[2017] JMSC Civ. 73

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 02570

BETWEEN	**ADOLPH ALLEN**	**CLAIMANT**
AND	**ORANDY MOVING & STORAGE COMPANY LIMITED**	**1ST DEFENDANT**
AND	**KAYON KENTISH**	**2ND DEFENDANT**
AND BETWEEN	**ORANDY MOVING & STORAGE COMPANY LIMITED**	**ANCILLARY CLAIMANT**
AND	**OMAR LAWRENCE**	**ANCILLARY DEFENDANT**

CONSOLIDATED WITH CLAIM NO. 2010 HCV 01798

BETWEEN	**MICHAELIA MOORE**	**CLAIMANT**
AND	**ORANDY MOVING & STORAGE COMPANY LIMITED**	**1ST DEFENDANT**
AND	**KAYON KENTISH**	**2nd DEFENDANT**
AND BETWEEN	**ORANDY MOVING & STORAGE COMPANY LIMITED**	**ANCILLARY CLAIMANT**
AND	**OMAR LAWRENCE**	**ANCILLARY DEFENDANT**

CONSOLIDATED WITH CLAIM NO. 2010 HCV 01800

BETWEEN	**JANEL DALEY**	**CLAIMANT**
AND	**ORANDY MOVING & STORAGE COMPANY LIMITED**	**1ST DEFENDANT**
AND	**KAYON KENTISH**	**2nd DEFENDANT**
AND BETWEEN	**ORANDY MOVING & STORAGE COMPANY LIMITED**	**ANCILLARY CLAIMANT**
AND	**OMAR LAWRENCE**	**ANCILLARY DEFENDANT**

IN OPEN COURT

Ms. Kimberly Facey instructed by Bignall Law for the Claimants.

Mr. Oraine Nelson for the 1st & 2nd Defendants and Ancillary Claimant.

Ms. Arlene Williams and Ms. Gabrielle Hosin instructed by Nunes Scholefield DeLeon & Co. for the Ancillary Defendant

31st May 2016, 1st and 2nd June 2016 and May 12, 2017

NEGLIGENCE – ROAD TRAFFIC ACCIDENT – ROAD TRAFFIC ACT – PERSONAL INJURIES – DUTY OF CARE – DUTY OF CARE TO PASSENGERS – DUTY OF CARE WHEN MAKING A TURN – CONTRIBUTORY NEGLIGENCE – VICARIOUS LIABILITY – ASSESSMENT OF DAMAGES

Thompson-James, J.

Background

[1] On or about May 3, 2007 at about 3:00 p.m. along Spanish Town Road, St. Andrew, a collision occurred between a freightliner sleeper-cab motor truck bearing registration letters and numbers CE1345, driven by the 2nd Defendant, Kayon Kentish, and owned by the 1st Defendant, Orandy Moving & Storage Company Limited, and a Honda Integra motorcar bearing registration numbers and letters 7578EZ, driven by the Ancillary Defendant, Omar Lawrence, and owned by Owen Lawrence, who is not a party to this suit.

[2] It is not disputed that, at the material time, the 2nd Defendant was an agent of the 1st Defendant.

[3] It is also undisputed that at the material time, all three Claimants, Adolph Allen, Michaelia Moore and Janel Daley, were passengers in the motor vehicle driven by the Ancillary Defendant. They now seek damages for the injuries they sustained and expenses incurred as a result of the collision. An order was granted for the consolidation of the claims.

The Claims

[4] Adolph Allen filed his claim May 15, 2008, whilst Janel Daley and Michaelia Moore filed claims April 12, 2010.

[5] At the material time, Mr. Allen was a 20-year-old contractor, born December 18, 1987. At the time of filing his witness statement, he noted that he was still a contractor. At the time of the accident, Ms. Daley, who is now a police officer, was a 17-year-old student, born January 26, 1990. Ms. Moore, who is now an Insurance Claims Associate, was also a student at the material time. She was born December 8, 1989 and would have been 18 years old.

[6] The pleadings as to liability are essentially the same in all three claims, in that, it has been alleged that the accident was wholly caused and/or alternatively contributed to by the negligence of the 2nd Defendant, who was, at all material times, an agent of the 1st Defendant. It has been averred, inter alia, that the 2nd Defendant was negligent in that he drove the truck at an excessive/improper speed and made a sudden right turn, without any signal, into the path of the Honda motorcar in which the Claimants were passengers, thus causing them to suffer injuries, loss and damages and incur expenses.

[7] It has however been additionally and alternatively pleaded by Janel Daley and Michaelia Moore in their claims, that the Ancillary Defendant was negligent and wholly caused and/or alternatively contributed to the accident, in that, he, inter-alia, drove at too fast a rate of speed, along the roadway in a careless and

reckless manner, failed to stop, slow down, or swerve; causing his vehicle to collide with that of the 2nd Defendant. It is to be noted however, that the Claimants in their submissions only addressed liability in relation to the 1st and 2nd Defendants.

[8] Mr. Allen did not make any similar allegations against Omar Lawrence.

The Defence of the 1st and 2nd Defendant and the Ancillary Claim

[9] The 1st and 2nd Defendants deny that the 2nd Defendant was negligent, and aver that it was the Ancillary Defendant who caused and or materially contributed to the collision, by, inter-alia, attempting to pass the truck without warning when the truck was already in the process of turning, and when it was unsafe and dangerous to do so. Whilst the Defendants outline in their defence detailed particulars of negligence of the Ancillary Defendant and how they contend the accident occurred. The 2nd Defendant who was driving the truck at the material time, did not give evidence in court nor did he file a witness statement. The only evidence on behalf of the Defendants came from the managing director of the 1st Defendant company, Mr. Oral Williams.

[10] The 1st Defendant subsequently filed three ancillary claims in respect of each claim, against the Ancillary Defendant Omar Lawrence, averring that the accident was caused and/or materially contributed to by Mr. Lawrence's negligence, and claims (i) indemnity and/or contribution in relation to the Claimant's claim, and, (ii) damages for the loss sustained and expenses incurred by the 1st Defendant as a result of the accident. The first ancillary claim, in respect of Adolph Allen's claim was filed June 25, 2008; the second, in respect of Michaelia Moore's claim was filed November 11, 2010; and the third, in respect of Janel Daley's claim was filed December 15, 2010.

[11] The particulars of negligence against Mr. Lawrence, as well as the special damages claimed, are essentially the same in all three ancillary claims. The

particulars of negligence are as outlined above in paragraph 9 in respect of the defence.

[12] Orandy Moving and Storage (the Company) seeks to rely on the evidence adduced by the Claimants in the claim, as support for its own case in the Ancillary Claim.

The Ancillary Defendant's Defence and Counterclaim

[13] The Ancillary Defendant, Omar Lawrence, in his amended defence and counterclaim contends that he is not liable to indemnify and/or contribute to the Claimant's claim, nor is he liable for damages to the 1st Defendant's motor vehicle as a result of the accident. He denies that the accident was caused solely or was materially contributed to by him driving negligently, and avers that the collision was caused solely and materially contributed to by the 2nd Defendant, in that, inter alia, the 2nd Defendant, driving the 1st Defendant/Ancillary Claimant's truck, made a sharp right turn across the path of the Ancillary Defendant's vehicle, and collided into the front left section of the Honda driven by the Ancillary Defendant.

[14] Mr. Lawrence has counterclaimed against the Company for damages and loss incurred as a result of the accident.

The Evidence

[15] All three Claimants gave similar evidence as to the condition of the roadway at the material time, as well as the manner in which the accident occurred.

[16] In their evidence-in-chief, all three claimants stated that the weather condition was sunny and bright and the roadway was smooth. They described the roadway as consisting of three lane vehicular traffic heading in the same direction, with a cement median separating the roadways going in either direction.

[17] The Honda was travelling in the extreme right lane along the dual carriage roadway in the direction of Spanish Town from the direction of Kingston. On

approaching a section of the roadway in the vicinity of the Sealy Mattress Co. Ltd, a large motor truck (Freightliner Sleeper-Cab motor truck lettered and numbered CE 1345), without any indication or signal, cut across the roadway from the left side of the road to the right side into the path of the Honda.

The evidence of Adolph Allen

[18] He testified that on the day in question he was seated in the left rear seat of the Honda Integra motor car, travelling along Spanish Town Road. The car was driven by Omar Lawrence. Michaelia Moore was sitting beside him in the rear of the car, whilst Janel Daley was sitting in the front passenger seat. In his evidence-in-chief, he stated he was a restrained passenger, but when asked in cross-examination if that meant he was wearing his seatbelt, his response was "no."

[19] He saw the truck cut across the front of motor vehicles from the left side of the roadway to the right side and entered the path of the Honda. He shouted to Omar "Watch the truck", and immediately Omar swerved right but the front of the motor truck still collided into the left front side of the Honda. The Honda was pushed further right and collided into a light post that was at the median.

[20] Before he observed the vehicles to his left braking, he was just sitting in the car. There were no motor vehicles immediately in front, but there were cars to the side. He observed the truck cutting across the front of the vehicles from left side to right, at the same exact time he noticed the vehicles in the left lane braking up. He however testified that it was only one car that he saw braking up beside them. There were no other cars ahead of that car. The nose of the other car, meaning the bonnet, fender and the wheel, was just before them. The car was right at the front of the median when it was braking up. After braking up, the car started to slide and then it stopped.

[21] Up to the time when he saw the vehicle braking up, which is the same time he saw the truck cutting across the road, the car he was in did not reduce speed.

When he shouted to Omar to “watch the truck”, he was trying to get him to slow down and avoid the truck.

[22] He disagreed that when he said the front of the truck collided with the left front side of the Honda, he meant that the centre of the truck front collided in the car. Omar swerved and it was not the centre of the truck that collided with the car, right at the front wheel. The truck would have been facing the gap in the medium, in their path.

[23] Mr. Allen gave evidence that when the truck started to turn, it was in the extreme left lane, cutting across three (3) lanes. The truck came from the left lane to the middle lane to the right lane at the point where the collision happened.

[24] At the time the truck started to turn left from the left lane, he did not see it. When he saw the truck, he did not see any indicator on the truck. No lights. He disagreed with Mr. Nelson’s suggestion that when he saw the truck, it was already positioned across the road. When he saw, it was still turning, but he agreed that when it started turning, he did not see it and that he cannot say whether a hand signal was given. He didn’t see a hand signal and he didn’t see any indicator. Even after the accident and everything stopped, there was no indicator on the truck. The truck had a container attached to it.

[25] He disagreed with the suggestion that the collision occurred because the car he was travelling in was speeding. When asked again by Mr. Nelson if the car he was travelling in attempted to slow down, he said, “yes, seeing the truck one lane over.” It attempted to slow down and after colliding, it swerved just barely. He agreed with him that in his evidence-in-chief, he did not say that the car attempted to slow down and that this information is important information to the case.

The Evidence of Janel Daley

[26] Janel Daley gave evidence that, at the material time, she was a passenger in the front seat of the Honda Integra being driven by Omar Lawrence. Michaelia Moore and Adolph Allen were seated in the rear passenger seats.

[27] The Honda was travelling in the extreme right lane along the dual carriageway of Spanish Town Road in the parish of St. Andrew in the direction of Spanish Town from the direction of Kingston. The roadway has three lanes of vehicular traffic heading in the same direction and there is a cement median which separates the traffic travelling in either direction.

[28] On approaching an intersection of the roadway in the vicinity of Sealy Mattress Co., she saw a large motor truck (Freightliner Sleeper-Cab motor truck lettered and numbered CE1345) cutting across the roadway from the left side of the road to the right lane approaching the lane of the Honda. The motor truck didn't sound his horn or use an indicator. The Honda braked up and swerved to its right but the front of the truck still collided into the left front section of the Honda. The Honda motor car then collided into another object before coming to a complete stop.

[29] A police car came to the accident scene very shortly after the collision and transported her and Ms. Moore to the Kingston Public Hospital.

[30] When she saw the truck, she had not yet reached the opening in the median but was approaching. The truck was also approaching the opening. The truck was farther away from the opening than the car she was in. When she saw the truck, it did not appear to pick up more speed on its way to the opening. She disagreed that at the time of the collision, the front of the truck had already reached the cut out in the median. She also disagreed that immediately before the collision, the car she was travelling in was attempting to beat the truck.

[31] In cross-examination by Ms. Arlene Williams, Counsel for the Ancillary Defendant, Ms. Daley, gave evidence that she was in the left front seat, so she had a good vision of what was happening to her right and left. She saw the large

truck cutting across the roadway from the left side. When she saw the truck, part of it was in the left lane and a part of it coming over to the right lane. The truck was not driving fast. The vehicle she was in was not moving fast. When she first saw the truck, it was not far from the Honda. The witness pointed out a distance estimated to be about 250 feet.

[32] When she saw the truck, it was to her left and both were going in the same direction. She is familiar with the area where the accident occurred. The road is about three car lengths wide. At the time she saw it, she did not see any form of indication that the truck intended to turn. She does not know if the truck is a right or left hand drive.

[33] The Honda braked up and swerved to avoid the collision. The first impact caused by the truck to the Honda was to the left side of the Honda. The front right side of the truck collided with the Honda. After the collision the truck came to a stop right at the intersection. At the time of the accident Mr. Lawrence was properly driving in his right lane and it was the truck that turned across his path that caused the collision. Mr. Lawrence took steps to avoid the collision.

The Evidence of Michaelia Moore

[34] At the material time she was a student and a passenger in the right rear seat of the Honda motorcar. Adolph Allen was seated to her left, Janel Daley in the front passenger seat and Omar Lawrence was driving.

[35] Without any indication, the truck cut across the roadway from the left lane towards the right lane and into the path of the Honda. Immediately afterwards, the front of the motor truck collided into the front left section of the Honda. The collision caused the Honda to veer right and it collided into a pole that was at the median of the roadway.

[36] Before the truck cut across the roadway, it was travelling in the far left lane. When she saw the truck cutting across, the car she was travelling in was not very far from the cut out in the median. It was pretty close to the cut out. She did not

see when the truck commenced the turn and she would not be able to say whether or not any hand signal was given. She disagreed with Mr. Nelson's suggestion that the car she was in did not slow down. However, in response to Counsel's question as to whether she gave that information to her attorneys, she replied she was not asked that question. She also gave evidence in cross examination that the Honda swerved before the collision occurred. This too, when asked if she had given this information to her attorneys, she said she had not been asked. In relation to whether she gave any information to her attorneys indicating that the Honda tried to avoid the collision, she stated that she did mention that the Honda tried to turn out of the path of being hit by the truck. She did however admit that this was not in her statement or particulars of claim. Ms. Moore agreed that it was in Court that she was for the first time saying that the car braked to avoid the collision.

[37] When she first saw the motor truck, it was in motion and turning from the far left lane, coming across. To her knowledge, the truck had to leave the left lane, enter the middle lane and then enter her lane. In answer to the question if it was correct to say the truck passed through the left lane and middle lane without any collision with any vehicle in those lanes, Ms. Moore responded that she was not certain, but from her recollection, their vehicle was the only one that was hit. She disagreed that the collision occurred because the Honda did not slow down when the truck was passing. She is not sure whether a hand signal was given because she did not see any, nor did she see any indication that the mechanical signals were on.

[38] In cross-examination by Counsel for the Ancillary Defendant, Ms. Moore's evidence was that at all times Mr. Lawrence was travelling in the right lane, at the time of the accident he was not driving fast, she saw the truck before the accident occurred and that when she saw the truck, it was a little bit past the middle lane but by that time it hit them and it would have then ended up in the right lane when the collision happened. The front end of the truck had passed the middle lane when she saw it. A part of it was still in the far left lane because it

was a very long truck. At no time when she saw it was any part of it in the right lane. It was coming over towards them. At all times when she saw the truck, she did not see any indication of its intention to turn. The witness agreed that when she saw Dr. Cheeks after the collision, she told him that the vehicle swerved to avoid the collision. The vehicle slowed down to avoid the collision.

The Evidence of Oral Williams (for Orandy Moving & Storage)

[39] Mr. Williams' evidence is that he is one of the managing directors of Orandy Moving and Storage Company Limited which owns a fleet of freightliner used in the company's operations, including the motor truck involved in the accident, registered CE 1345. The trucks are routinely maintained by professionals and he would examine the trucks on an ongoing basis to keep informed as to any issues with regard to operational safety, capability or otherwise. As a result, he knew that that particular truck was a completely functional vehicle, equipped with the requisite fitness permitting its use on the road. The lights on the vehicle could be engaged when the driver wished to make a turn, flashing left or right and sending an indication to other road users that the driver wished to make a turn in that direction. The truck was also equipped with wing mirrors and rear-view mirrors that were intact and from which the driver was able to view the traffic conditions and help drivers determine when it was safe to make a turn.

[40] Mr. Williams confirmed that at the material time the vehicle was being driven by Kayon Kentish and that he was employed to the company in the capacity of driver.

[41] The manner of turning onto the Company's compound [on Spanish Town Road] was standard practice by all the freightliner trucks, as the trucks are very large and require sufficient space to be able to manoeuver. The trucks cannot make a direct turn on to the compound by travelling along the side of Spanish Town Road that leads to Three Miles as the available space for turning would not be wide enough.

[42] He gave evidence that he drives along Spanish Town Road to work on a daily basis and it is the norm for trucks to be turning across the medians to get on to different premises.

[43] Following the accident, the truck required several repairs estimated at a cost of $353,892.25. The truck was out of service and unable to earn revenue for a period of ten (10) working days.

[44] In cross-examination by Ms. Williams, he gave evidence that the truck was being operated as a commercial carrier. In order to operate a commercial type vehicle, you need a licence from the Transport Authority. In order to get the licence, you must have the registration, fitness and insurance for the vehicle. It lasts a year before it expires. He did not have insurance for the motor vehicle at the time of the accident. It was being operated without insurance for two days. At the time of the accident he was not the driver or a passenger of the vehicle, nor did he see how the accident occurred.

Evidence of Omar Lawrence

[45] He was driving the Honda Integra along Spanish Town Road at the material time accompanied by the three Claimants. He was travelling at almost 60 – 65 kilometres per hour. He was travelling in the right lane from the direction of Three Miles heading towards Six Miles, going to the Jamaica Public Service Company Limited (JPSCo) in Six Miles, where he was employed at the time as a temporary employee. He is very familiar with the Spanish Town Road because he uses the road very frequently.

[46] On reaching the vicinity of Sealy Posturepedic, which is on the left heading to Six Miles, a Freightliner motor truck travelling in the same direction in the left lane suddenly and without any warning made a sharp right turn into his path across the road and collided into the left side section of the car damaging the left front passenger door to the entire front section.

[47] When he saw the truck, he tried to swerve to avoid the collision, but the truck still collided into the left side of his car. The car spun around and he lost control of it and collided into the median in the middle of the road and the light pole. The car came to a stop thereafter.

[48] There was extensive damage to the left side and front section of the Honda. There was damage to the left front quarter panel, left front passenger door, bumper and the entire front end was damaged.

[49] The accident was caused by the 2nd Defendant who turned across the road suddenly and without any warning.

[50] In cross-examination, in answer to Mr. Nelson, the witness gave evidence that he was driving at an average speed, not too fast and not too slow. He was familiar with the road because he used it frequently. He knows that the road has breaks at different points for vehicles to access the other side of the road. He agreed that knowing that there is this facility; it would be advisable to look out for vehicles turning or crossing the road, and to drive at a speed that would allow him to stop if he comes up on a vehicle crossing the road.

[51] Whilst he was approaching the stoplight that regulates traffic onto Weymouth Drive and when he passed the stoplight, the truck was not adjacent to him at any time. The truck was travelling ahead of him. He agreed that the truck had a container attached and that visibility along Spanish Town Road is not impeded by anything like corners. There were no other trailers or trucks driving beside or behind the truck.

[52] The truck was not moving at the point when he saw it. It was facing six miles in the 3rd lane. The 3rd lane is not used a lot so it was pretty much covered in dirt. There were no vehicles in front of it. He stated the truck was parked because it was stationary and not moving. He did not see any hazard lights and cannot recall any brake light being on on the truck. He did not see the truck when it moved off. At the time he was proceeding towards Sealy Posturepedic, there

were no vehicles ahead of him or adjacent to him. He could not say whether, at the time, the truck, albeit in the dirt, was closer to the middle lane side of that lane or the left side of that lane.

[53] He agreed that the larger a vehicle is, the more space it needs to turn and that the truck with the container on it could not turn from the right lane, which means it would have had to turn from either the middle or left lane. He disagreed, however, that the truck, loaded with a container, could not turn as quickly as a smaller vehicle such as the car he was driving. Later, when asked whether a trailer truck with its container, needing greater room to exhibit a turn can do so as quickly as a smaller vehicle, he responded that it depends on the turn. He disagreed with the suggestion that the truck, loaded with the container, could not have made a sudden sharp right turn as he described it in his evidence-in-chief. He also disagreed that if a loaded trailer with a container attached were to make a sudden sharp turn, it would risk turning over.

[54] When the truck made the sudden sharp turn, he had reached somewhere along the length of the trailer back. When asked if that was distinct from the side of the container, his response was, it would be closer to the end of the container. It was at that point that the truck made the sudden sharp turn. The cab went through the middle lane heading into the right lane. He agreed that it was correct to say that he was close to the back of the container and when it made the sudden turn, he was unable to stop to avoid colliding with the cab.

[55] He would describe the trailer as a 40 feet trailer, and with the cab, that vehicle would have been more than 40 feet. He disagreed with the suggestion that since he was close to the back of the cab, he would have been at least 40 feet away or greater than 40 feet. His car would have been alongside or adjacent to the back of the container. He had reached the back of the container. The nose of the car would be a little further up from the back of the container. The nose had gone between 5 and 10 feet alongside the trailer. His car would be about 7 to 8 feet, but he was not sure. He agreed that the truck without the container should be

longer than the car. He also agreed that it is possible that he was at the very least 37 feet away from the cab and that travelling along the road at all times, he was in a position to see the trailer. He did not however see it turning from the left lane before it got to the right lane. It would not be correct to say the truck was proceeding across or was about to proceed across the median. It turned facing his lane in the direction of three miles. The front of the cab was pointing towards the middle lane. When it turned it would have been facing towards Six Miles heading towards the other side of the road. It would be correct to say that the area of the truck that made impact with his car was to the right front side of the truck. It was the edge of the nose, which was the corner. He disagreed that it would be correct to say that the impact occurred when the front of the truck had already reached the cut out in the median. The truck was coming from one lane distance. The impact would be a lane away from the median. It would have been a greater distance than 4 feet because the car is wider than 4 feet. The truck was speeding towards the median. He was driving at 65 km per hour. When asked if it was because he was driving fast that he collided with the truck, his response was that the truck hit him. He swerved and braked before the impact. However, he admitted that he did not say anything about braking in his evidence-in-chief, even though he considers it to be an important fact to disclose. He disagreed with the suggestion that the collision occurred because he was trying to beat the truck before it went through the median space.

The Issues

[56] In my estimation, the main issues to be resolved are as follows:

i. Who was the proximate cause of the accident?

ii. Was Adolph Allen contributorily negligent?

iii. Should liability be apportioned between the Defendants and the Ancillary Defendant and to what extent?

iv. Should the Ancillary Defendant be held liable to indemnify the Defendants for the Damages to the Claimants?

v. Should the Ancillary Defendant be held liable for the Ancillary Claimant's damages?

vi. Should the Ancillary Claimant be held liable for the Ancillary Defendant's damages?

Law & Analysis

[57] Negligence is defined in the case of **Blythe v Birminham Waterworks Co.** (1856) 11 EX 781; [843-607] All ER 478 as:

> *'…the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.'*

[58] It is well established that the driver of a motor vehicle has a duty to take reasonable care not to cause injury or damage to other road users. Lord Jamieson in **Hay or Bourhill v James Young** 1941 S.C. 395, 429, a statement which was later approved by the House of Lords ([1943] A.C. 92) explained the duty as follows:

> *'No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in the premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care.'*

[59] Reasonable care means the care which an ordinarily skilful driver would have exercised under all the circumstances, and connotes an "avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on" (**Bourhill v Young [1943] A.C. 92)**. What is reasonable depends on the circumstances of each case and is a question of degree (Ibid)**.**

[60] **Section 32 (1)** of the **Road Traffic Act (RTA) of Jamaica** provides that if any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence.

[61] **Section 51 (2)** of the **RTA** provides:

> *"…it shall be duty of a driver to take such action as may be necessary to avoid an accident 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".*

[62] Further, **section 27** of the **RTA** provides:

> *"If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable…"*

[63] With specific regard to the duty of a driver on making a turn, **section 51(1)** of the Road Traffic Act which provides rules that all drivers of motor vehicles should observe is instructive. **Section 51(1)(d)** provides that a motor vehicle

> *"shall not be driven so as to cross or commence to cross or be turned in a road if by doing it obstructs any traffic;"*

[64] **Section 51 (1)(e)** then provides that a motor vehicle "*proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road*"; **section 51(3)(a)** states that "*a motor vehicle obstructs other traffic if it causes risk of accidents thereto*."

[65] **The Island Traffic Authority Road Code 1987**, pursuant to section 95(1) of the Road Traffic Act, in p**art 2**, provides that a driver should "always be able to stop his or her vehicle well within the distance for which they can see the road to be clear" (**no. 4, pg. 7**); "before slowing down, stopping, turning or changing lanes, check rear view mirror, signal intention either by hand or indicator light signals and make sure you can do so without inconvenience to others", and most importantly, "never make a sudden or 'last minute' turn, as it is very dangerous to do so" (**no. 6, pg. 7**). Further, 7(a) provides that "well before you overtake, or turn left or right, slow down, or stop; use mirrors then give the appropriate signal"; 7(c) provides that one should "not travel too closely to the vehicle in front of you" and to "always leave enough space between you and the vehicle in front so that you can pull up safely if it slows down or stops" (pg, 8). In respect of turning, no. 12 (pg. 10) provides that a driver must "signal intention to turn to other road users

well in advance of their turn." **Section 95(3)** of the **RTA** provides that the failure to observe any of the provisions of the Road Code may in any proceedings under the Act, whether civil or criminal, 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.

[66] In **Esso Standard Oil S.A. Ltd & Anor v Ivan Tulloch** [1991] 28 J.L.R 553, it was held that "all users of a road have a duty of care to other road users."

[67] Further, the driver of a vehicle in which there are passengers, has a duty not only to other road users, but also to those passengers, to operate said vehicle in such manner as would be expected from an ordinary, reasonable and careful driver in similar circumstances, so as to not cause them harm. This duty must be balanced, with the driver also having regard to the other users of the road (**Parkinson v Liverpool Corporation** [1950] 1 ALL ER 367).

[68] From the foregoing, it is clear that both the 2nd Defendant and the Ancillary Defendant as drivers, owed a duty of care not only to each other, but also to the Claimants who were lawful passengers in the Honda, to operate their vehicles in such a manner so as not to cause them any foreseeable harm. It is equally clear that the Claimants all suffered injuries in the accident and ought to be compensated. The questions the Court must now determine are, by whom and to what extent?

Liability

[69] The following facts are undisputed by the parties and I find:

i. that the accident occurred at the time, place and between the particular vehicles as earlier indicated;

ii. that the truck was owned by the 1st Defendant/Ancillary Claimant company, but was driven by the 2nd Defendant, who at the material time was acting as the company's agent;

iii. that the Honda Integra was owned by Owen Lawrence, but was being driven by his son, the Ancillary Defendant Omar Lawrence at the material time;

iv. that all three Claimants were lawful passengers in the Honda motor car at the material time;

v. that Janel Daley was sitting in the left front passenger seat, Adolph Allen in the rear left seat, and Michaelia Moore in the right rear seat;

vi. that Spanish Town Road is a dual carriageway with three lanes on each side, separated by a median, and facilitating vehicular traffic towards Three Miles on one side, and Six Miles in the direction of Spanish Town on the other;

vii. that both vehicles were travelling on the same side of the road towards Spanish Town at the material time;

viii. that the truck was in the far left lane of the road and the Honda in the far right lane with the median to its right;

ix. that at the time of the collision the truck was in the process of attempting to make a right turn from the far left lane across the road to the other side (a U – turn), whilst the Honda was proceeding straight ahead in the right lane towards Spanish Town;

x. that all three Claimants were injured and incurred expense due to the accident;

xi. that there were damages to both vehicles.

Can the Defendants/Ancillary Claimants rely on the evidence of the Claimants and the Ancillary Defendant to support their version of how the accident occurred?

Was the 2nd agent negligent?

[70] The Defendants deny that the 2nd Defendant was negligent, and declare that it was the Ancillary Defendant who caused and or materially contributed to the collision, by, inter-alia, attempting to pass the truck without warning when the truck was already in the process of turning, and it was unsafe and dangerous to do so. It is important to note that though the Defendants asserted a positive defence in their statement of case, they called no witnesses, nor did they put forward any other evidence as to the fact of how the accident happened. They do however seek to rely on the evidence of the Claimants, and submit that this is evidence that they are entitled to rely on in law and in fact to support their defence. They rely on The Modern Law of Evidence by Peter Murphy, 8th edition, page 79, paragraph 1, for the proposition that the evidential burden "when borne by a defendant may be discharged by evidence other than evidence adduced by the defence," that "the evidential burden may be discharged by any evidence in the case, whether adduced or elicited by the defence, co-accused, or the prosecution [or claimant]" (page 99, paragraph 1) and the evidential burden is "discharged when there is sufficient evidence [in the nature of facts] to justify, as a possibility, a favourable finding by the tribunal of fact" (pg. 79, para. 1).

[71] Counsel for the Claimants, however, reject this notion and simply argue that since the Claimants are witnesses of truth and in the absence of a witness of fact for the Defendants, the Defendants cannot prove and have not proven an account of how the accident occurred contrary to that given by the Claimants and so their version of the accident outlined in the defence and the ancillary claim should not be accepted by the Court.

[72] Where a defendant goes beyond a mere denial and puts forward an affirmative defence, he has a legal burden to prove the facts he has asserted to the standard of a balance of probabilities, on the basis of the principle that he who asserts must prove (**Murphy and Glover, Murphy on Evidence, 12th Edition, 2011**). Therefore, the Defendants in this case, in order for their defence to succeed must prove as fact, on a balance of probabilities that the accident occurred in the way they allege.

[73] I am in agreement with Counsel for the Defendants that this burden may be discharged by any evidence before the Court whether adduced by the Defendants themselves or another party, in the sense that the Court is empowered to consider all the evidence put before it in assessing the facts in issue regardless of who adduces it. It seems to me that if the evidence put forward by the Claimants tends to support certain elements of the Defendant's statement of case and is inconsistent with and/or goes against elements of their own case the Court is bound to consider it as such. The Court is not constrained to find for the Claimants simply because the defendant has not put forth any evidence of his own. The Claimants have an evidential burden and a legal burden to adduce sufficient evidence to prove that the accident occurred in the way they allege, it is the Court's purview to determine that this burden has not been discharged, or only discharged to an extent and on certain issues. Such a determination may or may not indirectly support the defence's statement of case.

[74] I can see no legal impediment to doing so, since the evidential and legal burdens must be met. Further, the evidence of the Ancillary Defendant as to how the accident happened may or may not also support the Defendant's version of how the accident happened, in the sense that it is within the Court's purview after examining all the evidence before it to find that the Ancillary Defendant's own evidence, by itself or coupled with that of the Claimants shows that he was also negligent.

[75] The 2nd Defendant had a duty of care to keep a proper lookout and ensure the way was clear before embarking on making such a turn. In my view, this duty was heightened by the fact that he was the one changing directions and cutting across the roadway in front of vehicles who had the right of way, as well as the size of his vehicle, and that he was crossing from the far left lane, to middle, to right lane. From the evidence, I cannot, on a balance of probability, say whether the 2nd Defendant gave a signal before commencing the turn, however, I do not accept the Claimants' and Ancillary Defendant's evidence that the truck made a sharp and sudden turn. Given the size and length of the truck (more than 40 feet

long by the Ancillary Defendant's own admission), and considering that it was laden with a container, it is quite likely that the truck would have overturned, had it made as sharp a turn as Omar Lawrence would have the Court believe. It is my view that the Honda could have been speeding at the material time, considering that, by Mr. Lawrence's own evidence, he was travelling behind the truck for most of the time that he was aware of the truck's presence. Further, from the position of the damage to the truck, that is to the right front wheel, I find that the truck had already entered the right lane, was positioned horizontally across the road and was close to completing the turn when the Honda collided into it. In my view, both drivers contributed to the accident, in that, if either of them had simply stopped and waited, the accident could have been avoided. Both drivers would have had an unobstructed view of the other's vehicle, given the evidence as to the conditions and structure of the road at the material time. It may well be that the driver of the Honda was attempting to beat the truck as was suggested by Counsel for the Defendant.

[76] Notwithstanding this, the 2nd Defendant in my view, that the greater duty of care, given that he was the one making the turn and changing direction, across the path of the Honda. Though it would have been prudent for the Honda driver to stop to allow the truck to complete the turn, having seen him in the process of turning, the onus was on the truck driver to ensure the way was clear before entering into the right lane into the path of the Honda. He ought to have seen the Honda approaching at a considerable speed and stop to wait for the Honda to pass. I would therefore apportion liability 80% to the 2nd Defendant and 20% to the Ancillary Claimant.

Vicarious Liability

[77] Since there is no dispute as to the 2nd Defendant being an employee of the 1st Defendant in the performance of his duties at the material time, the 1st Defendant is vicariously liable for the 2nd Defendant's actions. The owner of the vehicle only escapes liability when it is to be used for purposes in which he has no interest or concern (**Hewitt v. Bonvin** [1940] 1 K.B. 188).

Was the Claimant Adolph Allen Contributorily Negligent?

[78] Perhaps the best illustration of the use of the word "Negligence" in the sense of careless conduct is to be found in the phrase "contributory negligence." Here, the word does not mean breach of a duty to take care, but simply means careless conduct on the part of the person, usually the plaintiff, in failing to prevent or avoid the consequences of the other person's breach of duty to take care (**Charlesworth and Percy on Negligence 10th Ed. para 1-10**).

[79] The 1st and 2nd Defendants have pleaded that Claimant Adolph Allen was contributorily negligent in that he failed to wear a seat belt and failed to take adequate precautions for his own safety at the material time. This was admitted by Mr. Allen in cross-examination. For this, the Defendants rely on the evidence of Adolph Allen where he admitted that he was not wearing his seatbelt, and submit that though they did not adduce any evidence of their own as to this issue, the evidential burden can be discharged by any other evidence. The Defendants further rely on the case of **Froom v Butcher** [1976] QB 286 [incorrectly cited as **Frame v Butcher** in the submissions] where it was found that if the evidence shows that the injuries would have been a good deal less by wearing a seatbelt, the awardable damages should be reduced by 15%.

[80] Although Adolph Allen admitted that he was not wearing his seat belt at the time of the accident, attorney for the Claimant argues that notwithstanding Mr. Allen's admission, there is no evidence before the Court that the Honda was even fitted with seatbelts, and if so, that they were in working order. It is also submitted that since **section 43B** of the **Road Traffic Act** does not require passengers in the backseat of a motor vehicle to wear a seatbelt, the Claimant cannot be said to have been contributorily negligent on the basis that he was not wearing a seatbelt at the time. It is argued that since the Defendants raise the issue, it is they who have the burden of proof on a balance of probabilities [**Caswell v Powell Duffrey Associates Collieries Lts**. [1940] AC 152 at pg. 172]. This burden they have failed to discharge.

[81] **Section 3(1)** of the **Law Reform (Contributory Negligence) Act** empowers the Court to reduce the amount of damages recoverable by a Claimant who is partly at fault for his damages he has suffered, as the Court thinks fit and having regard to the Claimant's share in the responsibility for the damage. Fault is defined to include, inter alia, negligence or any act or omission giving rise to contributory negligence.

[82] In the case of **Froom & Others v Butcher** (1975) 3 AER 520 at pg 524, the Court propounded that:

> *"Negligence depends on a breach of duty whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might be hurt himself." [See Jones v Livox Quarries Ltd (1952) 2 Q. B. 68]*

[83] **Section 43B(1)(b)** of the **Road Traffic Act**, in accordance with **section 11(1)(c)**, **(d)** or **(f)**, requires that passengers riding in private motor vehicles must wear a seat belt, regardless of whether they are seated in the front or back of the car. Whilst there are cases where back seat passengers are exempt from wearing a seatbelt, for example in a truck or stage or express carriage, passengers in a private motor car do not fall in that category. Hence, all passengers in the Honda would have been required by law to wear their seat belts.

[84] In ***Froom v Butcher***, Lord Denning in finding that the Claimant was contributorily negligent for not wearing his seat belt concluded as follows:

> *"Everyone knows, or ought to know, that when he goes out in a car he should fasten the seat belt. It is so well known that it goes without saying, not only for the driver, but also the passenger. If either the driver or the passenger fails to wear it and an accident happens--and the injuries would have been prevented or lessened if he had worn it--then his damages should be reduced… If such passengers do not fasten their seat belts, their own lack of care for their own safety may be the cause of their injuries. In the present case the injuries to the head and chest would have been prevented by the wearing of a seat belt and the damages on that account might be reduced by 25 per cent. The finger would have been broken anyway and the damages for it not reduced at all."*

[85] In coming to a decision Lord Denning considered that it was required by law for every motor car to be fitted with seat belts (in the front seat at the time) and that Parliament must have thought it sensible to wear them, as well as that the seat belt is defined by the legislation to include a belt designed to prevent or lessen injury to its wearer in the event of an accident (which is very similar to the definition in section 2 of our Road Traffic Act).

[86] The Defendants cite the unreported case of **Salmon v Newland** (1983) Times, as cited in **Bingham & Berryman's Motor Claims Cases**, 10th ed. Pg 182, which I find to be useful. The Claimant therein was found guilty of contributory negligence "even though there was no medical evidence on indicating that her injuries would have been a good deal less severe if she had been wearing a seatbelt".

[87] Notwithstanding this, I agree with Counsel for the Claimant that it is for the Defendant to prove on a balance of probabilities that Mr. Allen was contributorily negligent (**Lewis v Baker** [2014] JMSC Civ 1, para. 3; **Murphy on Evidence**, 12th ed. [2011], at para. 4.5.2.2, pg. 78). Mr Adolph Allen has admitted that he was not wearing a seatbelt at the critical time. The question now arises, whether wearing the seatbelt would have lessened Mr. Allen's injuries. Although it has been widely accepted in jurisprudence (and The Road Traffic Act defines seatbelt in section 2 to include any device designed to diminish the risk of injury to the wearer), it is pertinent to look at Mr. Allen's injuries. It is unfortunate that the Defendant has put forward no medical evidence to assist the Court in this regard. In **Froom v Butcher** however, the Court assessed this issue by looking at all the circumstances of the case on a balance of probabilities. It was not a requirement that there must have been a definitive conclusion by a doctor on the issue, though that certainly would have been useful. In the case at bar, I take into consideration that Mr. Allen suffered neck and back injuries and was diagnosed, inter-alia, with acute cervical whiplash and lumbar strain. Though he gave no evidence of how his body moved on impact, the Court takes judicial notice of the fact that a whiplash injury is caused by a sudden jerking of the neck forwards or

backwards. I find that Mr. Allen was contributorily negligent, in that it is more probable than not that his whiplash injury would have been less severe had he been wearing a seatbelt. I would therefore assess his contribution at 15%.

Assessment of Damages

Adolph Allen

Special Damages

[88] The following agreed items of special damages were pleaded in the Amended Particulars of Claim and proved by way of receipts:

i.	Medical Report and visits: Dr. Waite	$82,000.00
ii.	Medical Report and visit: UHWI	48,000.00
iii.	Medical Report and visit: Dr. Randolph Cheeks	25,000.00
iv.	Medical Report and visit: Dr. Grantel Dundas	30,000.00
v.	Physiotherapy visits: Dr. Norelle Morrison Ramsay	28,400.00
vi.	Xray – St. Jago Ultrasound/X-ray Services	7,400.00
vii.	Receipt – Rehab Plus	3,000.00
	TOTAL	**$223,800.00**

[89] In relation to transportation costs, Mr. Allen has pleaded an amount of $24,600.00 in his Amended Particulars, for the sums he spent on taxi to and from his medical treatment. In any action where a Claimant seeks to recover special damages the general rule is that they must be specifically pleaded and proved: **Lawford Murphy v Luther Mills** (1976) 14 JLR p.119. It is accepted however, that the Court must only insist on certainty of proof of damage as is reasonable, having regard to the circumstances of the case [**Ratcliffe v Evans** [1892] 2 QB 524 (C.A)], and "the Court may use its experience where appropriate to arrive at an award that is just in the circumstances" [**AG v Clarke** (2004) Court of Appeal Jamaica, Civ App No. 109/2002, unreported]. It is clear to me that this type of transportation cost falls in this category, since in most cases in Jamaica, no receipt is given upon payment of taxi fares.

[90] I accept Mr. Allen's evidence in his witness statement as to what he expended on transportation as reasonable. His evidence is that he made approximately 24 round trips for medical treatment, many of which he had to charter a private vehicle owing to his condition. It is interesting to note however, that Mr. Allen has proved the amount of $40,400.00, a considerably larger sum than that which he has pleaded. There have been no further amendments to his Particulars of Claim to correct this sum. In such a circumstance, I am constrained to limit the award for transportation to the amount of $24,600.00 as pleaded. The Jamaican Court of Appeal case of **Michael Thomas v James Arscott** (1986) 23 JLR 144 is instructive on this issue. At page 151I-152A (as cited by Sykes J in DeSouza v CB Duncan & Associates et al (2004) JMSC, Suit No. CL D096/1998), Rowe P stated:

> *"In my opinion special damages must both be pleaded and proved…When, however, evidence is led which established the extra amount of the claim, it is the duty of the plaintiff to amend his statement of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum."*

[91] Therefore, the total amount of special damages recoverable by Mr. Allen is two hundred and forty eight thousand, four hundred dollars ($248,400.00).

Special damages in the sum of $248,400.00 less 15%. This amounts to $211,140.00

General Damages

[92] In support of his claim for general damages, Mr. Allen relies on the following medical reports:

i. Medical Report of Dr. Garfield Bunting dated November 15, 2007;
ii. Medical Report of Dr. Philip Waite dated March 2, 2008;
iii. Addendum to Medical Report of Dr. Waite dated November 22, 2008;
iv. Medical Report of Dr. Randolph Cheeks dated April 9, 2008;
v. Medical Report of Dr. Grantel Dundas dated November 24, 2008;

vi. MRI Report prepared by the University Hospital of the West Indies dated November 3, 2008.

[93] In his witness statement Mr. Allen, a contractor at the time of trial, gave evidence that following the accident he was taken to the Kingston Public Hospital (KPH). He experienced intense pain to his neck, chest, left knee and back whilst waiting to see a doctor. He was examined that same day by Dr. Garfield Bunting, who, as noted in his report dated November 15, 2007, found the Claimant had tenderness in his trapezius muscle bilaterally, but that there was no bony tenderness and the claimant was not in distress. The x-ray of the cervical spine revealed no abnormality in the chest and left knee. Dr. Bunting diagnosed the Claimant with "Motor vehicle accident with whiplash injury". On this occasion, the Claimant was treated with pain medication for tenderness and given a cervical collar. He was discharged the same day and given five (5) days sick leave. His evidence is that part of his treatment was administered by injections.

[94] Mr. Allen gave further evidence that after reaching home the pain to his neck, chest, left knee and back began to worsen. He was not able to sleep comfortably due to the back and neck pain, and had difficulty walking and standing for prolonged periods. He was unable to look up, down or turn his head from side to side too quickly. He also was unable to perform his job duties as he could do prior to the accident, as the frequent and prolonged standing or walking and the constant looking up aggravated the pain. He felt weakness to both hands and was not able to lift heavy objects. He took pain medication and used the neck collar constantly to manage the pain.

[95] Mr. Allen was first examined by Dr. Phillip Waite July 25, 2007 (about two and a half months after the accident) presenting with complaints of persistent neck pains, nervousness and weakness in hands, intermittent low back pains aggravated by standing, and ankle pain with prolonged standing. Dr. Waite's report of March 21, 2008 notes that at that time Mr. Allen's knee and chest pains had resolved. Dr. Waite found upon examination that Mr. Allen had bony tenderness and left paravertebral muscle tenderness in the cervical spine; bony

tenderness to the lower part of the thoracic spine; and bony and paravertebral muscle tenderness in the lumbosacral spine. Nerve irritation tests were positive on the left and there was a grade 4 power to the left lower limb. Sensation was impaired from the entire left side from C5 downwards. The reflexes were deranged and asymmetrical. No abnormality was found in his left ankle. Dr. Waite diagnosed Mr. Allen with:

i. acute cervical whiplash;

ii. left cervical radiculopathy/myelopathy

iii. mechanical thoraco-lumbo-sacral pains;

iv. possible left lumbar radiculopathy

For treatment, Mr. Allen was referred to the physiotherapy department, given analgesics and advised to do x-rays and MRIs of different areas of the spine.

[96] Dr. Waite further examined Mr. Allen November 14, 2007 at which time the pains and neurology had improved and the reflexes were symmetrical but not normal. Mr. Allen was advised to continue physiotherapy and return with x-rays in one month. Mr. Allen returned to Dr. Waite on December 19, 2007 reporting that his neck pain had since resolved and his back pain had improved. His x-rays were reported as normal. Mr. Allen next visited Dr. Waite January 30, 2008, at which time he reported that though the neck and back pains had resolved they returned when he went back to work. There was still occasional weakness to his hands. He was assessed as having:

i. Chronic neck pains with subjective cervical radiculopathy;

ii. Chronic subjective back pain

Dr. Waite estimated his total disability as a 5% whole person disability.

[97] Mr. Allen's final examination by Dr. Waite was October 8, 2008, the results of which are contained in the Addendum to his previous Medical Report dated November 22, 2008. On this occasion, Mr. Allen presented with occasional neck

and back pains, the back pain brought on by sitting for more than 15 – 20 minutes and the neck pain by holding neck in one position for prolonged periods such as when driving. He reported that he was unable to lift objects, and that the excessive walking and looking-up poles required by his work as a JPS contractor aggravated his neck and back pain. Upon examination, the doctor found no abnormality in the spine and assessed Mr. Allen as having chronic subjective neck and low back pain, classified as (1) chronic non-verifiable cervical whiplash injury and (2) chronic non-verifiable mechanical low back pain. As to prognosis, Mr. Allen was assessed as having a 5% partial permanent disability due to the fact that the nature of Mr. Allen's job aggravates the pain. Dr. Waite noted that although there is no impairment, the neck and back pain continues to be a source of discomfort and the pains could worsen unpredictably, thus he may need to change careers if the pain persists.

[98] Mr. Allen consulted with and was examined by Dr. Randolph Cheeks April 1, 2008, some 10 months after the accident, complaining of persistent low back pain aggravated by most physical activities, the severity of which is sometimes alleviated by the wearing of a lumbar brace. Dr. Cheeks relied on the November 15, 2007 report of Dr. Bunting and the March 21, 2008 report of Dr. Waite, in addition to Mr. Allen's own account, for background information. Dr. Cheeks examined the x-rays Mr. Allen had done previously and agreed that they showed no bone injury. Examination revealed areas of spasm and significant tenderness over the paraspinal muscles of the lumbar spine. Dr. Cheeks noted that the cervical spine was fully flexible, non tender and had a full painless range of motion. Dr. Cheeks concluded that Mr. Allen had sustained an acute flexion injury of his lumbar region which has healed with scarring and chronic spasm. He agreed with Dr. Waite that permanent impairment should be assessed at 5% of the whole person. Dr. Cheeks was of the view that since almost a year had elapsed, it was reasonable to conclude that Mr. Allen had reached the point of maximum medical improvement.

[99] The report of Dr. Grantel Dundas dated November 24, 2008 reveals that he examined Mr. Allen on November 13, 2008, at which time he complained of intermittent neck pain and some amount of back pain. He was diagnosed with cervical strain and lumbar strain. The x-rays done at KPH and the MRI scans done at UHWI of Mr. Allen's spine showed no pathology, and Dr. Dundas concluded that Mr. Allen demonstrated minimal residual range of motion deficit in his cervical spine from his injuries. Dr. Dundas put his disability at 6% of the whole person.

[100] The MRI report of Mr. Allen's spine from the University Hospital, prepared by P.B. Johnson, concluded that impression appearances were within normal limits.

[101] The parties have suggested several cases in respect of what they deem reasonable in light of Mr. Allen's injuries. I find the following cases useful:

i. ***Barbara Brady v Barlig Investment Co. Ltd. & Vincent Loshusah & Sons Ltd***. *Suit No. C.L. 1996 B 081, delivered 9th, 10th, and 11th November 1998 - The Claimant was injured after slipping on a slippery floor in a supermarket and landing on her back. She suffered loss of consciousness, severe lower back pains and tenderness along the lumbo-sacral spine and both sacro-iliac joints. She was initially diagnosed with severe lumbo sacral strain and treated with physiotherapy and analgesics. Following the accident she was plagued with lower back pains aggravated by sitting for more than ½ hour, bending and prolonged walking. Upon further medical examination some 10 months after she presented with lower back pains with radicular symptoms into both thighs. She was diagnosed with acute mechanical type lower back pain and assessed as having 6% Permanent Partial Disability (PPD) of the lumbar spine and 5% PPD of the whole person. The Claimant was awarded $300,000.00. Revalued, this amounts to $1,466,816.88.*

ii. ***Iris Smith v McPherson and Donald Oldfield***, *Suit No. C.L. 1999 S 130 delivered June 2000 (Khan, Vol. 5, pg, 246) – The Claimant was injured in a motor vehicle accident and suffered blunt trauma to her lower back and right side of the neck, multiple soft tissue injuries, soft tissue swelling around left knee, lower back pain, lumbar sacral pain – spasm of neck and low back. She had post-accident pain in the lower back for 2 ½ years. She was diagnosed with 5% disability of the whole person and was required to have follow-up treatment twice a year. She was awarded $350,000.00; revalued, this amounts to $1,532,654.56. It is interesting to note that she was awarded an amount for 5 years of future medical care.*

iii. ***Cordella Watson v Keith James and Errol Ragbeen*** *Suit No. C.L. 1994 W 236 (Khan, vol 5, pg. 256), delivered 26 & 28 November 1997 – The Claimant was injured in a motor vehicle accident and suffered injury to the back causing severe lower back pain. On examination, she was found to have discomfort on left lateral rotation and flexion of the lumbar spine, straight leg raising bilaterally to 90 degrees, blunting of the sensation along the left thigh and leg. Mild tenderness on palpitation of her midline of the lumbar spine. She was diagnosed with chronic mechanical back pain. It was concluded that her pain would be aggravated by prolonged sitting, bending and lifting (part of her daily existence), but could be reduced with a proper back care programme. Her PPD in relation to the lumbar sacral spine was estimated at 5%, equivalent to 3% of the whole person. She was awarded $200,000.000. Revalued this amounts to $1,042,813.46.*

[102] In my view the injuries in Barbara Brady are most comparable to Mr. Allen's injuries, with the exception that Ms. Brady suffered loss of consciousness whereas Mr. Allen did not. The injuries in Iris Smith is also very similar to those of Mr. Allen, however the seriousness of that Claimant's injuries required that she do future medical care. I also take into account that Mr. Allen's injuries have healed for the most part, and his pain only persists and worsens when he does electrician work. Dr. Waite's opinion was that Mr. Allen may need to change his profession due to the aggravating nature of the work he does. I find that the Claimant should not have to change his profession on account of an accident he did not cause, and I consider that as a loss of amenities. Dr. Grantel Adams assessed his whole person liability at 6%. I would award a sum of $1,750,000.00. However, having found that Mr. Allen was contributorily negligent, in that it is more probable than not that his whiplash injury would have been less severe had he been wearing a seatbelt, I will reduce the award by 15%. This amounts to $1,485,500.00.

Michaelia Moore

Special Damages

[103] The following items of special damages were pleaded in Particulars of Claim of Michaelia Moore and proved by way of receipts:

i. Medical Report and visit: Dr. Philip Waite $46,000.00

ii.	Medical Report and visit:	Dr. Randolph Cheeks	25,000.00
iii.	Medical Report and visit:	Kingston Public Hospital	1,000.00
	TOTAL		**72,000.00**

[104] In relation to damages for transportation, I find the sum of $3000.00, as stated in her evidence-in-chief, to be reasonable and therefore proved (**Ratcliffe v Evans**).

[105] Therefore, I would award the sum of **$75,000.00** for special damages.

General Damages

[106] Ms. Moore relies on the following medical reports in support of her claim for the injuries she suffered:

i. Medical report of Dr. Cooke dated April 29, 2008;

ii. Medical Report of Dr. Philip Waite dated January 1, 2008;

iii. Medical Report of Dr. Philip Waite dated June 15,' 2008;

iv. Medical Report of Dr. Randolph Cheeks dated March 28, 2008.

[107] Ms. Moore, in her evidence-in-chief, states that after the accident, she was taken to the Kingston Public Hospital where she began to feel pain to her head, right knee and right shoulder. There, she was examined by Dr. Cooke, whose report dated April 29, 2008, indicates that Ms. Moore suffered head trauma with a 4.5 cm laceration to the forehead and an open fracture frontal bone. Her wound was sutured and she received pain medication and was admitted for neuro observation. Ms. Moore gave evidence that she was admitted to the hospital for a period of two days. After being released from the hospital, Ms. Moore stated she continued to visit for outpatient treatment and continued to suffer protracted migraines and headaches. Her evidence is that she was unable to study or read whilst afflicted with the headaches, and had to remain isolated. She also experienced blurred vision and lapses in her short and long term memory. She

started to experience back pain and was not able to stand or sit for prolonged periods. She also had trouble sleeping due to the back and shoulder pain. She could not do any household chores such as cleaning or washing. There was also a sharp sticking pain in her right knee that affected her ability to walk, run or stand for prolonged periods. She could not exercise with the frequency that she used to. She continued to take pain medication but still felt the pain up to the time of her medical visit with Dr. Waite.

[108] Ms. Moore sought further treatment and was examined by Dr. Waite September 6, 2007. He assessed her as having (1) traumatic chondromalacia patella and (2) post head injury with a. healed open skull fracture, b. post concussion headaches, and c. short and long term memory impairment. It was also indicated that Ms. Moore had a 5cm linear scar to the anterior scalp extending across the hairline to the forehead, and a 1cm scar and retropatellar tenderness to the right knee. She was referred to the physiotherapy department, advised to do x-rays of her right Knee, and return for reassessment in three weeks. Dr. Waite examined Ms. Moore next April 15, 2008. The Addendum to his medical report dated June 15, 2008 indicates that he assessed Ms. Moore as having (1) muscular pain to the right shoulder (not consistent with the accident) and (2) resolved chondromalacia patella to the right knee. He concluded that there was no long term impairment from the injury to her right knee.

[109] Ms. Moore was examined by Dr. Randolph Cheeks March 19, 2008. He relied on the patient's own account as well as the initial report of Dr. Waite for medical background and history of the accident. His report dated March 28, 2008 indicates that Ms. Moore suffered a cosmetic defect in the form of a triradiate scar approximately 1½ inches near the midline of the frontal scalp, only ½ inch of which is visible on the forehead in daylight. Dr. Cheeks assessed her as having a blunt head injury and that the profile of the headaches she had been suffering since the accident corresponds with the trauma. In his opinion, the migraine headaches would likely continue, however, this would not significantly disrupt her daily activities. She would be able to still pursue her usual activities and hobbies

without the need for supervision. She was rated at a Permanent Partial Disability of 2% of the whole person.

[110] I find the following cases to be most comparable:

i. ***Campbell (Lascelles) v. Clifton Bennett and Steve Gardener (****unreported) Suit No. C.L. C 248 of 1995, delivered in September of 2005 – The Claimant was injured after being hit off his motor cycle and suffered a laceration on the left posterior part of the parietal region, a linear fracture of the right occipital bone, a small laceration on the scrotum, a small abrasion on the left shin and stiffness in the distal inter phalangeal joint of his right little finger. He was found to be suffering from headaches and a short-term memory defect of 10-12%, with normal medium to long term memory. Total Permanent Partial disability was assessed at 7% of the whole man. He was awarded a sum of $900,000.00. Revalued, this amounts to $2,290,542.77.*

ii. *In Claim No. 2006 HCV 01820* ***Velma Richards et al v Georgette Barnett****, Velma Richards sustained head injury with cerebral concussion and chronic neck pain secondary to whiplash injury, laceration to the scalp and dislocation of hip. She used crutches for two months and was given a 5% whole person impairment in March 2012. She was awarded $2,500,000.00; revalued, this would amount to $3,293,322.30*

[111] The injuries in Campbell, as well as Richards, are useful since both Claimants suffered a fracture in the skull area, headaches and minor memory loss. The injuries in Campbell are more serious. The PPD rating of 7%, as compared with Ms. Moore's rating of 2%. Richards was given a 5% whole person impairment rating. In the circumstances, I would award a sum of $2,500,000.00 as being reasonable.

Janel Daley

Special Damages

[112] The following items of special damages were pleaded in Particulars of Claim of Janel Daley and proved by way of receipts:

i.	Medical Report and visit:	Dr. Philip Waite	$35,000.00
ii.	Physiotherapy visit:	Debra Callender	7,400.00
	TOTAL		**$42,400.00**

[113] In relation to Transportation, the Claimant has given evidence of expending an amount of $15,000.00. I find this amount to be reasonable, and will allow special damages in the sum of **$57,400.00**.

General Damages

[114] Janel Daley, in her evidence-in-chief, states that after the collision, her right knee was swollen and she felt pain in her neck and head. This pain along with pain to her shoulder worsened at the KPH, where she was taken. She was examined by Dr. Armstrong Frame, who diagnosed a 1cm puncture wound to the right knee with active bleeding. The report is dated July 2, 2008. She was treated with compression dressing, limb elevation and pain medication. After being discharged, she returned for follow up orthopaedic outpatient care. Thereafter, she still experienced constant pain to her neck, head and right knee that was aggravated by looking up or down or turning her head either side. She had CXC examinations around that time and the pain along with constant headaches and migraines made it difficult for her to read or study. She was not able to bend her right knee without feeling severe pain, nor was she able to lie, sit, stand or walk comfortably. She was unable to run. Occasionally her right knee would shake vigorously or give way. The pain lessened in the following months and now is felt occasionally upon flexion of the right leg. The pain in her neck also lessened after about four months and the pain and numbness in her right knee became less frequent after six months.

[115] Ms. Daley thereafter sought treatment with Dr. Waite September 25, 2007. Dr. Waites report of January 5, 2008 indicates that she was assessed as having multiple scars to the right eyelid and both knees and mild chondromalacia patella to the right knee. Dr. Waite noted that the scarring may be considered consistent with the accident, but the chondromalacia patella could have existed prior to the accident and be due to the accident or be a traumatic aggravation of a pre-existing condition. He estimated her disability for the chondromalacia patella at 2% and recommended physiotherapy.

[116] In looking for a comparable case, I considered Dr. Waite's inability to conclude with certainty that Ms. Daley's protracted knee injury was a direct result of the accident, as well as the Claimant's burden to prove that her injuries were caused by the Defendants. I reject the submission of her attorney that in the absence of evidence to explain the injury, it should be attributed to the Defendants. That simply does not accord with the law of negligence. In that regard, I find that in the cases submitted by the Claimant, injuries are considerably more serious.

[117] I find the following cases to be useful:

i. ***Jonathon Johnson v The Attorney General for Jamaica et al****, Claim No. C.L. 2002 J066, delivered in March 2007, reported at pg. 58 of Ursula Khan's Personal Injury Awards, vol. 6.*

ii. *The Claimant was injured after tripping over a piece of copper protruding along the sidewalk whilst walking on Hagley Park Road. He suffered a comminuted fracture of the right patella with abrasions to the patella area and painful swelling over the right knee, as well as restricted range of movement of the leg. Up to two months after the fracture had still not healed and it was projected that the Claimant would suffer 3 months of disability following the healing of the fracture. An award of $800,000.00 was made. Revalued, this amounts to $1,863,024.39.*

iii. ***Reginald Stephens v James Bonefield and anor****, CL 1992/S230, delivered September of 1996, reported at pg. 212 of Khan, Vol. 4. – The Claimant suffered an abrasion of the left leg, bruise to the right foot and experienced pain for four weeks following a motor vehicle accident. He was awarded $40,000.00. Revalued, this amounts to $231,916.44.*

[118] I find that the knee injuries suffered by Jonathan Johnson are similar to those in Daley's case. However, Mr. Johnson sustained a fracture whilst Miss Daley suffered a puncture wound to her right knee. Her injuries are more serious than those sustained by Reginald Stephens. Further, Miss Daley is left with multiple small scars to her eye lid, as shown by Dr. Phillip Waite's report of January 5, 2008. Although the doctor opined that the scaring may be consistent with the accident, it was not indicated whether these would be permanent or not permanent. It cannot be gainsaid that this damage is to her face. I also take into consideration that Dr. Waite was unable to conclusively state whether the

chondromalacia patella was caused or worsened by the accident. In the circumstances, I find the sum of $1,000,000.00 reasonable.

Ancillary Claimant Orandy Moving and Storage Company Limited

[119] The following special damages were pleaded and proved by the Ancillary Claimant:

i.	Damage to Trailer	$353, 892.00
ii.	Orion Loss Adjustors Report	5,825.00
	TOTAL	**$359,717.00**

[120] The Ancillary Claimant further claims a sum of $880,876.00 for loss of income. Mr. Oral Williams gave evidence in his witness statement that the truck was out of service and unable to earn revenue for a period of ten (10) working days. He relies on the fact that in 2007 the company had what he calls very consistent bookings that required the company's trucks to be on the road, performing jobs island-wide from Monday to Saturday and, if pre-arranged, on Sunday. He stated that there were several trucks, all of which would be engaged on a weekly basis. He gave further evidence that, in the week leading up to the accident, the company earned approximately three hundred two thousand six hundred ninety two dollars ($302, 692.00). He could see no adverse situation that would have resulted in decreased revenue for the company. During the five month period prior to the assessment of the truck in September of 2007, the rate of customers seeking to engage the company's services remained stable. However, due to the absence of the truck, many of these jobs were lost.

[121] On amplification at trial, Mr. Williams gave evidence that on average the truck would be engaged three times per week at a cost of about $30,000.00 around town for that particular type of truck. For out of town, he stated that it depends, and that it is not set. During the ten days the truck was unavailable to the company, the volume of frequency of request for business was about twice per day.

[122] In cross-examination, Mr. Williams stated the truck was out of service in excess of five months, rather than ten days as stated in his evidence-in-chief, due to issues related to getting the parts. He could say a little over half a year. He admitted that though his company is registered at the Companies Office and he is required to file returns each year, he has not provided any evidence of returns that could suggest to the Court that he has lost the amount claimed. He further stated that the figure stated would represent gross income and does not factor in expenses, which would include tires, spare parts, fuel, driver's salaries, insurance and road licence. However, these things would only be a onetime cost and he would not be able to put a cost on them. He stated that the actual loss incurred as a result of the collision was a lot more than the figure claimed. This was due to the fact that the company did not take a note of the requests for a period, until they saw where the situation was headed. As it relates to expenses, he would consider all direct and indirect costs associated with daily operations. Direct costs would include fuel and labour. He was not in a position however to say what these costs were.

[123] The Ancillary Defendant on the other hand submits that firstly, the Ancillary Claimant has not provided any proof outside of throwing figures at the Court, and secondly, that the Ancillary Claimant is not entitled to damages as the truck was operating without insurance at the material time.

[124] Mr. Williams, as noted above, admitted that the truck did not have insurance at the material time, but stated that this was only for a period of two days. There is no documentary evidence before the Court that this was indeed only for two days, or that it was for a longer period. However, I find that Mr. Williams is an honest and credible witness, as, in the absence of any evidence by the Claimant with regards to the lack of insurance, Mr. Williams accepted the suggestion that this was indeed so.

[125] I do however agree with the Ancillary Defendant to the extent that there is no documentary proof before the Court to substantiate the amount claimed for loss

of income. The only evidence as to the issue is the testimony of Mr. Williams. As an item of special damage, I consider that this loss must be strictly proved, so far as is reasonable given the nature of the loss. In a situation where the loss was capable of being reasonably quantified, I find that I cannot countenance the Ancillary Claimant's failure to provide sufficient proof to the Court. Particularly in light of the fact that the company ought to have in its possession, accounting records as to profits and expenditure, and ought to have filed accounting reports with the Company's Office of Jamaica.

[126] The amount claimed for loss of income is therefore disallowed.

Ancillary Defendant Omar Lawrence

[127] The following special damages were pleaded by Omar Lawrence and proved in respect of the damage to the Honda Integra resulting from the accident:

i.	Total loss of motor car	$370,000.00
ii.	Excess (insurance)	25,000.00
iii.	Joe & Sons Wrecking Service fee	6,500.00
iv.	Police Report - Ministry of National Security	1,000.00
v.	Assessor's Report – Mendez Livingstone	8,737.50
	TOTAL	**$411,237.50**

[128] The Ancillary Defendant also claims a sum of $112,000.00 for transportation incurred owing to the loss of use of the car.

[129] In this regard, it is necessary to reiterate that the owner of the Honda is the Ancillary Defendant's father, Owen Lawrence, and not the Ancillary Defendant. Further, evidence as to the loss incurred was given by Mr. Owen Lawrence and documentary proof was tendered through him. Although Owen Lawrence is not a party to the suit, he seeks to recover the damages to the vehicle and the other

expenses incurred as a result of the accident through his son, the Ancillary Defendant. I have great difficulty with this.

[130] In a case of this nature, damages are primarily compensatory, and are designed to put a claimant, as far as possible, back into the position he was in prior to the damage or as though the damage had not occurred [Andrew Burrows, **Remedies for Torts and Breach of Contract**, 3rd Ed. Oxford University Press, 2004, Pg. 232; **Dominion Mosaics and Tile Co. Ltd v Trafalgar Trucking Co. Ltd** [1990] 2 All ER 246]. This is usually done by compensating for the diminution in value of the relevant property or making an award for the cost of cure or repair [Ibid]. In a case of this nature, damages are awarded to a Claimant who has incurred loss, with the aim of compensating them for that loss. Although the Ancillary Defendant has referred to the car in his pleadings, evidence and submissions as "his vehicle" and "my vehicle" and noted that he was "without the use of his vehicle", the evidence indicates that the person who actually incurred the loss was the owner of the vehicle, Mr. Owen Lawrence, and not the Ancillary Defendant. Omar Lawrence gave evidence that the vehicle was used by himself and other persons in his household to travel to and from work and to transact other business. His evidence is that he was out of the use of his vehicle for ten months and had to secure alternate transport to travel to and from work and to do other business by renting a car at a cost of $2000.00 per round trip per day at a total of $112,000.00. Although his total expense was for a longer period, he is only claiming for a period of eight (8) weeks. In his evidence-in-chief, he stated that he is seeking to recover the property damage to his vehicle and the expenses incurred as a result.

[131] It seems to me that Owen Lawrence, not being a party to the action, cannot recover damages for his motorcar. Further, there is no indication that Omar Lawrence was acting in the capacity of his agent. Omar Lawrence did not sue as his agent.

Order

1. Judgment for the Claimants against the 1st and 2nd Defendants and Ancillary Defendant.

2. Liability is to be apportioned 80% to the 1st and 2nd Defendants and 20% to the Ancillary Defendant.

3. Judgment for the Ancillary Claimant against the Ancillary Defendant. The Ancillary Defendant is liable to pay only 20% of the damages awarded to the Ancillary Claimant.

4. The Claimant, Adolph Allen, is awarded a sum of **$211,140.00** for Special Damages at 3% interest from May 7, 2007 to May 12, 2017 and for General Damages for pain and suffering and loss of amenities in the sum of **$1,487,500.00** at 3% interest from May 15, 2008 to May 12, 2017.

5. The Claimant Michaelia Moore is awarded a sum of **$75,000.00** for Special Damages at 3% interest from May 7, 2007 to May 12, 2017 and **$2,500,000.00** for General Damages for pain and suffering and loss of amenities at 3% interest from April 23, 2010 to May 12, 2017 in respect of the 1st and 2nd Defendants, and from January 4, 2011 to May 12, 2017 in respect of the Ancillary Defendant.

6. The Claimant, Janel Daley, is awarded a sum of **$42,400.00** for Special Damages at 3% interest from May 7, 2007 to May 12, 2017 and for General Damages for pain and suffering and loss of amenities of **$1,000,000.00** at 3% interest from April 23, 2010 to May 12, 2017 in respect of the 1st and 2nd Defendants, and from January 4, 2011 to May 12, 2017 in respect of the Ancillary Defendant.

7. The Ancillary Claimant, Orandy Moving and Storage Company Limited, is awarded 20% of the sum of **$359,717.00** against the Ancillary Defendant, Omar Lawrence**.**

8. Costs to all three Claimants, apportioned 80% to the 1st and 2nd Defendants and 20% to the Ancillary Defendant. Costs to be agreed or taxed.

9. The Ancillary Defendant is to pay 20% of the 1st and 2nd Defendant/Ancillary Claimant's costs, and the Ancillary Claimant is to pay 80% of the Ancillary Defendant's costs. Costs to be agreed or taxed.