



[2024] JMSC Civ 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV01888

BETWEEN	DAMAR CLARKE	CLAIMANT
AND	EILEEN ANGELLA TAYLOR	DEFENDANT

Mrs Khadine Dixon instructed by Dixon and Associates Legal Practice for the claimant

Ms Rachel Dunbar instructed by Dunbar & Co for the defendant

Heard February 20, 2023, March 31, 2023 and January 12, 2024

Motor vehicle accident – whether the defendant liable in negligence -whether claimant contributory negligent

CORAM: JARRETT, J

Introduction

[1] Jericho Road in the parish of St Catherine, intersects with the Main Road that connects Linstead and Ewarton at a T-junction. The Main Road accommodates two lanes of traffic. One lane is for vehicles travelling from Linstead to Ewarton, while the other lane is for those travelling from Ewarton to Linstead. Damar Clarke (“the claimant”), alleges that while attempting to cross the Main Road on the night of November 6, 2012, he was hit down by a motor vehicle. The motor car in

question is owned by Eileen Angella Taylor (“the defendant”), and at the time of the accident was being driven by her driver, Osbourne Hill (“Mr Hill”). This is the claimant’s claim against the defendant in negligence for personal injury, loss, damage and expense, he allegedly suffered as a result of the accident.

The pleadings

[2] In his amended particulars of claim filed on November 22, 2018, the claimant pleads that the defendant’s motor car registration number PP159Z was being driven by her or by her servant or agent on November 6, 2012, when it collided with him. At the time of the collision, he was a pedestrian crossing the roadway. He particularises the alleged negligence of the defendant, her servant and / or agent at paragraph 4 of the amended particulars of claim as follows: -

“The Defendant her servant and /or agent were negligent in that she/they:

- i. Drove at too fast a rate of speed in all the circumstances;
- ii. Failed to keep any or any proper lookout;
- iii. Drove without any or any sufficient consideration for other users of the road, in particular the Claimant who was a pedestrian crossing the roadway;
- iv. Failed to manage and/or control the motor vehicle registered PP159Z so as to avoid the accident;
- v. Failed to keep any or any proper and effective control of the motor vehicle registered PP159Z she was driving;
- vi. Failing to stop, slow down, swerve or otherwise conduct the operation of the said motor vehicle so as to avoid the said collision;

- vii. Failed to heed the presence of the Claimant who was a pedestrian crossing the said roadway;
- viii. Failed to apply her brake within sufficient time or at all;
- ix. Overtaking a line of traffic when it was unsafe to do so;
- x. Drove in a careless and /or reckless manner in that on the 6th day of November 2012, the Defendant while in the process of overtaking a line of traffic along the Jericho Road main road, Linstead in the parish of Saint Catherine and (sic) collided with the claimant who was at the material time a pedestrian crossing the said roadway and caused the claimant to suffer injury, loss and damage and incur expense. “

[3] The claimant alleges that he suffered injury to his right leg. He claims special damages of \$31,000.00 for the cost of obtaining medical reports from The People’s Medical Complex and the Linstead Hospital, as well as for transportation expenses.

[4] In her defence, the defendant admits that her motor vehicle was involved in a collision with a pedestrian on November 6, 2012, on the Main Road in question, but denies that she was driving at the material time. She avers that her motor vehicle was being driven by Mr Hill, but she denies that he was negligent as alleged or at all. She also pleads that the collision was caused solely by the claimant or substantially contributed to by his negligence. Among the allegations of negligence which she pleads is that the claimant suddenly and without warning ran into the path of her motor vehicle and collided with it; that he crossed or attempted to cross the roadway when it was manifestly unsafe to do so and that he failed to have sufficient care or concern for his own safety.

The evidence

The claimant

- [5] The claimant's witness statement was read over to him by his attorney-at-law, and he confirmed the truth of its contents. This, after Miss Mona Lee Barrett, a former legal assistant of Dixon and Associates Legal Practice gave evidence that she prepared the witness statement for the claimant after receiving his instructions, that the completed document was read back to him before he signed, and that he appeared to understand its contents. In oral evidence at trial, the claimant indicated that he could neither read nor write.
- [6] In his witness statement the claimant said that he resides at Jericho District in St Catherine and is a labourer. He was born on February 14, 1990. On November 6, 2012, at approximately 8 o'clock at night, he was coming from home and walking along the Jericho main road, which has two lanes. He was heading to Benlass Crossroads in Linstead. He stood on the left side of the road when a motor vehicle on that same side of the road stopped to allow him to cross. That vehicle was the only car on the road at the time. According to him, the streetlights were on in the vicinity of where he was crossing the road and as no vehicles were coming to his left or to his right, he proceeded to cross the road. He was in the process of crossing and had reached midway in the road, "still on the crossing", when he glanced to his left and saw a car coming with great speed. The vehicle, which bore licence plate number PP159Z, and which was being driven by the claimant or her servant and/or agent, negligently overtook the car that had stopped to allow him to cross the road and collided into him. Because the car was speeding, he did not have the time to get out of the way. The driver of the speeding car drove off after the collision, but he saw and recognised him as a taxi driver in the Linstead area.
- [7] As no one stopped to help him, the claimant said that he hopped home in pain. As he was young, he did not know what to do. His father began asking him questions, he explained to him what had happened. His father told him that he needed to

report the incident to the police. That same night, he reported the accident at the Linstead police station. The following morning, he saw the taxi driver and told him he had hit him the previous night. The taxi driver admitted to hitting him and told him to deal with his insurance company. He recognised the taxi driver because he had seen him driving a taxi throughout Linstead. While speaking with him, he wrote down the licence plate number of the taxi. The claimant said that he returned to the Linstead police station to complete his report. A policeman from the station accompanied him to where taxis load and offload passengers and there he saw the defendant and pointed him out to the officer. The defendant admitted to the officer that he had collided with the claimant the night before and that his insurance company would deal with it.

- [8]** According to the claimant, he was “still feeling pain to the right leg” and his father told him to visit a doctor. He did not go “right away” as he was trying to bear the pain and take over the counter drugs. However, on November 11, 2012, he visited the Linstead Hospital and paid \$1,000.00 for a medical report dated September 13, 2018. He also visited The People’s Medical Complex for assessment and paid \$20,000.00 for a medical report. To visit The People’s Medical Complex, he incurred travelling expenses of \$1,500.00. He paid \$500.00 for each visit, and he visited the doctor on three occasions. He travelled to the Linstead Hospital five times and each time he paid \$200.00 for taxi fare. His overall expenses to travel to hospital was \$1,000.00. It has been eight years since the accident, but he occasionally feels pain in his right leg which causes him to limp on some occasions.
- [9]** On cross examination the claimant said that he has lived in Jericho District for over twenty years and that it connects with the Main Road that takes you to either Linstead or Ewarton. Jericho Road meets the Main Road at a T-junction. Early in the cross examination he said that when standing at the entrance of Jericho Road and facing the Main Road, Linstead is to his right and Ewarton is to his left. He also admitted that the Main Road has two lanes and that the lane on the side where Jericho Road intersects with it, takes vehicles from Linstead to Ewarton, while the second lane on the opposite side of the road, takes vehicles from Ewarton to

Linstead. He accepted that travelling from Ewarton, Jericho Road is to the right, but insisted that he was on the pedestrian crossing when he was hit down by the defendant's speeding car.

- [10]** In early cross examination, the claimant also said that the car that had stopped to allow him to cross the main road, stopped on the same side of the road where Jericho Road meets the main road and that the speeding car that collided into him was coming from the same direction as the car that had stopped. In further cross examination, he said that he had crossed the first lane, reached the middle of the road, but never got to cross the second lane that takes vehicles from Ewarton to Linstead. When asked whether when he states in his witness statement that he glanced to his left and saw a car coming at great speed, whether it was in the direction of Ewarton he had looked, he said: "The car suppose to a come from Ewarton". When he was reminded of his earlier evidence on cross examination that the car coming at great speed was on the same side of the road and coming in the same direction as the car that stopped to allow him to cross, this was his response:

"In my statement I say a car come at great speed and hit me".

- [11]** The following exchange then took place between cross examining counsel Ms Dunbar and the claimant: -

Q. You agree the car that stopped was coming from Linstead towards Ewarton direction when it stopped?

A. The car that stopped was coming from Ewarton.

Q. Suggest that the car was coming from Linstead going towards Ewarton?

A. I disagree. The two cars coming from Ewarton.

When counsel said to him that the car that stopped did so to let off passengers and not to allow him to cross the road, the claimant said that the car had stopped to let him cross, the defendant's car overtook the stopped car at a fast speed, hit him on the left foot and the car that stopped, ended up on Jericho Road. In a demonstration in court, the claimant lifted his left hand and said it was his right, and lifted his right hand and said it was his left. The claimant initially said in cross examination that he went to the doctor on the night the car collided into him, but admitted on further cross-examination that he waited and did not go that same night. He admitted that he did not see any damage to the defendant's car as a result of the collision.

Medical evidence

- [12] The medical reports from the Linstead Hospital and The Peoples Medical Complex were agreed documents. Dr Clive Thomas, Senior Medical Officer at the Linstead Hospital said in a report dated September 13, 2018, that the claimant presented to that facility on November 11, 2012, complaining of injury to his right leg. Physical examination revealed tenderness with slight swelling to the anterior middle aspect of the right leg. The claimant was assessed as having myalgia. X-ray revealed no fracture, and he was given analgesic and discharged home with prescription.
- [13] Dr Keishma Robinson of The People's Medical Complex says in his report that he saw the claimant on November 6, 2012. He says that the claimant alleged that he was involved in a motor vehicle collision on that same day and that he sustained injuries to his right leg. There was no loss of consciousness, and he was seen and started on analgesics. On his assessment of the claimant, there was tenderness on palpation of the right forefoot on active and passive movement. There was large swelling and bruising and decreased range of motion. He was diagnosed with a large contusion of the right forefoot, and started on anti-inflammatories, muscle relaxants, tablets and cream. There were two follow up treatments on May 5, 2013, and on March 19, 2014, respectively. On the May 5, 2013, visit, the doctor reports that the claimant was still complaining of severe pains on examination to the leg,

he was sent for a repeat X-ray which was inconclusive of fracture, and given anti-inflammatories, muscle relaxants, tablets and cream. On the visit on March 19, 2014, it is reported that the claimant was still complaining of severe pains on examination to leg. This time physiotherapy was advised but was deferred by the claimant because of financial difficulty. But he was again given anti-inflammatories, muscle relaxants, tablets and cream.

The defendant

- [14] The defendant's sole witness was Mr. Hill. The defendant filed a witness summary on his behalf and he was allowed to give his evidence in chief orally. In 2012, he resided at Deeside District in Linstead and was a taxi driver for the defendant, operating the route from Spanish Town to Linstead. He recalls that sometime in 2012 at about 7.30 pm one evening, he was coming from Ewarton driving the defendant's motor car licence plate number PP159Z heading towards his home in Linstead and travelling on the Main Road. The Main Road has two lanes of traffic and there is a pedestrian crossing right at the Jericho District intersection. Going towards Linstead, Jericho District is on the right-hand side.
- [15] Mr Hill said that on the night in question the lighting was good, he had the car headlights on dim, there were streetlights, and he was driving at about 25 to 30 kilometres per hour. As he approached the Jericho District intersection, he noticed a car stop on the opposite side of the road with its headlights on. The car was facing in the direction of Ewarton. About three cars came and stopped behind it. He then saw somebody coming from the Jericho side of the road, run fast across the road. He applied his brakes and swerved to the left to avoid an accident, but the person bounced into the car's right front fender. The collision occurred on the left lane coming from Ewarton to Linstead. According to him, the person who bounced into the car fell to the ground, he stopped the car, came out, and upon asking the person if he was okay, the person said 'yes'. The defendant's car was

not damaged, he returned to it, the person walked away, and he headed home to Linstead.

[16] According to Mr Hill, the following day he saw the claimant at the Linstead taxi stand. The claimant called to him and begged him money. He believes the claimant reported the collision to the police, because the police came to speak with him, and it was after that, that he went to the station to make a report. He had not reported the accident before because he did not think that it was anything serious, since nothing was wrong with the defendant's car, and he thought the incident was a "minor thing". After the incident that evening, he saw the claimant many times but did not notice anything about him. On the night of the incident, he was not overtaking a stationary vehicle, he was not travelling at a great speed, he did not drive away after the collision. He also did not admit to the claimant that he had hit him, and he did not see the car that had stopped on the opposite side of the road allow anyone to cross the road.

[17] On cross - examination Mr Hill said that he had been driving for the defendant for about five years. The route where the collision occurred was a regular route for him, he travelled on it almost every day. He, however, did not know the speed limit. Asked how far away the man was who ran across the road when he first saw him, his response was:

"When I realise, just something straight coming into my vehicle at a fast speed".

When asked whether it would be correct to say that he did not see the person before the collision occurred, he said:

"The person come close to my car. That is when I saw the person and that is when I swerve away and brake up, and the person slam into the fender".

[18] On further cross examination Mr Hill said that it was less than a second before the collision occurred that he saw the person running across the road as the person was coming so fast. Asked how long he was observing the vehicle that had stopped, Mr Hill said that as he came down the main road, he saw a car on the opposite side of the road letting off passengers. In terms of distance, he said the car may have been seven car lengths away from where he was. The lighting where the car stopped was good and the person running across the road came from the direction where the car had stopped. When asked which part of claimant's body hit the defendant's vehicle, Mr Hill's response was:

"I would say most likely his hand and his belly".

Submissions

The claimant

[19] Mrs Dixon, counsel for the claimant, submitted that the claimant: "a simple man, had some challenges giving evidence as it was pellucid that he had some challenges reading and also, he was unable to articulate with the finesse and clarity in comparison to Mr Hill". Nevertheless, she argued, he was forthright and convincing and more credible than the defendant's witness in his account of how the accident occurred. She described the claimant during cross examination as unwavering, and consistent in his evidence as to how the accident occurred. According to counsel, the fact that Mr Hill did not report the accident until the police's insistence, it is reasonable to infer that he knew he was the proximate cause of the accident and was avoiding being questioned by the police. This conduct on the part of Mr. Hill, counsel argued, must be compared to that of the claimant who reported the matter to the police the same night of the accident. Reporting to the police as he did is not indicative of someone with guilt. Furthermore, submitted Mrs Dixon, the claimant returned to the police station the

following day which is not the conduct of a reasonable person who knowingly caused an accident.

- [20]** According to Mrs Dixon, it is not fatal to the claimant's evidence that he could not tell the difference between right and left. To say the vehicles were coming from left or from right is of no utility. The claimant however was certain that both the defendant's car and the vehicle that stopped to allow him to cross the road were coming from Ewarton travelling in the same direction towards Linstead. It was submitted that the defendant's vehicle could have been far from the claimant such that he would not have seen it before starting to cross the road. Additionally, since the claimant was on the pedestrian crossing, he would not have expected a motor vehicle to hit him down especially when another vehicle had stopped to allow him to cross the road.
- [21]** It was further argued that the claimant's evidence is that the vehicle hit him below the right knee, and this is consistent with the medical evidence of Dr Keishma Robinson. However, the contradiction between the date the claimant said he sought medical attention and Dr Robinson's medical report should be resolved on the medical evidence. The medical report is a contemporaneous document and therefore more reliable than the claimant's memory, given the fact that the accident occurred many years ago, memories fade and precise dates become muddled.
- [22]** If, argued Mrs Dixon, Mr Hill was travelling at 25 to 30 kilometres per hour, and visibility was good where the car had stopped on the opposite side of the road, the defendant's car lights were on dim and there were streetlights, he would have had to see the claimant crossing the road and be able to stop to allow him to do so. Being unable to see the claimant, meant that Mr Hill had to have been speeding. She argued that the claimant had to have been in the very near vicinity of the car that had stopped, but mysteriously, Mr Hill was able to see passengers being let out of that vehicle, but not see the claimant. Mrs Dixon questioned the accuracy of the speed at which Mr Hill says he was travelling. She argued that he could not, at one and the same time, see the vehicle letting off passengers from seven car

lengths away on the opposite side of the road, as well as vehicles in front of him and observe the speed at which he was travelling. Counsel also submitted that since the stopping distance when travelling at 25 to 30 kilometres per hour is 12 metres or 40 feet, which is equivalent to three car lengths; on the claimant's own evidence, he saw the stopped car when the stopping distance was more than double. He therefore would have had sufficient time to stop and allow the claimant to cross the road without hitting him.

[23] Learned counsel described as: "highly unusual", Mr Hill's answer to the question posed in cross examination as to which part of the claimant's body collided with the defendant's car. She argued that this was inconsistent with Mr Hill's evidence that it was the car fender that had hit the claimant. It was submitted that the fender is lower down on the car, and it was the claimant's right foot which was injured which was supported by Dr Robinson's medical report.

[24] Mrs Dixon cited the **Road Traffic Act** and the **Road Code** for the guidance they give to road users. As to contributory negligence, she cited **Nance v British Columbia Electric Railway Co Ltd [1951] 2 ALL ER 450** for the proposition that when contributory negligence is raised as part of a defence, the defendant must prove that the injured party did not take reasonable care of himself and contributed to his own injury. On quantum of damages, Mrs Dixon submitted that general damages of \$1,000,000.00 and special damages of \$23, 500.00 are reasonable awards in the circumstances. In support of her submissions on general damages, reliance was placed on the decisions in **Sherine Williams v The Attorney General of Jamaica [2016] JMSC Civ 12** and **Regional Stephens v James Bonfield and Conrad Young reported in Khans vol 4 page 212.**

The defendant

- [25] Ms Dunbar argued that on the claimant's own case, it is evident that the inconsistencies in his evidence are not minor and are in fact fatal. She submitted that the claimant's evidence is that he did not go right away to a doctor and waited until November 11, 2012, when he went to the Linstead Hospital. The parties agree that there was no damage to the defendant's motor vehicle. This, argued counsel, supports Mr Hill's evidence that he was not driving at a fast speed. A speeding car coming into contact with someone would result in serious injuries. According to Ms Dunbar, the claimant would have ended up in hospital had he been hit by a speeding car and would not be walking around for five days. She argued that it is obvious that the claimant was not injured in any serious way. There was nothing to report to the police since the claimant got up and walked away and there was no damage to the defendant's car. What would be the point, she asked rhetorically, in reporting an accident when there was no damage.
- [26] It was submitted that since the defendant's car was travelling on the lane that takes vehicles from Ewarton to Linstead, had it hit the claimant as he alleges, it would have been the claimant's left side which would have been impacted. The fact that the claimant's injury was to the front of his body suggests, submitted Ms Dunbar, that he was running into the car. The claimant agreed that when standing by the Jericho side of the main road looking towards the main road, Ewarton is to his left and Linstead is to his right. Counsel said it was the claimant's evidence that he was coming from his home and that the car that stopped to let him cross the road was on the same Jericho side of the road where he was standing and was coming from Linstead. He was quite clear where Linstead is and where Ewarton is, she argued. The claimant's later evidence of a car stopping on the other side of the road which takes cars from Ewarton to Linstead is a figment of his imagination.
- [27] Ms Dunbar further submitted that if Mr Hill had overtaken a car in front of him on the lane where vehicles travel from Ewarton to Linstead, the collision would have had to occur in the first lane which takes vehicles from Linstead to Ewarton, since

overtaking would place Mr Hill into that lane. Yet, she argued, the claimant's evidence is that the collision occurred in the second lane. It was submitted that on a balance of probabilities, the only version of the accident that makes sense is that the claimant was the one who ran into the road and into the lawful path of Mr Hill.

[28] It is not impossible or improbable for Mr Hill to have been unable to stop in time to avoid the collision, because he saw the stopped car at seven car lengths away, since Mr Hill had continued driving until the claimant suddenly ran across the road. According to Ms Dunbar, the claimant had a duty to ensure that he crossed the road when it was safe to do so. He was not on the pedestrian crossing and should have seen the lights of the defendant's car approaching before attempting to cross the road. He was therefore negligent.

[29] In her written submissions Ms Dunbar cited several authorities dealing with road traffic accidents, the law of negligence and the duty of care all road users owe to each other. Although I have not included them in this judgment, counsel can be assured that I have considered all of them. The principles of law they contain are well known.

[30] Ms Dunbar argued that if the court finds the defendant liable, general damages should not be more than \$200,000.00 and costs should be based on the parish court scale as this matter ought to have been brought in that court.

Analysis and discussion

[31] The burden is on the claimant to prove his case on a balance of probabilities. This means that he must satisfy the court, that on November 6, 2012, at around 8 o'clock at night, he was on the pedestrian crossing close to where the Jericho Road intersects with the Main Road, when Mr Hill, driving at a very fast speed, overtook a vehicle which had stopped to let him cross the road, thereby hitting him and causing him serious injury.

[32] The claimant's direct evidence was that a speeding car with registration number PP159Z, overtook a car that had stopped to allow him to cross the main road and hit him down while he was in the process of doing so. He puts himself midway across the road in what he describes as the "crossing", when the collision occurred. In a methodical cross examination conducted by Ms Dunbar, the claimant accepted that the Main Road has two lanes and that where he was standing before attempting to cross, was the side of the roadway near to the Jericho intersection and where vehicles proceed from Linstead to Ewarton.

[33] While it may be the case that the claimant confuses left from right from time to time, what is clear, is that he admitted quite assuredly when first cross examined, that when he stands on the side of the Main Road where Jericho Road intersects with it, and is looking towards it, to his right is Linstead and to his left is Ewarton. On his direct evidence, the defendant's speeding motor car, travelling from Linstead to Ewarton, overtook a car which was travelling in that same direction, but which had stopped to allow him to cross the Main Road, and collided into him. This version of how the accident occurred contradicts the pleadings, where it is alleged that the defendant her servant and /or agent were negligent in overtaking a line of traffic when it was not safe to do so. It is also contradictory in that the claimant alleges that the speeding car was coming from the same direction as the car that stopped to allow him to cross the road, yet he claims to have glanced to the left and seen that very same speeding car. It is also quite remarkable that on cross examination, the claimant said that he did not see any car overtaking a line of traffic, yet he insisted that what is contained in his amended particulars of claim is correct. In fact, this version of the accident, was later contradicted by the claimant's own evidence on further cross examination, which revealed a second version of how the accident occurred. The second version has the collision occurring on the lane taking vehicles from Ewarton to Linstead. On this second version, both the defendant's car and the car that stopped to allow him to cross the road, were both in the lane which takes vehicles from Ewarton to Linstead.

- [34]** I agreed with Ms Dunbar that on the claimant's second version of the accident, the collision would have had to occur in the lane which takes vehicles from Linstead to Ewarton, and not the other way around. This is so because had Mr Hill been overtaking when the collision occurred, the act of overtaking would put him in the first lane, yet the claimant insists that the collision took place in the second lane. The claimant's evidence is notable in its contradictions, its inconsistencies and in the contrasting versions of how the accident is alleged to have occurred. I frankly cannot accept Mrs Dixon's characterization of his evidence as forthright, convincing, and credible. On the contrary, I found it to be most unreliable.
- [35]** I agree with Ms Dunbar that the independent evidence of the medical report from the Linstead Hospital relied on by the claimant is significant. The reported injury is tenderness and slight swelling to the anterior middle of the claimant's right leg. This was not described as a serious injury. On the claimant's own account, he did not attend the Linstead Hospital until November 11, 2012. That is five days after the collision. Had the injury been serious, one would have expected him to seek medical treatment almost immediately, or at least on the following day. Furthermore, it would seem to me that had Mr Hill been speeding when the collision occurred as the claimant contends, he would have suffered very serious injuries or even death.
- [36]** The medical report from Dr Robinson is, in my view, rather curious. He says that the claimant presented on the same night as the accident. This contradicts the claimant's own evidence. I am unable to accede to Mrs Dixon's urgings to accept Dr Robinson's report of the date of first presentation of the claimant over the claimant's own evidence, because the passage of time since the accident would cause the claimant to be confused about dates. I reject this argument. The claimant clearly said in his evidence in chief that he did not seek medical attention right away, he bore the pain and sought to use over the counter treatment until he decided to visit the Linstead Hospital, which was five days after the collision. The Linstead Hospital's medical report says the claimant was treated there on November 11, 2012. The claimant's evidence is that he visited Dr Robinson after

his visit to the Linstead Hospital. On cross examination he confirmed that he waited before seeking medical treatment. I therefore find that the claimant did not visit Dr Robinson on the night of the accident. I find that he visited the Linstead Hospital on November 11, 2012, as is reported by that facility in its medical report dated September 13, 2018, and that this was the first medical facility he went to for treatment, after the November 6, 2012, collision.

[37] I consider the difference in the diagnoses significant. Linstead Hospital's diagnosis is that of slight swelling to anterior middle aspect of the right leg. Dr Robinson's diagnosis is of a large contusion to the right forefoot. Anatomically, the forefoot is a different part of the body from the leg. Lay persons may not readily appreciate the difference, but doctors would. Five days after the accident the claimant presented at the Linstead Hospital with slight swelling to the anterior middle aspect of the right leg, not the right forefoot. The Linstead Hospital is the first medical facility the claimant visited after the November 6, 2012, incident. I therefore cannot accept Dr Robinson's diagnosis as being an accurate reflection of the injury the claimant suffered because of the collision on November 6, 2012. Not only does his medical report contradict the claimant's own evidence in relation to when the claimant first consulted with him, but his diagnosis is of an injury to a different part of the claimant's body than that contained in the report from the Linstead Hospital.

[38] I found Mr Hill to be measured in the witness box and very credible. I accept his evidence and find that he was driving slowly at the time of the collision. This is consistent with what, in my view, was a minor injury sustained by the claimant. It is also consistent with the lack of any damage done to the defendant's motor car as a result of the collision. I also accept his evidence that he did not report the incident to the police because as far as he was concerned there was nothing to report, the defendant's car was not damaged, and the claimant told him after the collision that he was alright. Mr Hill's account of what the claimant is alleged to have said after the collision is also consistent with the claimant's own actions in not seeking medical treatment for the minor injury he suffered, until near five days later. I see nothing in Mr Hill's conduct which is indicative of any guilt.

[39] I also accept Mr Hill's evidence that he saw about three cars stop behind a car letting off passengers on the opposite side of the road, and that he saw someone suddenly running at a fast speed across the road towards him. But despite swerving to the left to avoid a collision, the person hit into the right fender of the defendant's motor car. Given the unreliable and contradictory evidence of the claimant, I do not accept that he was on the pedestrian crossing and that the driver of the motor car that had stopped, did so to allow him to cross the Main Road. I found Mr Hill to be very credible, and I accept his evidence that he saw a car stop to let off passengers on the Jericho side of the Main Road. It seems to me that given the pace at which Mr Hill was driving, the claimant clearly misjudged his own ability to cross the road ahead of the defendant's car, and in running across the road as he did, he hit his right leg into the front fender of the car. It is not improbable that Mr Hill, who was looking ahead of him, could have seen the car that had stopped on the opposite side of the road letting off passengers, and be able to estimate the speed at which he was travelling.

[40] Mrs Dixon submits that if, as alleged by Mr Hill, he was about seven car lengths away when he first saw the car that had stopped on the opposite side of the road, he would have had ample opportunity to see the claimant crossing the road and therefore he ought to have applied his brakes and allowed him to cross safely. But this submission ignores the fact that Mr Hill's evidence is not that he saw the claimant running across the road when he was seven car lengths away. It was the car that had stopped on the opposite side of the road that he said he first saw from that distance. As Ms Dunbar submitted, Mr Hill had continued to drive after he first saw the stopped car on the opposite side of the road. His evidence on cross examination was that it was less than a second before the claimant collided into the right front fender of the defendant's car, that he saw him running fast towards the car from the opposite side of the road.

[41] It is not improbable that the claimant could have run across the road at a time when the defendant's car was so positioned in relation to the vehicle that had stopped on the opposite side of the road, that despite the good visibility that night, Mr Hill

would not have seen the claimant until mere seconds before he ran into the front right fender of the defendant's car. It is not improbable, for example, that the claimant could have run across the road when Mr Hill was positioned alongside the car that had stopped on the opposite side of the road and so did not see the claimant running across the road until he was right up on the defendant's car.

[42] On the night of November 6, 2012, the claimant owed a duty to himself and to other road users to ensure that in crossing the Main Road, it was safe for him to do so. On a balance of probabilities, I find that he did not discharge that duty and has failed to prove that Mr Hill, the defendant's servant, was negligent and that he suffered loss, injury and expense as a consequence. I find on a balance of probabilities that the collision occurred in the manner described by Mr Hill and was caused solely by the claimant's own negligence. In the circumstances, the claim against the defendant must be dismissed.

Conclusion

[43] Having regard to the forgoing, I make the following orders:

- a) The claim is dismissed.
- b) Costs to the defendant to be agreed or taxed.

**A Jarrett
Puisne Judge**