[2015] JMSC Civ. 118

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008 HCV 05328

BETWEEN	NATALIE GRAY	CLAIMANT
AND	DONALD PRYCE	1ST DEFENDANT
AND	NOEL NEWSOME	2ND DEFENDANT
	A N D	
BETWEEN	DONALD PRYCE	ANCILLARY CLAIMANT
AND	NOEL NEWSOME	ANCILLARY DEFENDANT

Danielle Archer instructed by Kinghorn and Kinghorn for the Claimant

Raquel Dunbar instructed by Dunbar and Company for the 1st Defendant/Ancillary Claimant

Pauline M. Brown-Rose for the 2nd Defendant/Ancillary Defendant

Heard: October 21, 22; November 28, 2014 and June 18, 2015

Negligence – motor vehicle collision – one vehicle turned across path of other – other vehicle collided with while in its proper lane – apportionment of liability – contributory negligence – assessment of damages

P.A. Williams, J.

1. This claim arose out of a motor vehicle collision that occurred on the 5th of September 2007 along the Gregory Park main road, Portmore in the parish of Saint Catherine. The vehicles involved were a taxi with registration number PB8431 and a 1994 white Toyota Town Ace van licensed 0319 DR. As a result of the collision Natalie Gray, the claimant, who was a passenger in the taxi received injuries. She commenced proceedings against the driver of the van who she named as Donald Pryce, the 1st

defendant/ancillary claimant, who subsequently gave his correct name as Carol Donald Pryce.

2. Mr. Pryce did not seek to deny that he was involved in the collision but sought to explain the circumstances which led to it as being such that he was not to blame. He pointed to a 3rd party as being the cause of the collision. This party was the driver of a white Honda Partner who allegedly drove across his path suddenly and without warning causing him to apply his brake while at the same time swerving right and thus into the lane of on-coming traffic and into the path of the taxi. Mr. Noel Newsome, the 2nd defendant/ancillary defendant, was the driver of the Honda Partner licensed 7483BQ who had crossed the path of Mr. Pryce's vehicle.

3. Having launched her case initially against Mr. Pryce, Miss Gray learnt of the involvement of Mr. Newsome and thus joined him as a 2nd defendant in her claim. Mr. Pryce averred that the accident was caused solely by or substantially contributed to by the negligence of Mr. Newsome. He in turn filed an ancillary claim against Mr. Newsome seeking judgment against him for any amount that may be found due to Miss Gray. Mr. Pryce also alleged that his vehicle was extensively damaged so he sought to recover, *inter alia*, damages for his loss and expenses incurred. Mr. Newsome maintained that he was not involved in the collision and therefore bears no liability for any of the consequences flowing from it.

4. The evidence is such that it cannot be disputed that there can be no fault on the part of the claimant or indeed the driver of the taxi in which she was travelling. The submissions made by all counsel did not attempt to suggest anything to the contrary. A decision that there should be judgment for Miss Pryce on her claim is therefore easily reached. The issue which proves more difficult in resolving is who ought to be held liable for the collision – whether Mr. Pryce or Mr. Newsome or both. After carefully reviewing the evidence, assessing credibility of the witnesses and applying the relevant law and considering the submissions made, I have determined that liability must be shared between the two (2) men. The apportionment of the liability will be 75% on the

part of Mr. Pryce and 25% for Mr. Newsome. The reasons for my decision I will outline after reviewing the evidence given and the submissions made.

The evidence given by the parties

5. Miss Gray at the time of trial indicated she had got married and now was Mrs. Peters. There was no attempt or application made to amend the claim to reflect the change in the name, so for the purposes of this matter she will be referred to in the name in which the claim was filed. Miss Gray described as best as she could how the collision occurred from her vantage point as a passenger in the front of the taxi which she said was not being driven fast.

6. In her evidence-in-chief/witness statement, Miss Gray stated that she remembered seeing a vehicle coming towards her taxi from the opposite direction. This vehicle, which she described as a van-like vehicle, she said seemed to be trying to avoid another vehicle which she did not see. She noticed when the van-like left its correct side of the road and came over on to her side. She remembers putting up her hand to protect herself and her driver "drew his brakes" and she was thrown forward into the windscreen. After learning of the defence filed by Mr. Pryce she explained that based on how she remembered the collision, "it seemed as though Mr. Pryce was trying to avoid another collision before he collided into the taxi."

7. Under cross-examination she agreed that the vicinity in which the collision occurred was a straight flat road and one could see a far distance travelling along it. She could not recall if there were any vehicles travelling ahead of the vehicle she was in. She could not recall if she saw a vehicle making a right in front of the vehicle she was in. She did not see one vehicle turn into path of the other vehicle before it collided with hers.

8. In her further amended particulars of claim she had particularized the negligence of both the 1st and 2nd defendant. However, she had expressly stated she did not see the vehicle that had turned across the path of Mr. Pryce's van so she could only be relying on the evidence of the gentlemen for an account of how the collision may have

occurred. As regards the 1st defendant she did particularize that he was driving at too fast a rate of speed in all the circumstances. In cross-examination when first asked about the speed of the approaching vehicle she had said she could not recall. However, when confronted with her further amended particulars of claim she choose to stand with what was contained therein and agreed that the vehicle was travelling fast.

[9] When pressed under cross-examination by Mrs. Brown-Rose, Miss Gray admitted that she could not speak to involvement of Mr. Newsome in the accident. She accepted that she did not see any form of bad driving on the part of Mr. Newsome on that day.

[10] Miss Gray did however acknowledge that she was familiar with the area in which the accident occurred. She agreed that there was an establishment on the right of the road known to her as “Mr. T’s Bar”.

[11] Mr. Pryce and Mr. Newsome agree that it was into this establishment that Mr. Newsome had turned. Mr. Pryce explained that he had been proceeding along the Gregory Park Main Road at approximately 40 kph. It was on reaching in the vicinity of “Mr. T’s Bar” that he observed this Honda Partner travelling in the opposite direction from which he was travelling suddenly swerve in front of him. He maintained that he did not see any signals indicating the intention of the car to turn.

[12] Mr. Pryce in his witness statement/evidence-in-chief described how he applied his brakes while at the same time swerving right. He said the vehicle travelling immediately behind the Honda Partner swerved further to its left and passed without any mishap. He was unable to take any corrective action before the 2nd vehicle travelling behind the Partner collided with his vehicle. He said that by then the Honda Partner had parked on the bar piazza. On exiting his vehicle after the collision and examining his vehicle among the damage he observed was that the right front tyre was blown out. Most of the damage was to the right front of his van.

[13] Under cross-examination firstly by Miss Archer, Mr. Pryce was adamant that it was incorrect to say his vehicle collided with the taxi. He however reluctantly accepted

that the collision occurred on the taxi's correct side of the roadway as the front wheel of his vehicle was across the white line. He said his right side was fifteen (15) inches from the white line on the right side; a fact he remembered quite clearly although it had not been noted in his witness statement.

[14] Although in his witness statement he had said he had been unable to take corrective action, he further explained when questioned that he had lost control of his vehicle when he had to swerve away from Mr. Newsome's vehicle. He explained that he was driving at approximately 40 kph. He estimated that Mr. Newsome was about 12 to 15 feet away from him when that sudden turn was made. The actual distance was pointed out in court and measured to be 17½ feet. He eventually came around to accepting the suggestion that he had collided with the taxi because he had lost control of his vehicle but insisted he had lost control because of the sudden swerve he was forced to make. He denied any suggestion that he had been travelling too fast in the circumstances that day.

[15] Mrs. Brown Rose sought to find out whether Mr. Pryce had been travelling in a line of traffic that afternoon. He could not recall that to be the case but agreed that he was able to see straight ahead of him. He also agreed that that stretch of roadway is fairly wide. He further agreed that there was a line of traffic coming towards him. He acknowledged that he did not hit Mr. Newsome's car and also did not make contact with the vehicle travelling behind Mr. Newsome's car.

[16] He was questioned as to whether he stopped at the point when he saw Mr. Newsome's vehicle turning. He said he did not but disagreed that this was so because of the speed he was travelling. He explained he could not stop because he was trying to swerve away. He accepted he swerved into the path of an oncoming traffic in order to avoid colliding with Mr. Newsome and he had no choice but to act as he did. He now told Mrs. Brown-Rose that it was the taxi that had collided in his vehicle where he had stopped on the white line.

[17] He agreed that the accident between his vehicle and the taxi had occurred after Mr. Newsome had completed its turn. He, however, denied the suggestion that at the time he saw Mr. Newsome making the turn, the vehicles were more than 12 – 15 feet apart and definitely not as much as five car lengths. He did not agree that he had misjudged the distance between the vehicles and insisted that Mr. Newsome's vehicle did in fact present a danger to him. He was not driving negligently that day he insisted. He had been a driver for fifteen (15) years prior to this accident. He, however, could not agree that driving fast was the only explanation for a tyre being blown out. He had not been speeding and there had been no defect to his tyre as far as he was aware.

[18] After the collision took place, Mr. Pryce explained how he and the police went in search of Mr. Newsome. They went inside the bar but did not locate him there. He was eventually found in a room to the rear of the bar building. Indeed, Mr. Newsome agreed that it was on those premises that the police first spoke with him. He had not been involved in any accident so as far as he was concerned he had no need to have remained on the scene after it had occurred.

[19] Mr. Newsome in his witness statement/evidence-in-chief described how he had seen an enclosed van coming in the opposite direction as he proceeded along the Gregory Park main road. He said that road is wide enough to comfortably accommodate three vehicles going in the same direction. He said when he noticed the enclosed van it was about five (5) car lengths away. He said he indicated that he was turning right and made the turn. This he said he did without any problem. When he had parked, he heard a loud noise and realized there had been an accident shortly after he had parked.

[20] Miss Archer commenced her cross-examination of Mr. Newsome by seeking to have him clarify at which point he had turned on his indicator. He said it would have been from a distance of about 22 to 30 feet from where he eventually turned. He, however, insisted that there would not have been other places into which he could have turned from the time he put on his indicator to the time he turned into "Mr. T's Bar." He

disagreed with the suggestion that having the indicator on for the distance he indicated would not have made him a nuisance to other drivers.

[21] Mr. Newsome spoke of hearing a loud noise after he had parked. He estimated that it was within three to four minutes of parking that he had heard this noise. At the time he heard it he was in the parking lot and just about to come out of his vehicle. In pursuing this issue, Miss Dunbar had him saying he could have seen the scene of the accident from the parking lot. He estimated that from the parking lot to the scene of the accident was about 20 – 22 feet.

[22] It was whilst being cross-examined by Miss Dunbar that Mr. Newsome admitted that Mr. Pryce's vehicle did not seem to be travelling fast and he would agree to the suggestion that it was travelling at about 40 – 45 kph – which he would also agree would be described as a moderate speed. He accepted that he saw Mr. Pryce's vehicle on its correct side of the road and that to get to the premises he intended to go, he had to drive across that lane – his right lane. He agreed that in effect it was he who had changed direction from his correct lane.

[23] Mr. Newsome maintained that he had adopted the proper procedure before executing the turn. He agreed with the suggestion that he had not stopped and waited for Mr. Pryce to pass before turning. He was adamant, however, that he had not made a sudden turn across the road to make the right turn at a time when Mr. Pryce's vehicle was 12 -15 feet away. He denied the suggestion that he had not turned on his indicator and said his indicator was always working – inside and outside. He stated that he did not present a dangerous situation to Mr. Pryce when he turned and did not obstruct anyone when he turned. Indeed in his opinion, the accident was due to Mr. Pryce's carelessness as he did not create any obstruction.

The submissions

[24] Miss Archer for the claimant adopted the following approach in making her submissions. She first adumbrated the undisputed facts, then adumbrated the applicable law and then applied the law to the facts. A consideration of the law for her

began with considering section 51 of the Road Traffic Act with particular emphasis on 52(2) which states:

> *"Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver 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."*

[25] She referred to the dicta of Campbell J in the case of **Pamela Thompson and others v. Devon Barrows and others** Claim **No. C.L 2001/T143** delivered December 22, 2006 at paragraphs 10 and 11:

> *"Although both drivers were able to testify of the manoeuvring of the other vehicle prior to the accident, neither driver took the necessary evasive action to avoid the collision.*
> *Section 23 of the Road Traffic Act places a duty on each driver to take steps to avoid an accident. I find that neither driver was exhibiting the necessary care and skill in light of all these circumstances. Mr. Campbell submitted the driver who is on his correct side should not be saddled with additionally responsibility. I understand this to mean that a driver who is operating correctly if confronted with a collision which he can avoid has no responsibility to do so. I find that repugnant to the spirit and intendment of section 23 of the Road Traffic Act."*

[26] It was urged on behalf of the claimant that the doctrine of *res ispa loguiter* is also relevant to this matter while it was conceded that in none of the pleadings do any of the claimants say that they intended to rely on the doctrine, it ought still be considered. Support was found for this submission in the case of **Bennett v Chemical Construction Limited 1971 3 All ER 822** from the English Court of Appeal.

David L.J. at page 1575 said:-

> *"In my view it is not necessary for that doctrine to be pleaded. If the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the*

defendants, than it is for the defendants to explain and show how the accident could have happened without negligence."

[27] The case of **Hummerstone v Leary [1921] 2 KB 664** was also referred to where it was said to have been held that a collision between two vehicles raises an inference of negligence and the onus is on the defendant.

[28] In applying the law considered relevant to the evidence it was submitted that both defendants should be held liable for the occurrence of the accident. It was opined that there is clearly preponderance of evidence which supports and refutes both positions and in such a case; the court should find both sets of defendants equally liable. The case of **Pamella Thompson and others v Devon Barrows and others** (supra) was referred to as the judge therein found both drivers equally liable for the accident that occurred in circumstances where both defendants had presented case that the collision had occurred on their correct side of the road.

On behalf of the 1st defendant/ancillary claimant

[29] Miss Dunbar adopted a similar approach in her submissions on behalf of Mr. Pryce. She noted the undisputed facts and then acknowledged the points of disagreement between the parties. She noted that the parties failed to agree on whether *inter alia*, Mr. Newsome had made the sudden and unexpected turn in front of Mr. Pryce's vehicle, whether Mr. Newsome had put on his indicator and the distance Mr. Pryce's van had been from Mr. Newsome' vehicle when the turn was made.

[30] In reviewing the applicable law, Miss Dunbar began by considering the doctrine of negligence which she described as a stringent one. She noted the three elements that must be proven by a party alleging this head of tort; namely:

a. a duty of care was owed by the defendant to the plaintiff
b. there was a breach of that duty by the defendant
c. the plaintiff suffered damage as a result of that breach.

[31] She referred to the observations of Lord Wright in **Lochgelly Iron Coat Co. Ltd v McMullan [1934] A.C. 1** as cited in the text **Kodilinye's Commonwealth Caribbean Tort Law** at page 63:

> *"... in strict legal analysis, "negligence" means more than heedless or careless conduct whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."*

[32] It was posited that in order to determine whether a duty of care was owed to a claimant the question to be answered would be if in the particular circumstances is it reasonably foreseeable that the claimant will be harmed if the defendant does not exercise due care. She noted that once the answer to this is yes, the court must then determine whether there is a breach of that duty.

[33] It was also noted that the **Road Traffic Act** places a number of duties on users of the roadways. The section referred to in the claimant's submission was accepted to be of particular importance i.e., section 51 specifically (1) (d) (e) and (f). Also section 95 (3) was also highlighted. Finally, section 57 which speaks to the duty of a driver when turning or changing direction was also noted.

[34] Ms. Dunbar went on to review several cases which she said offered guidance on the law in relation to the duty of a car crossing the main road from a minor road. She referred to the Court of Appeal decision written by Wolfe J.A. (Ag.), as he then was, in **James Mitchell and Aaron Gordon v Leviene McKenzie and Dorrell Gordon SCCA 104/91** delivered on October 21, 1992, as also Supreme Court decisions of Harrison J, as he then was, **William Blackwood v Gloria Stephenson and Alexander Stephenson Suit no. C.L. 1994/B057** and Theobalds J, **Calvin Grant v Pareedon and Pareedon Suit no. C.L. 1983/G 108** delivered April 1986.

[35] A review of cases that dealt with the duty of care owed by a party changing direction was also embarked upon. It was submitted that it has been long established that the driver of a vehicle who is changing direction bears the greater duty of care

before undertaking his manoeuvre. Support for this principle was found in the case of **Pratt v Bloom** 1958 Times 21 October Div Court as found at page 85 in **Bingham and Berrymans' Personal Injury and Motor Claims Cases** 12th edition. Per Streatfield J: The duty of a driver changing direction is (1) to signal and (2) to see that no one was incommoded by his change of direction and the duty is greater if he first gives a wrong signal and then changes it.

[36] The case of **Grealis v Opum 2004 RTR 97** was noted where the court found the vehicle making the right turn across the vehicle going straight 80% liable as he bore the greater burden. The court was also said to have found that the vehicle going straight was speeding and thus 20% contributory negligent

[37] It was an important thrust of the submissions made on behalf of Mr. Pryce that he was placed in an extremely dangerous situation and in the agony of the moment he took action to avoid a collision with Mr. Newsome's vehicle. The decision of **Brandon v Osbourne Garrett and Co**., **1924 1 KB 548** was therefore considered particularly useful. The local decision of **Neil Lewis v Astley Baker 2014 JMSC 1** was also relied on. Anderson J at paragraph 17 stated in a manner described as succinctly the following:

> *"... Where the defendant's negligence has created a dilemma for the claimant, the defendant cannot escape full liability, if the claimant in the agony of the moment tries to save himself by choosing a course of conduct which proves to be the wrong one, provided the plaintiff acted in a reasonable apprehension of danger and the method by which he tried to avoid it, was a reasonable one provided that those two conditions are satisfied, these being that the claimant acted in a reasonable apprehension of danger and the method by which he tried to avoid the danger with which he was confronted at the material time was a reasonable one, then the claimant would not be contributory negligent as regards his loss and/or injury suffered."*

[38] In considering the evidence, it was opined that the main issue for the court to decide is whether Noel Newsome made the right turn 40 – 50 feet/about five car lengths

away as Mr. Newsome would have the court believe or 12 - 15 feet as Mr. Pryce testified. It was posited that given the evidence of Mr. Newsome that he was still in the car when he heard the loud sound of the impact and that he could see the accident from the bar's parking lot a distance of about 20 – 22 feet, it would seem more reasonable that the turning took place when the cars were close together at the 12 – 15 feet estimated by Mr. Pryce. This must also be considered against the background that all parties agreed that the accident occurred in the vicinity of Mr. T's Bar.

[39] Further it was urged that if Mr. Newsome's estimate of 40 -50 feet is to be accepted, it would mean that no accident should have occurred and it should not have happened in the vicinity of the bar but further down the road. It was opined that Mr. Newsome should not have still been in the car when the collision occurred if he had turned when he said he did. It was submitted further that once the court accepted that the vehicles were much closer when Mr. Newsome turned, then it will accept that Mr. Newsome's vehicle created an obstruction to Mr. Pryce's vehicle and that his act of turning was very sudden and unexpected. Mr. Pryce being faced with an obstruction and realizing they were going to collide, instinctively swerved away from that obstruction.

[40] The court was urged to determine what caused the accident and in so doing must consider the question – would the collision between Mr. Pryce's van and the taxi have occurred if Mr. Newsome had not turned right across Mr. Pryce's path. It was opined that the answer must clearly be no, as it was Mr. Newsome's act that precipitated the chain of events that ultimately led to the collision – between Mr. Pryce's van and the taxi. It was argued that no challenge can be made on the agreed facts that Mr. Pryce had the right of way on the main road and Mr. Newsome being the party who was changing direction, had the greater duty of care to wait until the way was clear before crossing over Mr. Pryce's lane.

[41] The argument was also made that given Mr. Newsome's evidence that Mr. Pryce was not speeding that day and that there was nothing alarming in the manner Mr. Pryce was approaching, it could only have been something drastic that would have caused a

vehicle travelling at a moderate speed, in its lawful lane on a straight flat stretch of road to just drive into the opposite lane. The cause it was posited, was the sudden and without warning turn of Mr. Newsome across Mr. Pryce's lawful path.

[42] It was ultimately submitted that Mr. Newsome was to be found to be the sole cause of the accident and judgment should be entered in favour of both Mr. Pryce and Ms. Gray against Mr. Newsome. It was, however, urged that if the court was minded to find that there is any contribution on Mr. Pryce's part it should be quite minimal, no more than 10%.

On behalf of the 2nd defendant/ancillary defendant

[43] Mrs. Brown-Rose in her skeleton submissions before the commencement of the trial argued that the issues to be determined would rest solely on the credibility of the witnesses and the factual circumstances surrounding the accident. The position on behalf of Mr. Newsome was that he was not involved in the collision with the motor vehicle in which the claimant was travelling.

[44] In her submissions at the conclusion of the trial, it was submitted that the evidence should first be considered. The evidence of Miss Gray was first reviewed and it was highlighted that she did not see Mr. Newsome's vehicle. It was noted that her unchallenged evidence was that when she first saw Mr. Pryce's vehicle it was about 10 feet away from her and had left its correct side of the road and was coming over to her side. She is therefore unable to give any evidence as to why Mr. Pryce was over on her side of the road. It was submitted that if there was in fact a sudden turning of Mr. Newsome's vehicle in the path of Mr. Pryce, Mr. Pryce's swerving right into the path of oncoming traffic would have been simultaneous and Miss Gray would have had full view of the manoeuvres leading to the collision. Her failure to give any such evidence was submitted to be grounds for the court accepting that Miss Gray did not see Mr. Newsome's car and did not see any negligent driving on the part of Mr. Newsome.

[45] In assessing the evidence of Mr. Pryce, it was opined that his demeanour in the witness box was evasive and he was less than forthright in his answers. It was noted

how he denied that it was his vehicle that had collided into the taxi. He was pressed before admitting that the collision occurred on Miss Gray's side of the road. The court was asked to note that Mr. Pryce denied he was driving fast but admitted to losing control of his vehicle. He further admitted that one his tyres blew out although it was in good condition prior to the accident. It was submitted that it was clear from Mr. Pryce's evidence that he did not accept responsibility for the collision and even whilst admitting that he swerved into the path of the taxi he insisted that the taxi had collided into his vehicle.

[46] The evidence of Mr. Newsome was reviewed by merely summarizing what was contained in his witness statement. It was submitted that Mr. Newsome was cross-examined at length but remained unshakeable and was firm and direct in his answers.

[47] In her review of the applicable law, Mrs. Brown-Rose was content with the statement that road users owe a duty of care to fellow users of the road not to, by their actions, cause injury to other persons or properties and if they operate contrary to this, they will be liable in negligence. She also noted section 51 of the **Road Traffic Act** which sets out the rules of the road.

[48] It was submitted that the decision on liability will therefore turn on the credibility of Mr. Pryce whose allegation against Mr. Newsome is not supported by the physical evidence. Further it was submitted that Mr. Newsome's action of turning left did not create a dangerous situation for Mr. Pryce and neither did it obstruct his path. It was argued that given the accepted fact that the vicinity in which the accident occurred was a straight road with a clear view of the road ahead, the fact that Miss. Gray did not see when Mr. Newsome allegedly made the sudden left turn is significant.

[49] The court was invited to note the marked divergence in the evidence of the claimant and of the first defendant as to the distances the vehicles were from each other when the turn was made. It was submitted that where there is a divergence between the evidence of the parties in a civil action for negligence involving a collision, the court is often urged to look at any independent physical evidence – the Court of Appeal

decision of **Calvin Grant v David Paradeen and Augustus Paradeen SCCA No. 91/87** was referred to in support of this point.

[50] It was submitted that in this instant case, the extrinsic physical evidence would be the location of the damage to the vehicles and the point of impact. The fact that there was no collision between Mr. Pryce's vehicle and Mr. Newsome's vehicle was noted as supporting Mr. Newsome's version that the accident occurred after he had completed his turn and that the manoeuvre posed no imminent danger to Mr. Pryce. It was further opined that if Mr. Newsome's car was at the distance Mr. Pryce alleged there would have been a collision between those two vehicles. It was submitted that based on the fact that it was Mr. Pryce's actions on that day that led to the collision, his swerving into oncoming traffic, the blown tyre suggest a high degree of negligence on the part of Mr. Pryce.

[51] There was one other bit of evidence Mrs. Brown-Rose chose to highlight and opined that it was quite remarkable. She noted that Mr. Pryce had said that the vehicle travelling immediately behind Mr. Newsome's had been able to swerve further to its left and passed without any mishap. It was submitted that the vehicle travelling behind Mr. Newsome would not be swerving further left to avoid Mr. Newsome who was turning right. It was argued that it would have been swerving further left to avoid Mr. Pryce who for some reason was no longer travelling in his correct lane. Mr. Pryce's action of swerving it was submitted is by itself a negligent act. Reference was made to **Doonan v Scottish Motor Traction Co.** at **Bingham and Berryman' Motor Claim Cases** page 257.

The discussion

[52] The definition of negligence that I have found particularly useful for matters such as this is that taken from **Blyth v Birmingham Water Works Co [1856] 11 Ex. Ch. 781**:

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations*

> *which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man would not do."*

[53] As it relates to motor vehicle collision, the words of Slade J in **Berrill v Road Haulage Executive 1952 2 Lloyd's Rep 490** as quoted in the text **Bingham and Berryman's Motor Claim Cases,** 10th ed. at page 3 also proves instructive:

> *"Paraphrasing the words of Lord Uthwatt in **London Passenger Transport Board v Upson** [1949] AC 155 .....a driver is not bound to foresee every extremity of folly which occurs on the road. Equally he is certainly not entitled to drive upon the footing that other users of the road either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of a road users teaches that people do, albeit negligently.":per Slade J.*

[54] Before leaving this consideration of the guidance to be found from precedents in this area, one other useful pronouncement is from the Privy Council decision of **Nance v. British Columbia Electric Railway Co. Ltd. [1951] 2 All ER 448** where Viscount Simon at page 250 said:-

> *"Generally speaking when two parties are so moving in relation to one another so as to involve risk of collision each owes to the other a duty to move with due care and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle."*

[55] It therefore is clearly established that the common law duty exists which requires all users of the road to exercise care when using the road to take all reasonable steps to avoid an accident. The statutory duty buttresses this common law duty and it is noted that in their submissions counsel did refer to the pertinent provisions of the local road traffic legislation. The provisions of section 51of the Act in outlining the rules of the road is undoubtedly of great significance. Section 51 (2) has previously been noted. For the purposes of the matter at bar, one other provision should be noted:

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

(a) .....

(b) .....

(c) .....

(d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;

[56] In the instant case, Mr. Newsome is being blamed by Mr. Pryce for his leaving his correct side of the road and trespassing into the path of traffic proceeding on their correct side of the road. It is somewhat bemusing how Mr. Pryce was adamant that he did not collide with the taxi in which Miss Gary was travelling. Technically speaking he may be correct. He did not collide in the sense that he claimed he was stationary at the time the collision took place so it was the other vehicle that hit into him. Mr. Pryce cannot escape from the fact that this other vehicle did not have much of a choice since he, Mr. Pryce, was in the way of that vehicle.

[57] The action of Mr Newsome in crossing the path of Mr. Pryce therefore must be considered as it may well be regarded as the action that set in motion the series of actions that culminated in the collision. So although he was not himself involved in the actual collision can he be held responsible for causing it? In his effort to get to Mr. T's bar, Mr. Newsome in executing the manoeuvre that took him across the lane of oncoming traffic had estimated that he had sufficient time and space to do so without causing an obstruction. He parked without colliding with any of the oncoming traffic suggesting that he was successful in his manoeuvre.

[58] The question of the distance between himself and Mr. Pryce at the time he made the turn becomes of paramount significance because although he successfully got across and even parked, his crossing may have been close enough to cause apprehension on Mr. Pryce's part. The argument offered by Ms. Dunbar in this regard is found to be most useful. Mr. Newsome said he had parked but not yet exited his vehicle when he heard the collision. He said he saw that there had been an accident

across from the parking lot where he was then located. On the balance of probabilities, I find that Mr. Pryce must have been sufficiently close to Mr. Newsome when the turn was made for Mr. Newsome to have later been able to hear and see what he did. The accident certainly would have been further down the road if Mr. Newsome's estimation of the distances was the correct one.

[59] While it is true that things must have happened quickly, I am satisfied that juxtaposing the two accounts the reasonable picture of what happened that day is that the turning across Mr. Pryce's path was in the immediate vicinity of the bar. Mr. Newsome stopped just as Mr. Pryce was completing his act of attempting to brake and had swerved across the dividing white line. Mr. Pryce indicates that another car successfully navigated its way around him before the collision with the taxi took place. I am satisfied that the distance estimated by Mr. Pryce that existed between the two vehicles at the time of the turn was more accurate than that of Mr. Newsome's. There was sufficient time and distance for Mr. Newsome to pass but not without causing Mr. Pryce to fear a collision and react accordingly.

[60] The matter, however, does not end there. A consideration must now be made of the reaction of Mr. Pryce to see if it was one which was reasonable in all the circumstances. I am mindful of the fact that in the agony of the moment Mr. Pryce made a judgment call to do an act which clearly turned out to be the incorrect one. He himself demonstrated his awareness of this fact when he explained that having stopped where he did he was unable to take what he described as a corrective measure to remove himself obstructing traffic in their correct lane. The need for correction to my mind indicates an awareness of being in the wrong.

[61] I think it appropriate to indicate that I am in agreement with Mrs. Brown-Rose's submission that the authorities and arguments put forward by Ms. Dunbar concerning principles involved where a collision takes place between traffic entering the major road from a minor road are of little assistance. The principle gleaned from **Brandon v Osbourne Garret & Company** [supra], however, is useful. Swift J said at page 550

> *"In my opinion this case is covered by the statement of the law in **Jones v Boyce**. Lord Ellenborough there in substance directed the jury that if a person is placed by the negligence of the defendant in a position in which he acts under a reasonable apprehension of a danger and in consequence of so acting is injured, he is entitled to recover damages, unless his conduct in all the circumstances of the case amounts to contributory negligence. If a person is not to be held guilty of contributory negligence because he, acting instinctively for his own preservation, does that which a reasonable man under those conditions would do ....."*

[62] The question now becomes whether Mr. Pryce's action was reasonable under the circumstance. He was travelling he said at a speed of about 40 kph. Mr. Newsome agrees that Mr. Pryce was travelling at what he described as a moderate speed of between 40-45 kph. Going at that speed and at the distance that permitted Mr. Newsome to successfully cross his path without them colliding, I cannot help but query why Mr. Pryce was not able to stop. Why was it necessary for him to swerve right knowing that in so doing he would be endangering others? Was the act of swerving right one that a reasonable driver exercising requisite care and control would be forced to do? In attempting to explain himself more fully, it is noted that Mr. Pryce went from a position of swerving right while attempting to brake-up to one of losing control of his vehicle. On the balance of probabilities, I find that Mr. Pryce in his act of self preservation given the negligence of Mr. Newsome did not respond as a reasonable driver would in all the circumstance. There is no logical explanation why going at the speed he was, Mr. Pryce did not just stop where he was.

[63] In the text **Bingham's and Berryman's** 11th edition at paragraph 5:20, the writers noted the case of **O'hara v Central Scottish Motor Traction Co. Ltd 1941 SC 363, 1941 SLT 202** where it was deemed to have held:

> *"Pulling up suddenly and violently is prima facie evidence of negligence (**Mars v Glasgow Corp**. 1940 SC 202, 1940 SLT 165) and so is a violent swerve."*

[64] It is also true that at paragraph 5:21, the case of **Ballingall v Glasgow Corp**. **1948 SC 60**, was noted where in it was pointed out that the converse is also true and the two cases mentioned above were distinguished. I am satisfied, however, that the matter is ultimately distinguishable and determined by considering the reaction of Mr. Pryce to what he perceived as a danger to himself ; it was not that of a reasonable and responsible driver. In all the circumstances on the balance of probabilities I am satisfied he was negligent. The final collision would have been avoided if Mr. Pryce had acted with more care and caution; he ought to have anticipated that in swerving in the way he did other road users would have been at risk. Both men are liable for the collision that caused injury to Miss Gray but Mr. Pryce bears more of the liability.

[65] In determining the apportionment of liability one instructive authority is that of **Brown v Thompson [1968] 2 All ER 708** as noted in **Bingham's and Berryman's Motor Claim Cases**,10th edition paragraph 22. It was there held *inter alia:*

> *"...regard must be had not only to the causative potency of the acts or omissions of each of the parties but to their relative blameworthiness (citing **The Miraflores** 1967 1 AC 826)."*

[66] I also bear in mind the point made by Lord Pearce in **Uden v Associated Portland Cement Manufacturing Ltd [1965] 2 All ER 213** at page 218. He reminded that the question of apportioning blame "is one of fact, opinion and degree."

[67] In all the circumstances as I have found them to be both liable and I find a fair apportionment of liability is 75% to Mr. Pryce and 25% to Mr. Newsome.

[68] On the matter of the claim brought by Mr. Pryce against Mr. Newsome for the damage allegedly caused by the collision, the issue of contributory negligence arises. A succinct definition of this defence is that of Viscount Birkhead in **Admiralty Commissioners v SS Volute** [1922] 1 AC 129:

> *"The test is whether the claimant in the ordinary sense of this business ... contributed to the accident."*

[69] In **Froom v Butcher [1975] 3 All ER 520** at page 524 Lord Denning had this to say on the matter:

> *"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 h did not act as a reasonable prudent man he might hurt himself. See* ***Jones v Livex Quarries Ltd****."*

[70] Based on the assessment of the collision already conducted, the finding is that Mr. Pryce did not in his own interest take care when in seeking to avoid a collision he choose to swing into a situation that caused damage to himself. In the circumstances, the appointment for his damage must remain the same 75% to himself and 25% to Mr. Newsome

The Assessment of damages – Re Miss Gray

[71] Miss Gray's evidence was that after the driver of the taxi "drew his brakes" she was thrown forward into the windscreen after which she was "knocked out." She woke up in the Spanish Town Hospital feeling dizzy. She "blacked out" again. When next she awoke she was feeling pain in her head, face, neck, shoulder, back and chest. She had a cut in her face which she said required stitches. She was given medication for the pain and remained in hospital for approximately six (6) hours before being released.

[72] She said she continued to feel sick even after being discharged and had to see a private doctor in Spanish Town on at least three (3) occasions. She also had to visit a clinic at Waterford on several occasions for the wound to be dressed. At the time of giving her witness statement on July 2013, almost six (6) years after the accident, she said she continued to feel the pains in her head whenever she had to be in the sun and would also experience nose bleeds from time to time. The pains in her neck, back and shoulder continued for a few weeks after the collision before eventually stopping.

[73] To support her claim as to her injuries, Miss Gray relied on a medical report from Dr. Kurt Waul a medical officer attached to the South East Regional Health Authority/Spanish Town Hospital on February 4, 2008 – the date of the report. He stated therein that at the time of her examination she had fully regained consciousness but was experiencing moderate frontal headaches. Significant findings were confined to her face and forehead. There were bruises over the right side of the forehead associated with swelling and tenderness.

[74] The diagnosis stated in the report was:-

1. Head injury with secondary cerebral concussion.

2. Soft tissue injury to the forehead to rule out skull fracture

[75] Subsequent x-rays of the skull did not reveal any bony injury. The Doctor explained Miss Gray was later discharged home on oral antibiotics and panadol tablets for pain. Two (2) weeks rest of strenuous activities was advised. A head injury advisory was given informing her to return to hospital on the event of deterioration of her conscious level.

[76] It is to be noted that Mr. Pryce had at the time of the collision seen that one of the ladies in the vehicle "that had collided into his" was bleeding from her forehead and she was put into another vehicle and taken away from the scene. This must have been Miss Gray and therefore supports her account of the cut to her head.

[77] On behalf of Miss Gray, Miss Archer urged an award of $2,000,000.00 as general damages for her pain and suffering. She relied on three (3) authorities:-

(1) **Henry Bryan v. Noel Hoshue** Khan Vol. 5 page 177

(2) **Bernice Clarke v. Clive Lewis Suit No. C.L. 2001/C234** delivered April 11, 2003.

(3) **Trevor Benjamin v. Ford et al Claim No. HCV 02876 of 2005** delivered March 23, 2010.

[78] In **Bryan v. Hoshue** the claimant sustained "abrasion to the frontal scalp, severe headaches" among other injuries. An award of $350,000.00 was made at the time. Using a CPI at the time of this trial that award was said to be updated to $1,753,500.00. In **Clarke v. Lewis** it was said the claimant sustained "a mild cerebral concussion". The award made of $660,000.00 updates to $1,892,000.00. In **Benjamin v. Ford et al**, the claimant was awarded $700,000.00 for soft tissue injuries which was sustained. This amount updates to $1,015,000.00.

[79] Both counsel for Mr. Pryce as well as Mr. Newsome recommended the amount of $600,000.00 for this heading and relied on the authority of **Boysie Ormsby v. James Bonefield and Conrad Young Suit C.L.1992/017** page 213 Khan Vol. 4 where the claimant had multiple superficial wounds to left supra orbital area and muscular tenderness in upper limbs. An award of $83,000.00 was made. Neither counsel however indicated how much this figure could be if updated at the time of trial.

[80] Miss Dunbar also relied on the case of **Frederick Foulkes v. Albert Thompson Suit C.L. 1988/F115** Harrison's Personal Injuries page 56. In this case the claimant suffered a severe blow to the head with abrasion to the face right hand and right costal areas, loss of consciousness and persistent headaches. Damages were assessed in 1990 to be $20,000.00. Miss Dunbar indicated that this award updates to $640,520.98.

[81] In the instant case, the fact of Miss Gray's loss of consciousness coupled with the fact that the diagnoses spoke to a cerebral concussion are to my mind most significant. It is however also to be noted that Miss Gray has been left with a scar to her forehead as a permanent reminder of the injury she received. There was no medical evidence to support any suggestion that the nose bleed she said she suffers from time to time is a direct result of the injury. In all the circumstances an award of $1,500,000.00 seems most fair and appropriate.

[82] In her further amended particulars of claim, the particulars of special damages for Miss Gray are as follows:-

(1) Medical expenses (and cont'd). $2000.00

(2)	Loss of earnings ($15,000 per month) for two (2) weeks and cont'd	$7500.00
(3)	Transportation expenses (and cont'd)	$6000.00
		Total $15500.00

[83] At trial Miss Gray in her evidence was able to prove the expense of $2000.00 for obtaining the medical report by having admitted into evidence the receipt obtained from Spanish Town Hospital. There was no other documentary proof on any other expenses.

[84] In her evidence she explained that at the time of the incident she worked as a sales representative for a company named Gorstew Trading Company selling neck ties and tie pins. This involved her working for hours in the sun to do her sales. She said she earned about $7,000.00 for her travelling expenses and a commission of 20%. She said she was collecting between $15,000.00 to $18,000.00 per month as her pay. She explained that she had to "stop working for about a year or so" as she could not manage to walk in the sun. As she explained it "unfortunately" the company had shut down at the time of her witness statement and she "don't remember where any of [her] old pay slips are located." On the strength of this evidence Miss Archer submitted that the sum of $216,000.00 representing one (1) year loss of earnings is justified.

[85] The case of **Desmond Walters v. Carlene Mitchell [1992] 29 JLR 173** was relied on by Miss Archer. The court there had held that a sidewalk vendor should be awarded loss of earnings although no documentary proof of his earning. The principle gleaned from that case is that not all categories of employment can provide strict proof of loss of earnings. Thus Miss Archer in the instant case felt that her submission that Miss Gray had provided sufficient viva voce evidence of being a sales representative and of the loss of earning she has suffered as a result of not being able to work.

[86] Once again opposing counsel were agreed in urging the Court to bear in mind that a party claiming special damages must provide strict proof of same. Miss Dunbar relied on the case of **Shaquille Forbes (bnf Kadina Lewis v. Ralston Baker et al**

Claim No. 2006 HCV 02938 delivered March 10, 2011 where Fraser J, re-iterated the well known principle urging plaintiff to be reminded that:-

> *"it is not enough to write down particulars and so to speak throw that at the head of the court saying this is what I have lost I ask you to give me these damages. They have to prove it."*

[87] Fraser J also went on to acknowledge the approach of Wolfe JA in **Walters v. Mitchell** and at paragraph 19 he quoted what Wolfe JA had said at page 176 inter alia –

> "There is support for the approach which the judge adopted. At paragraph 1528 of McGregor on Damages 12th Edition the learned Author states:
>
> *"However with proof as with pleadings the Courts are realistic and accept that the particularity must be tailored to the fact:*
> *Bowen LJ laid this down in the leading case on pleading and proof of damage,* ***Radcliffe v. Evans*** *1892 2 QB 524 (C.A.)……..."*

[88] Any relaxation of the rule of strict proof must be based in cogent evidence that can satisfy the court that the plaintiff was indeed earning as he alleges. In the instant case Miss Gray is unable to supply the court with even a letter from the company she named as having worked for because at the time of her witness statement that company closed down, she did not say when this closure occurred She indicated that she had pay slips but didn't know where to find them in 2013. This claim was commenced in 2008 – a year after the accident surely at that time, knowing what she needed to prove Miss Gray could have safely put away or handed to her attorney her play slips and a letter from her employer.

[89] However what is also curious about her evidence is that she spoke of having to walk about to sell her items yet claims to have been earning $7,000.00 for her travelling expenses. It would have been useful if Miss Gray had been able to explain what this

expense entailed. Further she spoke of earning a commission of 20% without giving any idea as to what it would be 20% of – i.e. was it her monthly, weekly or daily sales.

[90] In the circumstance, I find that the evidence does not support a relaxation of the strict rule that required Miss Gray to prove her losses. I will decline from making such an award. It is noted that in her submissions Miss Archer did not pursue the claim for the trips allegedly made by taxi to the private doctor or the clinic for dressing. This was indeed best as here again Miss Gray failed to give sufficient details as to how she arrived at a total of $6,000.00 for this expense to be justified.

Re: Mr. Pryce as ancillary claimant

[91] Mr. Pryce presented documents for the work he said he had to get done in repairing his vehicle. There was an invoice detailing the work that was done namely removing and replacing right hand door, repair right hand door post, remove and replace front bumper and front grill; replace dash board, to repair front panel and to repair tip (?) of chassis leg. There was also a receipt indicating he had paid a total of $27,000.00 for the work done.

[92] Mr. Pryce also claimed loss of use for seven (7) days at a cost of $1500 per day. In his evidence he explained that while the vehicle was being repaired he was forced to get around by taxi. However he said the amount varied sometimes from $300.00 to $400.00 per day. His evidence therefore failed to support his claim but in the circumstances I find that he would well have had to use alternate means of transportation and $400.00 per day is not unreasonable so I will make the award in that amount. Thus for seven (7) days he would be entitled to an award of $2,800.00.

Judgment

1. Judgment for the claimant with liability assessed at 75% on the part of the 1st defendant and 25% on the part of the 2nd defendant.

2. Damages for the claimant assessed as follows:-

(a) Special damages in the amount of $2,000.00 with interest thereon at 3% as of September 5th, 2007 to today's date.

(b) General damages for pain and suffering in the amount of $1,500,000.00 with interest thereon at 3% from March 10, 2010 for the 1st defendant and July 17, 2010 for the 2nd defendant to today's date.

3. Cost to the claimant to be agreed or taxed and apportioned 75%: 25% as between the 1st and 2nd defendant.

On the ancillary claim, judgment for the ancillary claimant with contributory negligence assessed at 75% on the part of the ancillary claimant and 25% on the part of the ancillary defendant.

Damages for the ancillary claimant assessed as follows:-

Special damages-

a)	Repairs	$27,000.00
b)	Loss of use	2,800.00
	Total	$29,800.00

Interest is awarded on Special Damages at the rate of 3% per annum from the date of the accident to the date of Judgment.

Interest is awarded on General Damages from the date of the service of the Claim to the date of Judgment.

No order as to costs