

- [2] The defendant has also filed an ancillary claim against the claimant. The claimant on the claim alleges that the defendant 's driver overtook a line of traffic and collided into the right rear of his vehicle as he was positioned to make a right turn across oncoming traffic into Burwood beach housing scheme. The defendant in his ancillary claim alleges that the claimant drove on the left soft shoulder then onto the main road without indicating his intention to do so and without stopping to allow the defendant's vehicle to continue in his left lane of travel.
- [3] It is beyond dispute that both vehicles were travelling in the same direction. This case turns on the issue of credibility. The issue of agency did not arise. Against this background, an examination of the evidence is required and it is the evidence presented and my impression of the witnesses which will lead to a determination of the issues of credibility and liability. I accept and have previously said that in assessing the credibility of a witness, demeanour is but one of the many factors to be considered. There is also the substance of the evidence which I have approached as a tribunal of fact with reason, logic and common sense. The proper approach which I have adopted is to consider the evidence of each witnesses against the backdrop of the totality of evidence led in the trial. This assists in making the connections from one witness to another and back to the facts. Demeanour is certainly not by any means the sole determining factor.
- [4] Each claimant in each of these claims bears the burden of proving his case on a balance of probabilities. On the claim, Reuben Simpson pleaded a case in which he was in the vicinity of Burwood beach indicated his intention to make a right turn and drove into the filter lane, when suddenly and without warning, Carlos McLathy, driving the defendant's vehicle, overtook a line of traffic and collided into the rear section of the claimant's vehicle, causing it to spin out of control and his vehicle sustained extensive damage as a consequence.

- [5] Mr. Simpson claims special damages in the sum of \$417,173.91 which has been reduced by the exclusion of the cost of extra help claimed in the sum of \$364,000 and now totals \$53,173.91.
- [6] The claimant also alleges injuries to his person. He said that he was unconscious after the accident. The agreed medical reports indicate that he was examined by Dr. S. Patterson at the Falmouth Hospital on the date of the accident. The medical report admitted states that Mr Simpson had small abrasions to his parieto-occipital scalp, his skull and right shoulder x-rays were normal and he suffered a presumed left lung contusion which was clinically insignificant. He was discharged on analgesia and was expected to make a full recovery with no adverse effect on daily activities. The claimant relied on a radiology report which is inconclusive as to whether any findings therein could have been attributed to the claimant being in the collision before the court, it does not assist.
- [7] The claimant relied also on a police report from the Falmouth police investigated by Cons. M. Campbell. In his report he lists that there was a passenger in the defendant's vehicle by the name of Derrick Dixon. This gentleman was not called as a witness and no evidence was given by Carlos McLathy that he had been driving with a passenger. The report concludes that both vehicles were travelling in the same direction. The direction of travel was noticeably absent from the defendant's defence as filed. The report indicates that observations were made and information received. The officer sketched the direction of travel and positions of both vehicles. The police report supports the claimant's version of events.
- [8] The ancillary claimant, Sanmerna Paper Products Limited's pleadings state that the ancillary defendant, Mr. Simpson suddenly and without warning drove from the left shoulder to the left of the main road into the path of its vehicle thereby causing a collision between both vehicles. The ancillary claimant claims special damages in the sum of \$2,125,695.00.

Negligence

[9] To prove negligence there are four requirements namely:

1. The existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.
2. Breach of the duty of care by the defendant, i.e. that he failed to measure up to the standard set by law;
3. A causal connection between the defendant's careless conduct and the damage.
4. That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

When these four requirements are satisfied, the defendant is liable in negligence.

[10] The test of whether a duty of care exists in a particular case is, set out by Lord Bridge of Harwich, in the leading case of **Caparo Industries plc v Dickman** [1990] 1 All ER 568, 573-574:

“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”

Lookout

[11] It is the duty of the driver or rider of a vehicle to keep a good look out. A driver who fails to notice in time that the actions of another person have created a potential danger is usually held to be negligent. (See **Foskett v Mistry** [1984]

R.T.R. 1, CA.) He must look out for other traffic which is or may be expected to be on the road, whether in front of him, behind him or alongside him, especially at crossroads, junctions and bends.

The Road Traffic Act

[12] The Road Traffic Act places certain duties on users of the road. The sections of particular importance which are self-explanatory are section 51(1)(a), (d), (e) and (f). Sections 95 (3) and section 57 speak to the duty of a driver when turning or changing direction.

Section 51(1) and (2) of the Road Traffic Act state:

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

- (d) 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;
- (e) proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road;
- (f) 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.”

[13] The Island Traffic Authority Road Code (1987) at Part 2 Rule 6 states:

“Before you slow down, stop, turn or change lanes, check your rear view mirror, signal your intention either by hand or indicator light signals and make sure you can do so without inconvenience to others. Never make a sudden or last minute turn; it is very dangerous.”

[14] Rule 8 states:

“Do not overtake unless you can do so without danger to others or to yourself. Before you overtake, make sure the road is clear far enough ahead and behind. Use your mirrors and if you are on a pedal cycle or

motorcycle look behind and to your offside or right side. Signal before you start to move out. Be particularly careful at dusk, in the dark and in fog or mist, when it is more difficult to judge speed and distance.

Do not overtake at or when approaching the following locations:

...

(c) *Road junction”*

[15] Any failure to slow down, stop, to check the rear view mirror or signal would constitute a breach of the Road Code. The Road Code exists to guide the actions of motorists therefore in my view evidence of a breach of the Road Code can be considered cogent evidence to buttress an allegation of negligence. See the provisions of the Road Traffic Act set out below:

“51(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 an 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.”

“57(1) The driver of a motor vehicle constructed to be steered on the right or off-side thereof, shall, before commencing to turn to, or change direction towards, the right, give the appropriate signal so as to indicate that direction.”

“95(3) The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to

establish or to negative any liability which is in question in those proceedings.”

Discussion

- [16] The evidence, that there was a collision is clear the only issue for this court is how did this collision occur? This was a case in which there had to be a resolution of two irreconcilably opposed versions of how the collision between both vehicles took place. Each driver gave evidence that he was driving on his correct side of the road. There was no room for compromise or accommodation between both, versions nor the possibility that one of the drivers was mistaken in his recollection of the accident: it is simply this one of them was truthful and the other was not.
- [17] The evidence plainly shows that the collision took place on the right side of the road in what has been called the filter lane. It is an additional lane restricted to vehicles making a right turn which allowed for the free flow of traffic to continue on in the left lane.
- [18] The damage sustained to both vehicles is worthy of note, Mr Simpson says he sustained damage to the right rear of his vehicle damage to the right back light, door and front. Mr Beckford said Mr. Simpson’s vehicle sustained damage to the right rear. Mr McLathy said that the damage to his vehicle was “as at initial impact the left side of my vehicle was damaged, the left door, left mirror, left front tyre blew out and squeezed right into the front passenger seat everything come over into one”. Mr McLathy described the damage to Mr. Simpson’s vehicle as a hit on the right side of the car on the door stretching along the back, right in the door post.
- [19] On Mr McLathy’s evidence, the unanswered question remains, how did the claimant’s vehicle end up on the left shoulder? If Mr McLathy is to be accepted as a witness of truth, how could he have known that the claimant while driving on the left soft shoulder had passed the right turn lane? For this is what was put to

the claimant. On the evidence of Mr. McLathy in order for the claimant to turn back, he drove on the shoulder and suddenly re-entered traffic at a point at which both vehicles were some three car lengths past the intersection. There was no evidence from Mr. McLathy that Mr. Simpson attempted to turn across his path or to make a U- turn. Mr. McLathy said that he first saw the vehicle at a distance further than the back of the courtroom and that he observed it for 5 seconds driving on the soft shoulder. There was no evidence from Mr McLathy that he reduce his stated speed of 75kmh. In addition, Mr. McLathy was shown the police report, he said the police arrived while he was there, he said he was spoken to by the police, at what scene would this have been? Could it have been the scene 3 car lengths away from the intersection which the defendant asserts was the location of the accident? There was no right turn lane in that vicinity and the police report, which I accept, clearly shows the claimant's intended direction of travel was right of the centre line.

[20] The account given by Mr. McLathy was highly improbable and did not accord with common sense, the fact that both vehicles ended up in a ditch on the right side of the road demonstrates this. It is incredible in my view, that Mr. Simpson's vehicle could have hit Mr. McLathy's vehicle and caused them both to spin out of control onto the opposite side of the road ending up in a ditch. While I appreciate that Mr. McLathy admitted travelling at 75kmh more or less, there was no evidence that Mr. Simpson was going at a pace even close to that. There was no logical explanation then on the evidence given by Mr. McLathy why Mr. Simpson's motor car spun out of control and into the ditch. Mr. McLathy was less than truthful he was unimpressive as a witness and lacked candour. I did not accept his evidence.

[21] It is clear on the claimant's evidence how this collision occurred. He was positioned to turn right Mr. McLathy overtook a line of traffic and collided with the rear of Mr. Simpson's vehicle. I accept the evidence of Mr. Simpson and Mr. Beckford, they were witnesses of truth and I found them reliable and their veracity was demonstrably present in their evidence. Mr. Simpson has given the

more probable version of events and it is more probable than not that defendant was speeding and overtaking on right side of the road and is the cause of the accident. Mr. Simpson did not contribute to the accident nor could he have avoided it.

[22] The defendant is not entitled to any of sums sought in their counterclaim. The claimant has to prove that the defendant owed him a duty of care to, that there was a breach of that duty and that there was damage resulting from that breach. All road users owe a duty of care to other users of the road and are required to obey the rules of the road and the Road Traffic Act.

[23] Section 51(2), imposes a duty on all drivers to take the necessary steps to avoid a collision. McLathy said he saw claimant's car from distance and he observed it for 5 seconds as he travelled at speed of 75kmh which means he did nothing to avoid the collision despite seeing the claimants moving vehicle. Section 51(g) of the RTA relates to overtaking as does rule 8 of the Road Code. Mr. McLathy did not have a clear and unobstructed view, he did not see Mr. Simpson's car and he caused the collision. Overtaking at road junctions is also prohibited. I find that this is why Mr. McLathy sought to mislead the court by moving the location of the accident to beyond the intersection.

Assessment of damages

[24] Both counsel cited cases in support of their submissions, however I have chosen the one closest to the injuries suffered by the claimant. In the case of **Elaine Graham v Daniel James** and Anor, on September 29, 2000, Harris, J awarded the sum of \$600,000 with interest at 3% for pain, suffering and loss of amenities. The claimant in that case had considerably more injuries to her back, left lower limb and neck. She had lost consciousness for 90 minutes. In the case at bar, the claimant also lost consciousness. He suffered from small abrasions to his parieto-occipital scalp. Radiographs of his skull and right shoulder were normal. He suffered from a presumed left lung contusion however there was no evidence

of this. The claimant was discharged on the day of the accident on analgesia with the expectation that he would make a full recovery with no adverse effect on daily activities. Mr. Simpson gave evidence of suffering from migraines and memory loss, this was not challenged.

[25] In all the circumstances, I would discount the award which updates to \$2,653,825.58. The award is discounted by \$653,825.58 to arrive at \$2,000,000.00.

Orders

1. Judgment on the claim to the claimant
2. General damages awarded to the claimant on the claim, for pain, suffering and loss of amenities in the sum of \$2,000,000 with interest at 3% from September 11, 2014 to July 31, 2018
3. Special damages awarded to the claimant on the claim in the sum of \$12,425.00 with interest at 3% from December 18, 2012 to July 31, 2018.
4. Costs to the claimant, Reuben Simpson to be taxed if not agreed.
5. Judgment to the ancillary defendant on the ancillary claim.