claimant Mr. Carter were absent. Mr. Kinghorn indicated that Mr. South was overseas and was faced with a challenge with regards to attending. In light of the foregoing, Mr. Kinghorn enquired of opposing Counsel whether the witness statement of Mr. South could be agreed. This was not agreed.
- [9] Alternatively, Counsel asked that Mr. South's claim be severed so that there be no injustice to the other claimants in proceeding. In light of Mr. South's failure to attend, Mr. Reitzen and Mr. Gordon asked the court to enter judgment against Mr. South in favour of their clients.

- [10] In its ruling on these preliminary issues the court took note of the judgement of Dunbar-Green JA (Ag) handed down on the 6th November, 2020 arising from an appeal against orders made in the pre-trial review in the instant case. At the pre-trial review none of the parties was in compliance with the case management orders that witness statements were to be filed by the 31st October, 2018. Mr. Reitzen made an application by notice supported by affidavit for relief from sanctions for his clients. Mr. Kinghorn and Mr. Gordon made similar applications orally. The court granted the relief and gave time to all the parties to file and serve witness statements. The court's ruling was appealed by Mr. Reitzen.
- [11] The Court of Appeal subsequently ruled that the judge erred in granting the oral applications for relief from sanctions and set aside the orders granting Mr. South, Mr. Morgan and Mr. Stone time to file and serve witness statements. Therefore, the only parties who could rely on witness statements and call witnesses were Mr. Carter, Ms. Kelly and Ms. Harrison. Mr. South's difficulty was not only that he was absent from the trial of a matter he commenced, there was also no witness statement on which he could rely. What then would be the purpose of the severance? Counsel cited Mr. South's concern that the other parties would not be able to proceed. That was not a reason for severance as this court had no intention to delay trial. The court has therefore not been given any reason that justified severing Mr. South's claim.
- [12] This court was also of the view that it would be manifestly unjust and prejudicial to the other parties to sever Mr. South's claim. The matters were consolidated because all three touched and concerned the same issues, it facilitated the best use of the court's resources and ensured that there would be no conflicting judgment from different tribunals. The application for severance was refused.
- [13] Regarding Mr. Reitzen's and Mr. Gordon's application, Rule 39.5 of the Civil Procedure Rules (2002), provides that in the event that a party fails to attend for trial, judgment may be entered against the absent party. The court reserved its ruling on this issue until the completion of the trial.

Evidence

[14] Further to the procedural appeal in this matter the only parties eligible to rely on their witness statements and call witnesses were Ms. Kelly, Ms. Harrison and Mr. Carter. Despite the foregoing, Counsel for Mr. Carter indicated to the court that he had no intention of calling Mr. Carter as a witness and would therefore only be relying on the evidence of Ms. Kelly and Ms. Harrison.

Evidence of Ms. Veronica Kelly

[15] Ms. Kelly stated that on July 13, 2012 at about 12 noon she was involved in a motor vehicle accident along the Colgate Main Road travelling from Ocho Rios to Moneague. Her evidence was that she was in the middle back seat of a red plate taxi being driven by Mr. O'Neil Carter. She said that Ms. Dawnalee Harrison was in the front passenger seat. Upon cross examination she testified that she was directly behind the front passenger seat but she doesn't remember if the taxi was a right or left hand drive. She testified that at a certain point in the journey the taxi went around a left turn "blind corner" where persons were unable to see cars coming from the other direction.

[16] Ms. Kelly stated that as the taxi was in the corner she saw a large frontend loader moving from her left to her right across the roadway, blocking the road. She also stated that she felt the taxi hold brake but the frontend loader was too close and the taxi collided into the side of the frontend loader.

[17] Upon cross-examination she was unable to say how much time passed from the time she first saw the frontend loader to the time of the collision. She also testified that Mr. Carter was not speeding but could not say at what speed he was travelling before he entered the corner. When asked if there was any change in the speed of the vehicle she was in after she saw the frontend loader she responded that she was so frightened that she didn't know what happened. She also stated that she could not remember if the vehicle she was in swerved.

[18] Ms. Kelly stated that when she saw the frontend loader Mr. Carter said “wah dis now father” and she then cried out “me dead now”. Counsel Mr. Gordon asked, “how long after Mr. Carter said “wah dis now father” did you say “me dead now?” and she responded, “When I see him going into the frontend loader”. Mr. Gordon followed up with, “So Mr. Carter went into the front end loader?” and she responded “yes sir”. Ms. Kelly, however, was unable to give any or any approximate duration of any of the events.

[19] Ms. Kelly’s evidence was that the frontend loader was coming from a street on the left hand side of the road. She said that after the collision, the vehicle she was travelling in was positioned right where the front end loader was coming from. She stated that right before the collision she was looking at Mr. Carter for fifteen (15) seconds and she could confirm that he had both hands on the steering wheel. Further that the collision caused her to jerk up into the front passenger seat. Someone helped her out of the car and she was taken to the St Ann’s Bay Hospital for treatment.

Evidence of Dawnalee Harrison

[20] Ms. Harrison testified that at all material times she was the front seat passenger of the vehicle being driven by Mr. O’Neil Carter along the Colgate Main Road in the parish of Saint Ann. Her evidence was that there were four other passengers in the back of the vehicle including Veronica Kelly. She explained that she did not know where Ms. Kelly was sitting and she did not know any of the other passengers.

[21] Ms. Harrison’s evidence was that as the taxi went around a left-hand corner which she described as a “blind corner” she saw the frontend loader which she described as having a heavy metal front like a shovel and some big wheels and at the bottom some grill. She was unable to say how far the taxi was from the frontend loader or how much time passed from the time she saw the vehicle to the time of the

collision. Her evidence was that when she did see it, she felt the taxi decelerate straight away but because the loader was too close the taxi collided with its side.

[22] She also testified that right before the collision she had held her head down and brushed off her clothes because she was eating patty. She said that she got a chance to observe Mr. Carter before the collision and she heard him say “Lawd God a wah dis now”. She stated that he was driving at a moderate speed but she was unable to say how fast the vehicle was going. Under cross examination Ms. Harrison stated that from the time she saw the frontend loader to the time of collision the speed of the vehicle did not change and the vehicle did not swerve at any point.

[23] Her evidence was that the frontend loader was driving forward coming out of a lane located on the left hand side of the road and was positioned across the roadway. She said after the collision the taxi was still in the left lane of the main road at the spot where the frontend loader was coming from. She further stated that both the iron metal part at the front and the side of the frontend loader was in the roadway.

[24] She testified that the collision caused her to be jerked forward very hard and she was dazed and shocked. She said she noticed the taxi’s dashboard collapsed on her legs. She stated that soldiers came on the scene and broke down the back of the seat to free her and pull her out of the taxi. She was put to lie on the grass on the side of the road and subsequently taken to St. Ann’s Bay Hospital for treatment.

Submissions for Ms. Kelly and Ms. Harrison

[25] Mr. Reitzen submits that the fundamental question in these proceedings is whether the collision occurred on the main road or in a driveway to the left of the main road. Counsel contends that the collision took place on the main road and the evidence of the Claimants should be accepted by the court.

[26] Counsel refers to the pleadings set out in the Claimants’ Particulars of Claim which states that Mr. Hopeton Stone pled guilty to driving while unlicensed and driving

while uninsured. He argues that as a result of this guilty plea Mr. Stone conclusively admitted that at the time of the collision he was driving the frontend loader on a road to which the public were granted access and not a driveway. To support his argument Counsel relies on ss. 2,12, 13, and 16 of the Road Traffic Act and s. 4 of the Motor Vehicles Insurance (Third Party Risks) Act which speak specifically to vehicles being used on a road.

[27] On the issue of credibility, Mr. Reitzen argues that the Claimants' evidence is not contradicted, inherently reasonable, probable and conclusive of the matter. Counsel relied on the case of **Hardy v Gillette** [1976] VicRp 36 [1976] VR 392 (27 November 1975) to support his submission that the court is bound to accept the evidence of the Claimants as it meets the requirement set out therein with respect to credibility.

[28] With respect to the suggestion by Counsel for the Defendants that the Claimants were under an obligation to negative the proposition that the collision could have been avoided by Mr. Carter, Mr. Reitzen submits that the suggestion is misconceived. He argues that in order to fix liability on the Defendants the Claimants only have to show that their negligence was a cause of the collision, not the only cause or the dominant cause. To support this argument Counsel relied on the case of **Continental Express v Haskell** [1950] 1 All ER 10 where Devlin J. said:

"Where the wrong is a tort, it is clearly settled that the wrongdoer cannot excuse himself by pointing to another cause. It is enough that the tort should be a cause and it is unnecessary to evaluate competing causes and ascertain which of them is dominant: see Minister of Pensions v Channel [1946] 2 All ER 721 per Denning J."

[29] He also submits that Counsel for the Defendant never established that the Claimants were capable of assessing the times and distances accurately enough to assist the court. Therefore, this should not be used to discount their evidence. With respect to costs, Counsel submits that if the Claimants receive a favourable judgment then costs should follow the event. He submits that if the court grants

judgment in favour of Mr. Carter with respect to the claim of Trevor South the court should award wasted costs against the Attorney on record for Mr. South pursuant to Civil Procedure Rule 64.14(1)(b). He argues that Counsel for Mr. South should have known that he had no legitimate claim against Mr. Carter and the Attorney's conduct was improper, unreasonable and/or negligent which would justify wasted costs under rule 64.13(1)(b). Counsel is also asking the court to grant costs to Mr. Carter if the court finds in his favour with respect to the ancillary claim.

Submissions for Mr. Stone, Mr. Morgan and Morgan's Trucking Co. Ltd.

- [30] On claim 2013 HCV 01505 Mr. Obika Gordon submits that the 2nd and 3rd Defendants are entitled to judgment against Mr. South who could not rely on a witness statement or call any witnesses. He argues that although the Defendants are in a similar position, the burden of proof is on the Claimant and Mr. South is absent without any reasonable excuse or justification for his absence. He submits that Mr. South cannot pursue his claim for damages so the Defendants are entitled to judgment. Counsel argues that the same goes for Mr. Carter who was also absent without reason or justification. He submits that a litigant who is absent ought not to get judgment in his favour.
- [31] With respect to the ancillary claim against the Defendants Counsel argues that this ought to be dismissed as the Defendants were never served with an Ancillary Claim Form only an Ancillary Particulars of Claim. He relies on Rule 18.2(1) and (2) which state that an Ancillary Claim is to be treated as if it were a claim under the rules, which require a Claim Form to be filed with Particulars of Claim. Alternatively, he argues that the court should dismiss the claim on the basis that Mr. Carter did not appear and the claim is contingent on a finding for him against Mr. South.
- [32] Counsel on the point of liability refers to the case of **Hardy v Gillete** (supra) and the submission that the Claimants' evidence is not contradicted, and argues that the evidence of the respective Claimants contradicted each other. Counsel also

submits that the argument of the frontend loader being unlicensed and uninsured is not relevant to liability.

- [33] Counsel argues that jointly and severally the evidence of the Claimants is so lacking in credibility that they failed to discharge their burden with regard to any negligence on the part of Mr. Stone. He submits that Ms. Harrison is not a credible witness and has not made out a case of negligence. Further that her evidence gives the impression that the taxi went around a blind corner, came upon a front end loader and could not stop thus colliding. Upon cross examination, he submits, the evidence was subpar which results in uncertainty as to whether the accident could have been avoided or who was at fault.
- [34] Counsel further argues that the most important piece of evidence Ms. Harrison gave was that right before the accident she was holding her head down and brushing off her clothes. He points to the fact that he also asked her how long her head was down and she responded that she didn't know. Counsel submits that an inference can be drawn that if her head was down she was not in a position to say how the accident happened. He also argues that her evidence was that she was looking at Mr. Carter, though she could not say how long. He submits that there is a further inference that if she was looking at Mr. Carter she could not credibly say how the accident happened. Counsel points to the fact that Ms. Harrison also gave evidence that from the time she saw the loader to the time of the collision there was no change in the speed of the vehicle which he submits would either infer that the driver did not apply the brakes or that the brakes failed.
- [35] Similarly, with respect to Ms. Kelly, Counsel submits that she is not a credible witness and she was also unable to make out a case of negligence against Mr. Stone. He points the court to her evidence, when asked if the vehicle swerved at any time, that it could have happened but she did not remember. He argues that that answer along with the several times she answered that she was not sure lends itself to her lack of credibility. He submits that the most important part of Ms. Kelly's evidence was when she was asked where was the frontend loader and she

responded that it was on the street to the left of the main road. Further that Counsel followed up by asking where was the taxi after the collision and she responded that the vehicle was on the street the frontend loader was coming from. It was pointed out that she also admitted that the taxi was still in the side of the frontend loader after the collision. Counsel submits that if the court accepts Ms. Kelly's evidence as stated above that would mean that the taxi went off the main road. He makes reference to her evidence that she was looking at Mr. Carter for fifteen (15) seconds and submits that it cannot therefore be credible that she saw how the accident occurred.

Law and Analysis

Effect of a previous conviction on civil proceedings

- [36] The Claimants' pleadings state that Mr. Stone entered a plea of guilty to charges arising from the accident and brought before another tribunal. Mr. Reitzen has submitted that this guilty plea is proof that the frontend loader was on the main road when the collision happened. Mr. Gordon has responded that the matters dealt with before the other tribunal are not relevant to liability in the case at bar.
- [37] The court finds the case of **Hollington v F Hewthorn** [1943] 2 All ER 35 to be of great assistance on this issue. In that case the plaintiff's car was involved in a collision with a car owned by the defendants. The defendants sought to rely on a previous conviction for a road traffic offence in the same collision. The Court of Appeal held that a certificate of a conviction cannot be tendered in evidence in civil proceedings. It ruled that on a subsequent civil trial, the court should come to a decision on the facts before it without regard to the proceedings before another tribunal. Harris JA in **Julius Roy v Audrey Jolly** [2012] JMCA Civ. 53 adopted this position and confirmed that **Hollington (supra)** is still the law in this jurisdiction.
- [38] The fact that Mr. Stone has a previous conviction cannot, therefore, impact the findings of this court on the matter of liability. The court will disregard the

submissions made with respect to this issue and focus on the evidence of the Claimants.

Whether the burden of proof has been met for Negligence

[39] In order to satisfy the court of a claim of negligence the Claimant must prove the following on a balance of probabilities:

- i. A duty of care owed to the Claimant by the Defendant*
- ii. A breach of that duty*
- iii. Damage resulting from that breach*

[40] In the case of **Talisha Bryan v Anthony Simpson & Andre Fletcher**, Lindo J. referred to the case of **Esso Standard Oil SA Ltd & Anor v Ian Tulloch** [1991] 28 JLR which supports the settled position that all road users owe a duty of care to other road users. Therefore, both Mr. Carter and Mr. Stone owed a duty of care to each other. Mr. Carter, being the driver of the vehicle the Claimants were travelling in would owe them a duty of care. Mr. Stone, by extension of his duty owed to Mr. Carter would also owe a duty of care to any passengers travelling in Mr. Carter's vehicle who may be affected by his actions on the road.

[41] Being further guided by the judgement of Lindo J in **Bryan (supra)**, each driver is therefore required to exercise reasonable care to avoid causing injury to persons or damage to property. Reasonable care is the care which an ordinary skillful driver would have exercised under all the circumstances and includes an avoidance of excessive speed, keeping a proper look out and observing traffic rules and signals.

[42] Section 51(1) and (2) of the Road Traffic Act (RTA) state:

“(1) The driver of a motor vehicle shall observe the following rules - a motor vehicle –

- (i) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;*
- (ii) proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road;*

(iii) *proceeding from a place which is not a road into a road or from a place which is not a road, shall not be driven so as to obstruct any traffic on the road.*”

“(2) 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 a collision, 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.”

[43] Having observed the demeanor of the witnesses as they gave their evidence, they struck me as witnesses of truth. Their inability to testify about time periods and to recall certain things in the chain of events in this court’s view did not signify a lack of credibility, but a lapse in memory as a result of the amount of time that has passed between the accident and the trial, approximately eight years. Miss Kelly actually said that it was so long that she didn’t remember most of it.

[44] The discrepancy, highlighted by Mr. Gordon, between the evidence of Ms. Kelly and Ms. Harrison is in this court’s view non-existent. Both witnesses are clear that the frontend loader was coming from a side road onto the main road. Mr. Gordon has suggested that on Ms. Kelly’s evidence the taxi ended up on the road that the frontend loader was coming from. However, this is how the evidence unfolded,

Mr. Gordon: After the collision where was the vehicle you were in?

Miss Kelly: Same place on the way to Moneague.

Mr. Gordon: Where was the vehicle positioned that you were in?”

Miss Kelly: On the way to Moneague. The frontend loader coming from a street, so it was right where the front end loader was coming from a street.

Mr. Gordon: So you are saying the front end loader was coming from a street?

Miss Kelly: Yes

Mr. Gordon: And you are saying after the collision the taxi was positioned on the street the frontend loader was coming from.

Miss Kelly: Yes

Mr Gordon: And after the accident you say it was still in the frontend loader?

Miss Kelly: Yes

- [45] Looking at the totality of the evidence the court finds that Ms. Kelly was stating that after the collision the vehicle was positioned on the main road at the point where the frontend was emerging from the side road. This is consistent with the evidence of Ms. Harrison. Miss Kelly denied that the frontend loader was in a driveway and that Mr. Carter swerved off the road. Further, whilst both Claimants testify that they were doing things right before the collision, that is, brushing off patty crumbs and looking at the driver, they are unanimous that the frontend loader was on the main road across the path of the taxi in which they were travelling.
- [46] There is no doubt in this court's mind that the frontend loader was in fact obstructing the road way when the collision occurred. This would mean that Mr. Stone was in breach of the requirements set out in the Road Traffic Act and had failed to exercise reasonable care to avoid causing injury and damage. Notwithstanding the foregoing, Mr. Carter also had a duty to take such action as may be necessary to avoid the collision by keeping a proper look out, slowing down or maneuvering the taxi around the frontend loader where it was safe to do so.
- [47] On the evidence both Claimants agree that Mr. Carter was not speeding. However, on cross examination both could not assure the court that Mr. Carter slowed down upon seeing the frontend loader. In fact, although in their evidence in chief they stated that the taxi slowed down, under cross examination neither could testify to a change of speed and both denied that the taxi swerved prior to the collision. Their evidence is that the frontend loader was too close and the taxi collided into the side. This suggests to the court that the vehicle was moving at an excessive speed and Mr. Carter did nothing to avoid the collision. The corner is described by both witnesses as a "blind corner", hence, Mr. Carter should have slowed down as he would have been unable to see around the corner and hence needed to have taken more care to avoid any possible unforeseen danger.

[48] The court finds on a balance of probabilities that Mr. Stone acted negligently when he drove the frontend loader onto the main road and obstructed the traffic that was travelling along that thoroughfare, thus causing the collision. The court also finds that Mr. Carter contributed to the collision when he negotiated a blind corner at such a speed that he failed to take the necessary action to avoid a collision. The court therefore assigns 50% liability to Mr. Stone and 50% to Mr. Carter.

[49] As Mr. Clive Morgan is the owner of the frontend loader and Mr. Stone is his servant and/or agent, Mr. Morgan is vicariously liable for Mr. Stone's acts and omissions.

Wasted Costs (Claim No. 2013 HCV 01505)

[50] Mr. Reitzen who represents Mr. Carter in this matter has asked for a wasted costs order on the basis that Counsel for Trevor South should not have commenced proceedings against Mr. Carter as he had no legitimate claim. He made submissions to the effect that Counsel acted improperly, unreasonably and/or negligently in including Mr. Carter as a party to the proceedings. He contends that Mr. South's witness statement made no allegations of negligence on the part of Mr. Carter.

[51] The guidance of Lord Bingham MR in **Ridehalgh v Horsefield** [1994] Ch 205 was sought by Sykes J (as he then was) in **Gregory v Gregory**, Supreme Court Suit NO. 2003 HCV 1930, a matter concerning an application for a wasted costs order. As outlined in the judgment, the three main questions the court considers when determining whether to grant said order are:

- (a) *Has the attorney acted improperly, unreasonably or negligently?*
- (b) *If yes, did the conduct cause the applicant or any party to the proceedings to incur unnecessary costs?*
- (c) *If yes, is it in all the circumstances just to order the attorney to compensate the party for the whole or any part of the costs?*

[52] There is no evidence before the court to support Mr. Reitzen's position that Counsel for Mr. South acted improperly, unreasonably or negligently. The court notes that Mr. South's witness statement was never admitted into evidence and bears no weight on the proceedings and the pleadings filed by Mr. South speak directly to negligence on the part of Mr. Carter. The court has also found in the consolidated claim where Mr. Carter was included as an Ancillary Defendant, that he is contributorily negligent and does bear some liability for the collision. Further Mr. Carter was absent, without any explanation, from the trial of a matter in which he was a defendant and an ancillary claimant. It cannot be said therefore that Counsel acted improperly, unreasonably or negligently as there was a probability of success against Mr. Carter.

[53] In light of the foregoing, the application for wasted costs is refused.

Validity of the Ancillary Claim in Claim no. 2013 HCV 01505

[54] On the matter of the Ancillary claim initiated by Mr. Carter (1st Defendant) against Hopeton Stone and Clive Morgan (2nd and 3rd Defendants respectively) Mr. Gordon has brought to the court's attention the fact that the action was commenced by way of an Ancillary Particulars of Claim and not an Ancillary Claim Form. Counsel relies on CPR Rule 18.2 to argue that the Ancillary Claim was not properly brought since no Ancillary Claim Form was filed. Mr. Reitzen counters this submission by arguing that the Defendant has waived this flaw in proceedings and took fresh steps after knowledge of it. Mr. Reitzen relies on the case of **Rein v Stein** (1892) 66 L.T. per Cave, J at p. 471:

"In order to establish a waiver, you must show that the party has taken some step which is only necessary or only useful if the objection has been actually waived or has never been entertained."

[55] Subsequent to being served with the Ancillary Particulars of Claim on August 14, 2014, Counsel for the Defendants filed an Acknowledgment of Service of Ancillary Particulars of Claim on September 3, 2014. In that document Counsel acknowledges that they were not in receipt of the Ancillary Claim Form. Despite

the foregoing, an Ancillary Defence and Counter Claim was subsequently filed on September 18, 2014. Trial in this matter was in December 2020 and that was the first time the court was being made aware that the Defendants took issue with the flaw in proceedings.

[56] This court finds that the Defendants waived this flaw in proceedings when they filed a response to the Ancillary Particulars of Claim and made no issue of the missing Claim Form for six years during the lead up to trial. The Ancillary Claim will therefore stand as filed in the Ancillary Particulars of Claim.

Assessment

Special Damages

[57] The court finds that special damages were not proven. Therefore, there is no award for special damages.

General Damages

Ms. Dawnalee Harrison

[58] Dr. Mariyappa M.B.B.S in her report dated May 10, 2016 assessed Ms. Harrison on 17/07/2012 as having:

- i. Whiplash injury*
- ii. Mechanical back pain*
- iii. Laceration to left leg with soft tissue injury*
- iv. Abrasions to left forearm with soft tissue injury*
- v. Blunt trauma to the chest and shoulder*

[59] She was prescribed analgesics, antibiotics and anti-inflammatory medications along with muscle relaxants. She was asked to rest at home and return for a follow up in two days with x-rays. On 24/07/2012 the Claimant returned to the doctor who found that her laceration had healed hence her sutures were removed and the wound dressed. She was found to be ambulating normally.

- [60] The Claimant's evidence is that she still has pain in her lower back that affects her sleep and her ability to do chores around the house. When the time gets cold she feels pain in her leg and arm.
- [61] Counsel for the Claimant has relied on the case of **Claston Campbell v Omar Lawrence and Others** (unreported), Supreme Court Jamaica Suit No CL C135 of 2002 and is asking that Ms. Harrison be awarded \$2,801,814.52. Counsel for the Defendant relies on the case of **Billy Tait v Wesley Salmon** [2015] JMSC Civ. 215 and submits that \$1,000,000.00 is a reasonable sum to be awarded to the Claimant.
- [62] In **Claston Campbell (supra)** the Claimant suffered laceration to the chin, trauma to chest resulting in severe chest pain and difficulty breathing and trauma to the back resulting in severe pain and swelling and difficulty walking properly for three weeks, and whiplash injury to the neck resulting in pain and restriction of movements. A collar was recommended. The court awarded the sum of \$650,000.00 in February 2003 (Consumer Price Index 24.8). Using the Consumer Price Index of December 2020 of 109, this award updates to \$2,856,854.84.
- [63] In **Billy Tait (supra)** the claimant suffered a whiplash injury to the neck with moderate muscular spasm and pain in the muscles of the neck, upper back and shoulders accompanied by headaches. As a result of this injury movements in the neck were limited. The claimant also suffered lower back strain with moderate muscular spasm of the muscles of the lower back, gluteal areas and hamstring muscles. As a result, movements of the back were affected. There was contusion to the sterna area of the chest with tenderness along the parasternal area. As a result, deep inspiration and coughing were very painful. The doctor gave eight weeks as the period of incapacitation. Two possible long-term complications were listed in the report. The first was chronic intermittent pain in the neck and lower back as a result of ligament damage. The second was costochondritis of the sternocostal joint. The court made an award of \$900,000.00 in November 2015 (CPI 88.8). Using the CPI of December 2020, this award updates to \$1,080,000.00.

[64] The case of **Peter Marshall v Carlton Cole and Alvin Thorpe** Khan, Vol. 6, page 109 is instructive. In that case the Plaintiff suffered from moderate whiplash, sprain, swollen and tender left wrist and left hand and moderate lower back pain and spasm. The Plaintiff was given two week's sick leave, analgesics and cataflam injections. He continued to attend for treatment and was discharged after sixteen weeks of care with no residual pain or suffering. The Plaintiff was awarded \$350,000.00 in October 2006 (CPI 38.2). Using the CPI of December 2020, this award updates to \$998,691.09.

[65] The case of **Claston Campbell (supra)** can be distinguished from the instant case as the injuries suffered therein were more severe than those of Miss Harrison. The cases of **Peter Marshall (supra)** and **BillyTait (supra)** are of more assistance. Miss Harrison did not return for a follow up visit after the sutures were removed hence there is no finding of any long term complications from her injuries. Taking into consideration the nature of the injuries suffered and the Claimant's evidence that she still has pain in her lower back this court finds that an appropriate award for pain and suffering is \$1,000,000.00.

Ms. Veronica Kelly

[66] Dr. Mariyappa M.B.B.S in her report dated May 10, 2016 assessed Ms. Kelly on 14/07/2012 as having:

- i Fracture to the proximal phalanx left little toe*
- ii. Multiple blunt trauma*
- iii. Blunt trauma to the left shoulder with rotator cuff tear*
- iv. Cervical spondylosis*

[67] She was treated with oral analgesics and anti-inflammatory medication and was advised to rest. Her left little toe was splinted. She returned on 04/08/2012 and she had mild tenderness over left lateral malleolus and the little toe. She was advised to continue splint and oral analgesics and follow up in three weeks. On 05/05/2016

she had no complaints of pain in the shoulder, leg or little toe. There were no neurological symptoms and she was ambulating normally. X-rays showed generalized moderate osteoporosis and early proximal interphalangeal joint and distal interphalangeal joint degenerative changes and soft tissue thickening related to the lateral aspect of 5^h metacarpophalangeal joint.

- [68] Her evidence is that for several months she could not walk properly and had difficulty falling asleep and staying asleep because of the pain in her toe. Her injury also inhibited her from going for her morning walk which she did for exercise. She states that she had to wear a sling and for several months following the accident she was unable to do chores around the house. She also states that now she is back to normal and has no serious problems persisting from the accident.
- [69] Counsel for the Claimant relies on the cases of **Hugh Douglas v Morris Warp & Ors.** Suit No. C.L. 984 D 130 and **Errol Finn v Herbert Nagimesi et al**, Khan 4 at page 66 proposing the sum of \$1,626,739.13 as a reasonable award. Counsel for the Defendant also relies on the **Errol Finn** case and submits that an award of \$650,000.00 would be appropriate for general damages.
- [70] In **Douglas (supra)** the plaintiff suffered bruises to right upper limb and weals over right shoulder, bruising of left upper limb with swelling to left arm, tenderness over humerus and swollen and tender left forearm and swollen and tender thigh. In that case the Claimant was assaulted by a policeman with a thick piece of rubber, white baton and fists, and kicked all over his body. The action included a claim for false imprisonment and malicious prosecution. The court awarded the sum of \$195,000.00 in April 1994 (CPI 9.6) which updates to \$2,214,062.50.
- [71] In **Finn (supra)** the plaintiff suffered a compound fracture of the 5th metatarsal of the left foot and a wound at the fracture site requiring stiches. He was seen at the University Hospital of the West Indies where his wound was sutured and lower leg and foot immobilized in a plaster cast. The stitches were later removed but the wound was not fully healed so it was dressed and he was instructed to rest for two

weeks. He was totally disabled from the 5th of August to the end of August 1990. He then had a disability amounting to 30% of his extremity for 1 month and of 10% for a further month with no significant final disability. The court awarded the sum of \$64,365.00 for general damages. This updates to \$715,896.42.

[72] The court is of the view that **Douglas (supra)** was not of any assistance. Whilst in **Finn (supra)** the claimant suffered a fracture, said injury was more severe than that suffered by Ms. Kelly as she was never assigned a disability rating by her doctor and her broken toe was able to be treated with a splint as opposed to a cast. The court however takes into consideration her evidence that for several months she could not walk properly and had pain in the toe and had to wear a sling. As a result, she was unable to do her morning exercises and her chores around the house. The court finds that an appropriate award for pain and suffering and loss of amenities is the sum of \$800,000.00.

Disposal

Claim No. 2013 HCV 01505

- i. The Claimant's statement of case is dismissed due to his absence from the trial.*
- ii. Judgment for the 2nd and 3rd Defendants against the Claimant.*
- iii. The 1st Defendant/Ancillary Claimant's statement of case is dismissed due to his absence from the trial.*
- iv. Costs awarded to the 2nd and 3rd Defendants against the Claimant to be taxed.*

Claim No. 2016 HCV 03472

- i. Judgment for Ms. Harrison, the Claimant, with liability to be apportioned as follows:
 - a. 50% liability against Mr. Carter, Ancillary Defendant*
 - b. 50% liability against Mr. Morgan and Mr. Stone, 2nd Defendant and 3rd Defendant.**

- ii. *General Damages awarded in the sum of \$1,000,000.00 to be apportioned in accordance with liability with interest thereon at 3% per annum from the date of service of the claim form to the date of judgment.*
- iii. *Costs to the Claimant against the 2nd and 3rd Defendants and the Ancillary Defendant to be taxed and apportioned in accordance with liability.*

Claim No. 2016 HCV 03473

- i. *Judgement for Ms. Kelly, the Claimant, with liability to be apportioned as follows:
 - a. *50% liability against Mr. Carter, Ancillary Defendant*
 - b. *50% liability against Mr. Morgan, 2nd Defendant and Mr. Stone 3rd Defendant**
- ii. *General Damages awarded in the sum of \$800,000.00 to be apportioned in accordance with liability with interest thereon at 3% per annum from the date of service of the claim form to the date of judgment.*
- iii. *Costs to the Claimant against the 2nd and 3rd Defendants and the Ancillary Defendant to be taxed and apportioned in accordance with liability.*