[2014] JMSC Civ 17

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV03545

BETWEEN	**MARK DOUGLAS**	**1ST CLAIMANT**
AND	**DESRENE DOUGLAS**	**2ND CLAIMANT**
AND	**KIANE DOUGLAS (An infant who sues by her Next Friend DESRENE DOUGLAS)**	**3RD CLAIMANT**
AND	**RORY SIMPSON**	**DEFENDANT**

AND ANCILLARY CLAIM

BETWEEN	**RORY SIMPSON**	**ANCILLARY CLAIMANT**
AND	**MARK DOUGLAS**	**1ST ANCILLARY DEFENDANT**
AND	**DONNA DENNIS**	**2ND ANCILLARY DEFENDANT**

Mr. Oraine Nelson instructed by K Churchill Neita & Co for the Claimants and the 1st Ancillary Defendant

Mrs. Pauline Brown-Rose for the Defendant/Ancillary Claimant

Mr. Jeffrey Mordecai for the 2nd Ancillary Defendant

September 26 & 27; October 8 & 15, 2012 and February 12, 2014

Motor vehicle accident – Determination of Liability – Assessment of Damages

D. FRASER J

INTRODUCTION

[1] The claimants seek damages for negligence arising from a motor vehicle accident on December 21, 2006. The 1st claimant was driving Toyota

Corolla motor car registered 4691EC along the Junction main road in the parish of Saint Andrew. The 2nd and 3rd claimants were passengers in the car. On reaching the vicinity of Eleven Miles, the claimants' motor car met in a collision with motor vehicle registered CD 1911, owned and being driven by the defendant. The claimants allege they suffered injuries, loss and damage caused by the defendant's negligent driving.

[2] The defendant on the other hand in his Defence and Counterclaim alleged the accident was caused or contributed to by the negligence of the 1st claimant and claimed damages for property damage occasioned to his motor vehicle. Further, the defendant/ancillary claimant filed an ancillary claim against the 1st claimant/1st ancillary defendant and the 2nd ancillary defendant, the owner of motor car registered 4691EC. The ancillary claim seeks damages for property damage occasioned to his motor vehicle as well as contribution and/or indemnity from the 1st claimant/1st ancillary defendant, for any damages awarded against him in favour of the 2nd and 3rd claimants.

[3] The Acknowledgment of Service of the defendant filed September 18, 2009 indicates the Claim Form and Particulars of Claim were served on him on August 14, 2009. The Acknowledgment of Service of the 2nd ancillary defendant filed November 24, 2009 indicates the Claim Form and Particulars of Claim were served on her on October 13, 2009.

[4] During the hearing the following exhibits were received in evidence by consent:

i. Medical Report for Mark Douglas from Monacare Medical Services (Dr. Andrew Greene) dated January 13, 2008 (Exhibit 1A)

ii. Medical Report from University Hospital of the West Indies (Dr Murphey Osbourne) dated April 10, 2007 (Exhibit 1B)

iii. Invoice from MSC McKay (Ja) Limited re Toyota Corolla Motor car dated 14 February 2007 (Exhibit 2A)

iv. Damage Assessment Report from MSC McKay (Ja) Limited re Toyota Corolla Motor car dated 7 February 2007 (Exhibit 2B)

v. Medical Report for Desrene Hanson-Douglas from University Hospital of the West Indies (Dr Kimani White) dated 12th February 2009 (Exhibit 3)

vi. Medical Report for Kiane Douglas from Monacare Medical Services (Dr. Andrew Greene) dated January 13, 2008 (Exhibit 4)

vii. Damage Assessment Report re International Wrecker Flatbed dated 18 January 2007 (Exhibit 5A)

viii. Receipt from MSC McKay (Ja) Limited re International Wrecker Flatbed dated January 25, 2007 (Exhibit 5B)

ix. Medical Report for Rory Simpson from Dr. Jean Williams-Johnson dated March 19, 2007 (Exhibit 6A)

x. Medical Report for Rory Simpson from Dr. Jean Williams-Johnson dated February 8, 2011 (Exhibit 6B)

xi. Certifying Medical Report from Dr. Jean Williams-Johnson dated 17 May, 2011 (Exhibit 6C)

THE QUESTION OF LIABILITY

The Claimants' Case

[5] Four witnesses testified on behalf of the claimants. The three claimants and their witness Beverley Banner. Their witness statements stood as their evidence in chief and they were each cross-examined. In summary the claimants' case is that on December 21, 2006 at about 6:45 pm the 1st

claimant/1st ancillary defendant Mark Douglas (hereinafter “the 1st claimant”) was driving a left hand drive Toyota Corolla motorcar owned by the 2nd ancillary defendant Donna Dennis. Ms. Banner was seated in the front passenger seat; the 2nd claimant Desrene Douglas, wife of the 1st claimant, was seated on the left of the rear passenger seat; the 3rd claimant Kiane Douglas, the daughter of the 1st and 2nd claimants, was seated in the middle of the rear passenger seat; and one Mr. Samuels was seated on the right of the rear passenger seat. They were driving along the Temple Hall main road in the parish of Saint Mary towards Kingston behind a Tru-juice motor truck.

[6] The 1st claimant in his witness statement stated that the road was not very busy, it was still light out, traffic was flowing and he was driving at about 40 miles per hour, about 2 car lengths behind the truck. He kept this distance he stated, because he noticed the truck did not have any brake lights and was giving off a lot of fumes.

[7] Having reached the vicinity of Eleven Miles, when he came to a section of the road where there was a right hand corner going towards Kingston, a red wrecker traveling in the opposite direction towards St. Mary with a police vehicle on it, came around the corner fast. There was dirt from a landslide on the right hand side of the road. The wrecker driver tried to take away from the dirt and in so doing drove onto the 1st claimant’s side of the road, colliding in the right front section of the motor car. The impact caused the car to spin and then it stopped in the middle of the road blocking traffic from both directions. It was subsequently moved by persons who came on the scene, to allow vehicular traffic to proceed.

[8] In cross-examination by Mrs. Brown-Rose for the defendant/ancillary claimant (hereinafter “the defendant”), the 1st claimant indicated that he was actually 3 not 2 car lengths behind the truck. This distance was estimated at 25 metres. He also stated that he had been traveling behind

the truck all the way from St. Mary. Black fumes were coming from the truck's exhaust and it was not a pleasant experience traveling behind the truck. He further stated that he would not be able to see the brake lights of the truck going around the corner, which was why he gave himself that distance. He indicated they were not in any hurry.

[9] He first saw the red wrecker when it came around the corner and it was maybe one car length from his car. At this time he was already at the extreme left of the road. There was however a ditch to the left side of the road. He indicated that if they held their lanes two big JUTC yellow buses would be able to pass comfortably around the corner.

[10] It was pointed out to the 1st claimant that in the Claim Form and Particulars of Claim filed on the claimants' behalf in July 6, 2009 and signed by him as true it was indicated that the defendant, *"negligently negotiated a corner and in an attempt to avoid a head on collision swerved from a motor vehicle registration number unknown which was travelling along the said road way, lost control rode the embankment and collided with the aforesaid motor vehicle the Claimants were travelling in."* This was contrasted with paragraph 6 of the 1st claimant's witness statement filed July 27, 2012 where it was stated that, *"There was a landslide on the right side of the road in the vicinity of the corner and so there was dirt in the road. When the wrecker came around the corner he tried to take away from the dirt in the road and in so doing he drove onto the left side of the road, my correct driving side of the road and collided into the right front section of the car that I was driving."*

[11] When asked to explain the two accounts and in particular the absence of any mention of a landslide in the claim documents, he stated that the wrecker driver swerved because of the dirt and that the unknown vehicle that he swerved from was the Tru-juice truck. He maintained that he was speaking the truth about the swerving of the defendant and how the

accident happened. He denied that he had been overtaking; that the accident occurred on a straight section of the road before he got to the corner and that the wrecker had already cleared the corner at the point of the accident. He also denied that there was no pile of dirt in the road at the point where the accident occurred.

[12] He stated that the red wrecker hit his vehicle which spun and stopped in the middle of the road. The wrecker rode the embankment on the wrecker's side, passed his vehicle and came to a stop on the wrecker's side of the road with part of the wrecker on the embankment. At this point the wrecker had already cleared the pile of dirt which was on the same side as the embankment.

[13] He maintained that the point of impact on his car was the right hand side fender by the light and denied that he drove into and caused damage to the entire front of the defendant's truck. When asked, he admitted that day was the first time he had driven that motor car and further that he had not driven frequently on the stretch of road on which the accident occurred.

[14] In brief cross-examination from Mr. Mordecai on behalf of the 2nd ancillary defendant the 1st claimant agreed that in exhibit 2B, the assessors report from MSC McKay, it was stated that damage to the motor car was to its right front side section. He identified the first page of pictures in that exhibit and indicated it showed the car he was driving at the time of the accident. He also stated that his journey had started that morning from Liguanea in Kingston to St. Mary, he had driven the same way going and coming and that the accident had occurred on the return journey.

[15] To the court the 1st claimant stated that the wrecker did not ride the embankment before it hit the car but it rode the embankment after.

[16] Desrene Douglas the 2nd claimant gave her initial account of the accident in paragraph 2 of her witness statement. It reads, *"On the 21st day of*

December 2006, I was travelling along the Junction main Road with my family and heading towards Kingston. I was seated in the back of the car. Upon reaching the vicinity of Eleven Miles and when approaching a corner, a wrecker truck coming at a fast rate of speed from around the corner and heading in the opposite direction collided in the vehicle I was travelling. Upon impact, the vehicle began to spin and then came to a stop."

[17] Cross-examined by Mrs. Brown-Rose, she stated that there was a Tru-juice truck travelling about 2 ½ to 3 car lengths ahead of them at a moderate speed. The 1st defendant was going slow as he was about to take a corner. When she first saw the wrecker it was almost hitting into them. The accident she said happened right in the corner; the wrecker came out right into the car.

[18] As was the case with the 1st claimant Ms. Douglas was also shown the section of the Claim Form and Particulars of Claim that had been shown to the 1st claimant/1st ancillary defendant, both of which she said she signed as true. She stated that the unknown motor vehicle referred to in those documents was the Tru-juice truck. She further stated that the collision occurred after the wrecker passed the true juice truck. Their car was very close to the left hand side of the road and when it was hit, it spun to the middle of the road. If it had spun to the other side they would have gone over the precipice.

[19] In terms of the sequence of events at the time of the accident she stated that the wrecker truck came around the corner swerved from the Tru-Juice truck to the embankment, rode the embankment then it swerved from the pile of dirt and into their car. At this time the 1st claimant was driving to the extreme left of the road, close to a ditch and he couldn't go any closer to the left hand side. She agreed that at the point of the road where the accident happened two JUTC yellow buses could pass and leave space.

[20] She denied the suggestion that the wrecker did not swerve from the Tru-juice truck. She further denied the defendant's case that the accident occurred on the car's right hand side of the road while the 1st defendant was in the process of trying to overtake the Tru-juice truck.

[21] The 3rd claimant Kiane Douglas, the daughter of the 1st and second claimants was 9 years old at the time of the accident. In her witness statement she indicated that while travelling along the Junction main road she was seated in the middle of the car. They were travelling behind a Tru-juice truck and, *"upon reaching a corner, a tow truck coming from the opposite direction collided in the side of our vehicle."*

[22] Cross-examined by counsel for the defendant she pointed out a distance estimated to be more than 25 metres that the car was travelling behind the Tru-juice truck. She said neither the Tru-juice nor the car was travelling fast. Kiane also said she didn't see any cars behind them going to Kingston nor did she remember if there were vehicles ahead of the Tru-juice truck. The first time she saw the tow truck was when the front of the tow truck was coming directly into the front right side of the car in which she was driving.

[23] She further stated that the car was on the extreme left of the road and could not go over any further because there was a precipice there. The collision took place right by the precipice. Explaining how the accident occurred she stated that she saw the truck come around the corner take it wide and then had to swerve. There was a landslide by the corner in the truck's lane; a pile of dirt estimated about 12 inches high, leading from the hill out into the lane.

[24] When challenged by counsel about her account she said she thought that the driver swerved from the dirt and she knew that he swerved from the Tru-juice truck. She however could not remember if he swerved from the Tru-juice truck before he swerved from the pile of dirt, but she was certain

that he swerved. She denied the suggestions of counsel that the driver of the tow truck did not swerve from the Tru-juice truck or any pile of dirt and that the accident had occurred in the tow-truck driver's lane when her father, the 1st defendant, attempted to overtake the Tru-juice truck.

[25] The final witness for the claimants was Ms. Beverly Banner, the right front seat passenger in the motor car. She provided quite a bit of detail concerning how the accident occurred. Paragraphs 3 and 4 of her witness statement read as follows:

> 3 We were driving behind a Tru-juice truck and Mr. Douglas was not driving fast. As we were approaching a corner in the vicinity of Eleven Miles I saw a wrecker heading in the opposite direction towards St. Mary come around the corner at a fast rate of speed.
>
> 4. There was a landslide on the wrecker's side of the road and so there was dirt in the road on his side. The wrecker driver tried to take away from the dirt in the road and so he drove onto our correct left side of the road and collided into the front right side of the vehicle that I was traveling in.

[26] Cross-examined by counsel for the defendant she stated that as the right front passenger she had a clear and unobstructed view of the road ahead. The Tru-juice truck was driving at a moderate speed and had a lot of fumes coming from its muffler. They had been driving behind the truck from St. Mary, a fact which she had criticised. There was a vehicle ahead of the Tru-juice truck and a line of vehicles behind it heading into Kingston. Two big vehicles she said could pass on the road.

[27] She maintained that when she first saw the tow truck that came around the corner it was around 2 car lengths from her car. She described the sequence leading up to the accident as follows, *"When I saw the truck we had not reached the corner. The tow truck had not cleared the corner. It went wide and then take away from the Tru-juice truck turn back to the*

landslide, buck up on the landslide and then take away from the land slide and come into my side."

[28] She further stated that it could have been about half of the wrecker driver's lane that was taken up by the dirt, enough of the lane for him to *"take away from it"*. Her driver she said could not swerve away or go any further left as if he did he would have gone over the banking or precipice.

[29] She denied the defence suggestions that the wrecker driver was not going fast, that there was no pile of dirt in the road and that he had not swerved from the Tru-juice truck. She stoutly maintained that it was not the case that her driver had been overtaking and that the accident had happened on their right hand side of the road in the wrecker driver's lane.

The Defendant/Ancillary Claimant's Case

[30] The defendant/ancillary claimant Mr. Rory Simpson, a policeman, in his witness statement indicated that at the time of the accident he was driving his International motor truck at approximately 40 kph along the Temple Hall main road heading towards St. Mary. He states from the middle of paragraph 2 and in paragraph 3 as follows:

> 2. …I saw a truck coming in the opposite direction, being followed by a line of traffic consisting of more than six (6) vehicles. I had just come out of a corner and entered a straight section of the road, the vehicles traveling in the opposite direction were approaching the corner.
>
> 3. As I was about to pass the truck which was traveling in the opposite direction, a brown Toyota corolla car, left hand driven, traveling immediately behind the truck, pulled out from behind the truck, into my correct driving lane as if it was about to overtake the truck that had been traveling ahead of the car and collided in the front of my motor truck.

[31] He further stated that the impact to the truck completely dislodged the right hand wheel of the vehicle and that the entire front of his motor truck was damaged.

[32] Asked by his counsel to comment on the evidence of the claimants he stated that he did not take the corner wide; he maintained that he did not see a pile of dirt in the road and neither did he swerve from the Tru-juice truck or a pile of dirt and collide into the claimants' vehicle. Further he maintained that at the point of impact on the side of the road the car was travelling there was a retaining wall.

[33] Cross-examined by Mr. Nelson for the claimants he stated that at the point of the accident the road was approximately 22 feet wide; his truck was about 8 feet wide and the claimants motor car about 5 feet wide. The accident he said took place about 10-15 feet from the corner after he had cleared the corner. He said the front of his truck was beyond the middle and nearing the back of the Tru-juice truck while he was passing it. The claimants' car pulled partially into his lane and in a split second there was a collision. He said the average car was 12 -15 feet long and the Tru-juice truck would at least be longer than 12 feet.

[34] He agreed that the right hand front section of both his vehicle and the claimants' car collided and said he considered that to be a head on collision. He also agreed that in his witness statement he had said the car pulled out from behind the truck and not that it pulled out partially. He said there was both a retaining wall and a precipice on the claimants' side of the road at the point where the accident occurred. He denied the claimants' account of how the accident occurred.

[35] Cross-examined by Mr. Mordecai on behalf of the 2nd ancillary defendant he agreed that his vehicle was larger than the average vehicle on the road but did not agree that his vehicle was more difficult to manoeuvre when it

was carrying something. In fact he said it manoeuvred better with weight on it.

[36] He then gave some critical evidence: when he first saw the Tru-juice truck he was in the corner, completing the corner. The Tru-juice truck was not in the corner. The Tru-juice truck was less than 10 feet in front of his wrecker. He could see down the straight but he did not see the car at that point. Where he first saw the Tru-juice truck was about 10 feet from the point where the collision occurred with the car. As he had earlier indicated to Mr. Nelson he reiterated to Mr. Mordecai that when he saw the car pull out he was beyond the middle of the Tru-juice truck.

[37] He agreed that he had given three points of reference:

i. When he first saw the truck and did not see the car;

ii. When he first saw the car and was beside the truck; and

iii. A collision 10-15 feet from the corner.

[38] He further agreed that from point (i) to point (iii) was 10 -15 feet; and that both point (ii) to point (iii) and point (i) to point (ii) were distances less than 10 feet.

[39] Of significance is also his evidence that when he first saw the car the Tru-juice truck had passed the point where it had initially been; he was seeing the truck and the truck was beside him. He agreed that the car could not have reached up to the back of the Tru-juice truck as on his case it would have had to have some distance to overtake.

[40] Having disagreed that the damage was caused to the right front side of the motor car he was shown the middle section of page 2 of Ex 2B which reads, *"As a result of an impact to the Right Front Side Section, damage was sustained to the following items.:"* He nevertheless maintained that he

didn’t see any difference between “right front side section” and “right front section.”

[41] Having been shown the pictures in Ex 2B of the damaged motor car he however acknowledged that the vicinity of the right front wheel showed bad damage and that where the Toyota sign was in the middle front appeared to have far less damage. Further he agreed that the damage to the left side of the vehicle was not as bad as to the right side. He also acknowledged damage to the right front door as shown in the pictures.

[42] Additionally he was shown Ex 5A, the assessors report in respect of the damage done to his wrecker. He agreed that more parts were required for the right hand side than for any other section of his vehicle.

[43] To the court he indicated that his wrecker was 28 feet long and he would say the Tru-juice truck would be about the same length. Following on the court’s question Mr. Mordecai asked him whether, given that his truck was 28 feet long and the accident took place 10-15 feet from the corner, he would agree that meant that some part of his wrecker would still have been in the corner when the collision occurred. He however maintained that his entire wrecker was on the straight.

[44] The defendant called one witness, Mr. Mark Bryan a District Constable. He indicated in his witness statement that at the time of the accident he was traveling in a motor car, third behind a box body truck, in a line of traffic proceeding at approximately 30 kph. He then stated that he saw the claimants’ motor car which was traveling immediately behind the box body truck pull out from behind the truck in an attempt to overtake the truck and collided with a red wrecker coming from the opposite direction in the left lane heading towards St. Mary. He had known both the wrecker and its driver, the defendant, before.

[45] Cross-examined by Mr. Nelson he indicated that he could not say how close the Toyota was traveling behind the truck but he wouldn't say it was that close. He denied that he had only come to court to help the defendant and also denied the claimants' version of events

[46] Cross-examined by Mr. Mordecai he maintained that the collision happened on a straight stretch of road while the Tru-juice truck was approaching but had not yet reached the corner.

[47] He also stated that he was three vehicles and 100 metres away from the corner when he first saw the wrecker, at which time it was traveling on the straight. The three vehicles were spaced over that 100 metres and he estimated they were each traveling about 6 feet from the other. All the vehicles heading towards Kingston were going about 30 kmh.

[48] He said the wrecker was about 25 to 30 feet long, the collision happened about 50 metres from the corner and the defendant's vehicle ended up about 25 metres from the corner. This collision he said was a head on collision. In exhibit 2B he was shown the first page containing two pictures; the first picture showing damage to the right front side section of the Toyota Corolla and the second showing no damage to the Toyota emblem in the centre of the front of the bonnet. He maintained those pictures were consistent with a head on collision. He denied the suggestion that he was not there when the accident occurred.

Submissions and Analysis

[49] Counsel submitted written submissions of some length which the court found most useful. I have fully considered all those submissions though I have not found it necessary to set them out *in extenso*. As I conduct my analysis I will refer to aspects of them periodically.

[50] I have set out the evidence of each witness with some particularity as the cases of the claimants and of the defendant differ in two significant details:

the side of the road on which the collision occurred and whose action caused the collision. It was therefore important to set out the evidence to facilitate assessment of the internal consistency of the respective accounts. The stark difference in the accounts on each side I find does not leave room for a finding of contributory negligence if the court were to accept totally one side's account to the necessary exclusion of the other. I remain aware however, that I can accept a part and reject a part of any witness' evidence.

The Claimants' case

[51] Given the number of witnesses for the claimants, one key consideration is the extent to which there exist inconsistencies and/or discrepancies in their evidence. Counsel for the defendant submitted that the claimants and their witness gave almost identical evidence concerning how the collision occurred but that there were differences in their evidence relating to the sequence of events immediately preceding the collision.

[52] She highlighted that on the pleadings the significant event was that the defendant swerved from a vehicle with an unknown registration number, lost control rode the embankment and collided with the vehicle in which the claimants were travelling. There was no mention of a "landslide" or "dirt in the road" which the defendant "took away from" or from which he swerved. This came latterly in the witness statements and oral evidence. She submitted that the claimants sought to merge their two versions under cross examination. Significantly she noted that both versions were diametrically opposed to the case put forward by the defendant and his witness; a case which she submitted was more plausible and on a balance of probabilities more probable than the case of the claimants. Counsel submitted that if the accident had happened as the claimants' allege their car would have been hit over the precipice or into the retaining wall.

[53] How does the court view the absence of mention of any “landslide” or ‘dirt in the road” in the pleadings? Does that omission undermine the claimants’ case? Is there any plausible explanation the court should accept? There is also the further issue that on the pleadings and in the evidence of the 2nd claimant the defendant’s tow truck rode the embankment before the collision while the evidence of the 1st claimant is that it rode the embankment after the collision.

[54] The case of the claimants has consistently been and remains that the defendant’s truck negligently negotiated the corner and swerved away from the vehicle that was in front of the claimants’ vehicle. The reference to the landslide does not in any way affect that initial account. It however provides evidence of an additional obstacle in the road from which the claimants’ allege the defendant swerved before his vehicle collided with them. If accepted by the court, this would be further detail explaining how the accident occurred, but crucially not detail inconsistent with the initial account. Further it should be remembered that though counsel for the defendant submitted that the claimants had “two versions”, it was acknowledged that fundamentally the claimants’ and the defendant’s cases were “diametrically opposed”.

[55] The additional detail of the landslide is therefore a factor to be considered by the court in assessing the credibility of the claimants and the overall cogency of the account given by the claimants of how the accident occurred. Ultimately however the court’s decision will have to be based on which of the “diametrically opposed” cases, or parts of those cases, to accept, having carefully examined both cases and bearing in mind the burden and standard of proof on the issues to be determined.

[56] With regard to the riding of the embankment I do not find the differences highlighted significant. Whilst only the 2nd claimant speaks definitively to the defendant’s vehicle riding the embankment before the collision, Ms.

Beverly Banner, right front seat passenger stated that the defendant's vehicle "*take away from the Tru-juice truck turn back to the landslide, buck up on the landslide and then take away from the land slide and come into my side."* Though Ms. Banner did not specifically say the defendant's vehicle rode the embankment her description of the accident is not inconsistent with that having occurred before the collision. The evidence of the 1st claimant is that after the accident the wrecker rode the embankment on the wrecker's side, passed his vehicle and came to a stop on the wrecker's side of the road with part of the wrecker on the embankment.

[57] I agree with counsel for the claimants that there is no necessary inconsistency between the two accounts given the evidence of the 3rd claimant that along the defendant's side of the road there was a hill side. Therefore if their evidence were accepted the different claimants would be referring to the wrecker riding the embankment at separate points along the roadway, before and after the accident.

The Defendant's case

[58] The main ingredients of the defence are that the accident occurred in the defendant's lane on the straight after the wrecker had cleared the corner. The cause – improper overtaking by the 1st claimant. The defence account however raises some significant questions regarding its overall cogency. On the defendant's account he first saw the Tru-juice truck when he was completing the corner at which point he could see down the straight but did not see the car. He first saw the car when he was beside the truck. When he first saw the car he was beside but beyond half way towards the back of the truck and the car pull partially into his lane. He agreed that in his witness statement he had said the car pulled out from behind the truck and not that it pulled out partially. The accident took place in a split second 10-15 feet from the corner. Despite the fact that he said his wrecker was

28 feet long he denied that some part of his truck would still have been in the corner at the time of the accident. He maintained that the accident took place on the straight and that the accident was a head on collision.

[59] It is difficult to see how the accident could have occurred as the defendant outlines. The car would not have had sufficient time get from behind the Tru-juice truck into his lane and collide head on such a short distance from the corner. The defendant also having agreed that the car would have had to have some distance between it and the truck for it be able to overtake the truck it is curious that the defendant would not have seen the car when he first saw the truck and could look down the straight. Further if there had been that distance the accident would not have occurred only a maximum of 15 feet from the corner.

[60] The evidence of the defendant's witness Mark Bryan is I find inconsistent with that of the defendant. While he does speak to seeing the car pull out from behind and attempt to overtake the truck he maintains that the accident occurred on the straight as much as 50metres from the corner. Inexplicably he also said the wrecker ended up 25 metres from the corner which means it would have gone backwards rather than forwards after the accident. Even allowing for an error and assuming he meant to say the accident took place 25 metres from the corner and the wrecker ended up 50 metres away from the corner, that distance is significantly different from that of the defendant and from the evidence on the claimant's case that the accident took place in the vicinity of the corner. Neither the defendant nor his witness indicated that they had a difficulty estimating distances. The court also notes that both are members of the police force and takes judicial notice of the fact that in their work policemen are often required to take note of distances.

The Concluding Analysis on the Question of Liability

[61] The account of the claimants' case I find to be cogent and I accept the evidence of the claimants and their witness. Their account I find to be more probably true than not true. I do not agree with counsel for the defendant that if the claimants' account were true the claimants' car would have ended up over the precipice or would have hit into the retaining wall. No expert evidence was adduced that would justify that conclusion. I find the defendant's case to be implausible in light of the evidence given by and on behalf of the defendant which I have highlighted.

[62] I have come to this conclusion even before making reference to the independent evidence. That independent evidence is consistent with and wholly supportive of the conclusion at which the court has arrived. The value of independent evidence was highlighted by counsel for the defendant.

[63] She cited ***Calvin Grant v David Pareendon and Augustus Pareendon*** Suit No. CL 1983 G. 108 (15th October 1987) in which Theobalds J said at page 5, *"Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious."* On appeal this approach was endorsed and upheld by the Court of Appeal in SCCA 91/ 87 (October 4, 1988).

[64] I agree with counsel for the 2nd ancillary defendant that the two expert Assessors reports from MSC McKay (Ja.) Limited, based on the damage to the vehicles and point of impact they reveal, buttress the claimants' case while undermining the case of the defendant. The fact that the point of impact to the car is to its "right front side section" and not to the right front section supports the claim that the defendant's vehicle came over

into the lane of the claimants rather than there being a head on collision caused by the 1st claimant trying to overtake as maintained by the defendant. In particular it supports the account of the witness Beverly Banner who said the wrecker was coming right at her where she was sitting in the right front passenger seat. This independent evidence also proves that the damage to the front of the defendant's wrecker was greater to the right side of its front. Indeed in the defendant's own witness statement at paragraph 5 speaking of damage to his vehicle he stated that, *"The impact to the truck completely dislodged the right hand wheel of the vehicle…"*

[65] Having carefully considered all the evidence and submissions I find that the accident was wholly caused by the negligence of the defendant who is solely responsible for the damage flowing therefrom.

DAMAGES

Special Damages

The 1st Claimant

[66] Special Damages were agreed in the sum of $17,324.36. Additionally I find proven by the evidence of the 1st claimant the sum of $2,900.00 for trips to the University hospital and to Monacare Medical Centre for treatment. The sum is reasonable and adequately proven in the circumstances of this case although no receipts were tendered. The cost of extra-help claimed was however not proven and the claim for loss of earnings was not pursued. I therefore award the total sum of $20,224.36 for special damages for the 1st claimant.

The Second Claimant

[67] Special Damages were agreed in the sum of $8,205.70 Additionally I find proven by the evidence of the 2nd claimant the sum of $7,000.00 for trips

to the University of the West Indies for both general follow up and physiotherapy one per week for two week. The sum is reasonable and adequately proven in the circumstances of this case although no receipts were tendered. The cost of extra-help claimed was however not proven. I therefore award the total sum of $15,205.70 for special damages for the 2nd claimant.

The Third Claimant

[68] Special Damages were agreed in the sum of $5,673.70. Additionally I find proven by the evidence of the 2nd claimant on behalf of the 3rd claimant the sum of $5,000.00 for trips to the University Hospital and to Monacare Medical Centre and Oxford Medical centre for treatment. The sum is reasonable and adequately proven in the circumstances of this case although no receipts were tendered. The cost of extra-help claimed was not pursued. I therefore award the total sum of $10,673.70 for special damages for the 3rd claimant.

General Damages

The First Claimant

[69] The 1st claimant indicated in his witness statement that during the impact he was flung forward and his chest hit the steering wheel. He lost consciousness for a brief moment. When he came back to his body felt tender and weak and there was a deep pain in his chest area. He could hardly move his neck and his face was bruised off. He was taken to the University Hospital of the West Indies where he was treated and given pain medication and send home with a prescription for more medication. He was still in pain both neck and body. The day after he had to a cast fixed around his neck. Due to the pain within days after the accident he went to see Dr. Andrew Greene who prescribed him more pain medication and ointments to rub on the affected areas his neck and chest mainly. He

started to see improvements in his condition about three weeks after the accident.

[70] At the time of giving his statement June 2011 he maintained that he still feels chest pains though they don't last as long as they used to. His neck still gets stiff and hurts and he would often get severe headaches at night since the incident. In his job as a welder his duties involve moving around a lot and lifting heavy objects

[71] Dr. Greene saw the 1st claimant on January 6, 2007 and then on October 22, 2007 at which time he had achieved maximum medical recovery. On examination on January 6, 2007 Dr. Greene noted that his mobility was generally reduced as he complained of moderate pain on the movement of his neck and upper body. There was significant restriction in the range of movement of the neck and there was mild tenderness over his left pectoralis muscle (anterior chest), left and right trapezius muscles, and as well as in both para-vertebral muscles of the lower cervical spine. Under "Prognosis" Dr. Greene noted that the injuries sustained by the 1st claimant were primarily soft tissue muscular (neck and chest) strains and were not expected to lead to any permanent residual disability. Examined on October 22, 2007 Dr. Greene's opinion was that he function at present was generally good, he had returned to his functional pre-accident state and would be able to continue in his present profession as a welder.

[72] Counsel for the claimant relied on three cases. In ***Wilford Williams v Nedzin Gill*** reported in Recent Personal Injury Awards in the Supreme Court by Ursula Khan (hereinafter Khan) Vol. 5, p.148, the claimant was treated conservatively for a whiplash injury to the neck which healed without any residue within 8 weeks. The claimant was awarded $350,000 which at the time of submissions filed September 2012 updated to $1,146,530.30. Counsel submitted that the injuries in the present case were more serious and hence the award in this case should be greater.

[73] In ***Milton Goldson v Knoeckley Buckley and Nestle JMP Jamaica Limited*** Claim No 2009HCV01260 (December 9, 2009) the claimant suffered muscle and ligament damage to the cervical spine causing muscle spasms. He was treated conservatively with a prognosis of good recovery in 3-4 months. He was awarded $850,000 which at the time of submissions updated to $1,041,023.93. Counsel for the claimant again suggested that given the 10 month recovery period in the instant case and wider range of injuries the award should be increased for the present claimant.

[74] Counsel finally relied on ***Horace Williams v Knoeckley Buckley and Nestle JMP Jamaica Limited*** Claim No 2009HCV00247 (December 9, 2009) in which the claimant suffered strain to the ligaments of the lumbar vertebra. He was treated conservatively with expectation for full recovery in 8 – 10 weeks. He was awarded $750,000 which at the time of submissions updated to $918,550.53. For the same reasons as in the previous case counsel submitted the award in the instant case should be increased.

[75] Counsel submitted that in light of the authorities and the peculiar injuries in the instant case the award should be in the region of $1,200,000 which would be $1,350,319 updated to December 2013.

[76] Counsel for the defendant relied on one case ***Manley Nicholson v. Ena Thomas and Glenmore Thomas*** Khan Vol. 5 p. 165. The claimant suffered a whiplash with soft tissue injuries including other injuries. On appeal, general damages were reduced to $250,000 (November 2001) from $450,000 (January 2000) because the X Rays showed no bony injuries and the injuries were mild. Given the nature of the injuries the initial award was seen as inordinately high. Updated to October 2012 the award would be $897, 460.19. Counsel submitted that an award of

$700,000 - $800,000 would be appropriate in the circumstances. Those sums update to $780,200.63 - $891, 657.86 (December 2013).

[77] Having considered the cases I find that the injuries in the instant case and the resultant pain and suffering are more serious than all the cases cited by both the claimant and the defendant. In the circumstances I award the sum of $1,250,000 to the 1st claimant.

The Second Claimant

[78] In her statement the 2nd claimant indicates that upon impact she was flung forward in her seat and felt a deep pain in her knee area. She noticed he left knee was really paining her and she was also feeling pain in her hands. She was taken to the University Hospital of the West Indies and treated. Her left knee was X-rayed and bandaged and she was released.

[79] At home she indicated she said her entire body was numb and weak. Her hands were a bother and she could hardly move them without feeling this sharp pain. She spoke in her statement of having received physiotherapy for about 2 weeks. The pain in her knee area she indicated prevented her doing all her household chores. The numbness and pain in her wrist area she said still affected her sometimes when it was cold.

[80] The medical report from Dr. Kimani White discloses that in her history of impairment she was seen at the Orthopaedic Out-Patient clinic on June 14, 2007 for assessment of a six month old injury to her left hand and wrist as well as other injuries. She was assessed as having carpal osteoarthritis and the left wrist was splinted. When he saw her on February 9, 2009 he diagnosed her with bilateral maltracking of the patellae with resultant advanced chrondomalacia of the patellae. Both of these conditions pre-dated her injury on December 21, 2006. In his opinion though they may have been temporarily aggravated by the injury, neither was a result of the injury. By way of prognosis he noted that the 2nd claimant was awaiting

further management of her injuries and would likely benefit from surgery on her left knee.

[81] Counsel for the claimant relied on two cases. In ***Leroy Robinson v James Bonfield and another*** Khan Vol. 4 p. 99, the plaintiff suffered multiple abrasions to the left hand, tender swelling to the left elbow abrasions to the eyebrows and fracture of the right wrist. He was treated conservatively by application of a cast and healed without any permanent disability, though there was slight wrist deformity. The award of $269,438.00 updated to $1,205,501.00 at the time of submissions. Counsel submitted that despite the fact that there was no fracture in the instant case the fact that the claimant herein had osteoarthritis of the carpal bones provided a basis for comparison as that condition might ultimately lead to some deformity.

[82] In the other case ***Wayne Griffiths v Det. Duncan and The Attorney General*** Harrison and Harrison Assessment of Damages for Personal Injuries p 291 the plaintiff suffered loss of the distal phalanx of the right fourth finger, laceration to the right foot, soft tissue swelling of the left elbow, bruises to back and a swollen and bruised right jaw. There was rateable disability of the hand, but it was not considered major. The award of $15,000 updated at the time of submissions to $542,935.74. The value of this case counsel submitted was in the fact there was some disability to the plaintiff's hand. Counsel maintained that the recognition of osteoarthritis in the claimant's hand in the instant case meant that some disability would set in.

[83] Considering the wrist and the aggravation of the 2nd claimant's knee condition counsel for the claimant submitted that a sum of $750,000 would be appropriate. That sum updated is $835,929.25 (December 2013)

[84] Counsel for the defendant relied on ***Thelma McCarty v. Hubert Simms*** Harrison and Harrison Assessment of Damages for Personal Injury p. 361.

In that case the claimant suffered from significant swelling and tenderness of the left leg from the knee downwards into the knee downwards into the lower legs etc. Damages awarded in November 1990 update to $281,426.44 (October 2012).

[85] Counsel submitted that given her pre-existing conditions, an award of between $250,000.00- $300,000.00 would be reasonable. This updates to $278,643.08 – $334,371.70 (December 2013).

[86] While there is evidence that the 2nd claimant suffered pain and has had pain in her wrist there is no medical evidence that the osteoarthritis in her wrist is a result of the accident. The cases cited by counsel for the claimant I have found largely unhelpful as being too dissimilar and with attempts at showing their relevance to the instant case speculative. I found the authority cited by counsel for the defendant more useful. Given the 2nd claimant's pre-existing conditions and the absence of a clear link from the injury to her condition of osteoarthritis I find the appropriate award is $375,000.

The Third Claimant

[87] The 3rd claimant suffered soft tissue injury to the left cheek and was found by Dr. Greene to have mild tenderness to the left cheek in the region just over her left mandible when he examined her on January 6, 2007. Treatment involved the use of anti-inflammatory analgesics. Her injuries were not considered serious. A complete recovery was expected.

[88] Counsel for the claimant relied on ***Raymond Shaw v Michael Gordon*** Harrison and Harrison Assessment of Damages for Personal Injury p. 61 in which the plaintiff suffered trauma to the face resulting in lacerations to the cheek forehead chin and neck. The award of $25,000 updated to the time of submissions was $276,875.90. Conceding the cited case was

more serious that the instant case counsel submitted an appropriate award would be in the region of $200,000. That sum updates to $222,914.46 (December 2013).

[89] Counsel for the defendant relied on ***Panton v The Attorney General*** "Harrisons' Assessment of Damages", 2nd Edition p. 151. In this case the claimant sustained multiple bruises to the face and pain all over his body. In October 1992 he was awarded $30,000 which updated to October 2012 is $331,311.95. Counsel submitted that a possible award under this head should be between $200,000 – $300,000. This updates to $222,914.46 - $334,371.70 (December 2013).

[90] Both cases cited are more serious than the injuries suffered by the third claimant in this matter. The appropriate award I find to be $225,000.

[91] In respect of the Ancillary Claim I award the sum of $700,292.60 as agreed for the 2nd ancillary defendant's special damages.

DISPOSITION

[92] Judgment for the claimants against the defendant on the claim. Judgment for the ancillary defendants against the ancillary claimant on the ancillary claim.

ORDER

[93] **In the Claim:**

Special Damages awarded to:

i. The 1st claimant in the sum of $20,224.36 with interest thereon at the rate of 3% per annum from the 21st day of December 2006 to the 12th day of February 2014;

ii. The 2nd claimant in the sum of $$15,205.70 with interest thereon at the rate of 3% per annum from the 21st day of December 2006 to the 12th day of February 2014;

iii. The 3rd claimant in the sum of $10,673.70 with interest thereon at the rate of 3% per annum from the 21st day of December 2006 to the 12th day of February 2014.

General Damages awarded to:

i. The 1st claimant in the sum of $ 1,250,000 with interest thereon at the rate of 3% per annum from the 14th day of August 2009 to the 12th day of February 2014;

ii. The 2nd claimant in the sum of $375,000 with interest thereon at the rate of 3% per annum from the 14th day of August 2009 to the 12th day of February 2014;

iii. The 3rd claimant in the sum of $225,000 with interest thereon at the rate of 3% per annum from the 14th day of August 2009 to the 12th day of February 2014.

Costs to the claimants to be agreed or taxed.

[94] **In the Ancillary Claim**:

i. **Special Damages** awarded to the 2nd ancillary defendant in the sum of $702,292.60 with interest thereon at the rate of 3% per annum from the 21st day of December 2006 to the 12th day of February 2014.

ii. Costs to the ancillary defendants to be agreed or taxed.