[2021]JMSC Civ 100

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014HCV00970

BETWEEN	**DAMION GREEN**	**CLAIMANT**
AND	**ALICIA NOTEMAN**	**DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015HCV06004

BETWEEN	**RENARDO MUNDELL**	**CLAIMANT**
AND	**ALICIA NOTEMAN**	**DEFENDANT**
AND	**DAMION GREEN**	**DEFENDANT**

Representation: Lemar Neale and Shantel Green instructed by NeaLex for Damion Green as Claimant.

Suzette Burton-Campbell instructed by Burton, Campbell for Damion Green as Defendant.

Mr Monroe Wisdom instructed by Nunes, Schofield and DeLeon for Alicia Noteman.

Monique Thomas instructed by Bignall Law for Renardo Mundell.

Heard: April 19th and 20th 2021, June 4th 2021

Motor Vehicle accident – negligence – duty of care – res ipsa loquitur – contributory negligence – entering a major road from a minor road

HUTCHINSON, J

INTRODUCTION

[1] This action is a consolidated claim which arose out of a collision between a Rav 4, owned and driven by the defendant Alicia Noteman, and a motorcycle owned and driven by the first claimant Mr Damion Green. Mr Mundell who is the Claimant in the action which was filed later in time had been the pillion rider on the motorcycle at the time of the collision. The incident occurred on the 1st of November 2012 at the intersection of Port Henderson Road and Mt Royal Estate where Mrs Noteman was seeking to enter the main road from Mt Royal Estate in order to travel towards Bayside, while Mr Green was travelling in the outer section of the left lane heading in the direction.of Naggo Head.

[2] Mrs Noteman subsequently filed a counterclaim and all 3 Claimants allege that the respective drivers so negligently managed and/or controlled their vehicles that they caused or contributed to the collision. As a result of the collision Messrs Green and Mundell sustained personal injury and suffered loss and damage. Mrs Noteman had no injuries but suffered loss and damage. The particulars of negligence of the defendants as well as the loss and damage suffered were set out in the particulars of claim and counterclaim and I do not propose to restate them here.

The case for Damion Green

[3] Mr Green provided a witness statement which was allowed to stand as his evidence in chief with some amplification, he stated that on the 1st of November 2012 sometime after 6 pm he was riding his motorcycle along the Port Henderson road with his stepson Renardo Mundell as his pillion rider. He explained that he was travelling in the lane from Bayside heading towards Greater Portmore and the vehicles were travelling slowly but not bumper to bumper. There was no traffic in the lane heading in the opposite direction.

[4] He was unable to provide the speed at which he was travelling but was certain that he had been travelling slowly because of the line of traffic. He said that he was riding beside a car in his lane when he saw the bright lights of a Coaster bus which was travelling quickly towards him. He then saw a van in front of the bus heading

in the same direction. He recounted that the right front section of the van came across into his lane and collided with the front of his bike throwing him and his passenger to the ground.

[5] Mr Green stated that the Coaster bus was not involved in the accident as the driver had swerved away from the van when it came out into his path. As a result of the collision, the entire front section of his bike was damaged and he also observed damage to the right headlamp of the van which he later learned was owned by Mrs Noteman. He suffered an injury to his leg for which he initially received stitches but had to return to the hospital where he was admitted for a month in order for the doctors to remove the stitches and excise dead flesh. He was referred for further care including exercise of the leg.

[6] Mr Green was cross examined and agreed that he had been overtaking the vehicles in his lane, he denied however that he had still been overtaking when he arrived at the intersection. He initially denied that the Rav 4 had turned right to head in the direction of Bayside but later agreed that it had. He did not accept that the first time he saw the Rav 4 was when it was on Port Henderson road but contradicted this response by stating that this was correct. He insisted that the collision had occurred in his lane and denied the suggestion that his bike was moving at the relevant time. He insisted that he had been travelling close to the vehicles in his lane and refuted the suggestion that he had been using the other lane to overtake. He also denied that there had been a head on collision with the Rav 4 and that he had been speeding.

[7] He was asked about the injury to his leg and stated that he still experienced pain in the winter months. A review of the medical report agreed revealed that he sustained soft tissue injury to chest and a large degloving wound to his right leg for which he had to be admitted to the hospital on two separate occasions. On the first occasion for one week and the second for a week and a half after which he received outpatient care. In his follow up comments, Dr Sangappa opined that he had shown fair recovery from his injuries.

[8] Mr Green denied that it was because he had been riding faster than the other vehicles in his lane why he had been unable to stop and he said that the collision occurred within a minute of him seeing the bright light of the Rav 4. He accepted that while he was travelling alongside the line of vehicles he could not see clearly to his left but insisted that in any event he had slowed down as he approached the intersection. He said that the car to his left did not stop at the time of the collision but he was unable to say if it swung away. He denied that he had caused the accident by failing to stop, keep a proper lookout or exercise sufficient control over his motorcycle. He also denied that a truck had stopped and he had ridden into the path of the Rav 4.

Case for Renardo Mundell

[9] Mr Mundell's statement was permitted to stand as his evidence in chief with minor editing. It revealed that at the time of the incident he was 13 years old and had been invited by his stepfather to accompany him on the road. He said that while they were heading home his stepfather was riding in his lane to the right of the vehicles heading towards Naggo Head. He also recounted that while they were passing the other vehicles, his stepfather was blowing his horn. On arriving at the intersection they were about to pass a truck, when he observed that it came to a sudden stop. He said the bike continued as it was unable to 'safely' stop and he felt an impact to the left side of the bike and everything went black. On regaining consciousness, he became aware of pain to his abdomen, chest, groin and head. He also observed that the vehicle which 'hit' them was a Rav 4.

[10] He stated that he and his stepfather were transported by the police to the Spanish Town Hospital where he was treated. As a result of ongoing issues, he had to seek further treatment. He claimed that these issues are still unresolved as he continues to experience pain in his groin and is unable to run or play football. He also has to self-medicate as he experiences pain whenever it gets cold. The medical reports disclose that he sustained soft tissue injury to the scrotum. In his follow up comments, Dr Sangappa opined that he had shown fair recovery from his injuries.

[11] He was cross examined and conceded that his view directly in front of him would have been blocked by his stepfather. He agreed that at the intersection a truck was at the head of the traffic and his stepfather had been about to pass it when it came to a stop just before the accident. He accepted that at the time the truck stopped the bike was still moving. He denied however that the bike had been travelling in the lane for vehicles headng in the opposite direction. Mr Mundell acknowledged that he did not see the Rav 4 before the collision and the first time that he saw it was when he got up off the ground. He was unable to say if the bike had been overtaking at the time of the collision and he did not agree with the suggestion that the bike had been going fast at the time of the collision. He also did not agree with the suggestion that by mid-January 2013 he was no longer feeling any pain in his groin.

The case for Alicia Noteman

[12] In her written account, Mrs Noteman outlined that at about 6:40 p.m. that evening she left her home to travel to work in Kingston driving her 2006 blue Toyota Rav4 motorcar registered 3344 GB. Upon reaching the intersection of Congreve Park and Port Henderson Road, she came to a complete stop as there was slow moving bumper to bumper traffic travelling from the direction of Bayside towards Naggo Head along the Port Henderson Road. She stated that there was little to no traffic travelling from the direction of Naggo Head towards Bayside. Her headlights were on and her right indicator was flashing signalling her intention to turn towards Bayside and take the toll into Kingston.

[13] She said that she waited for a minute at the intersection to enter Port Henderson Road when a truck, which was at the head of the line of traffic travelling towards Naggo Head, stopped and the driver gave her clearance to exit. The vehicles in the line of traffic behind the truck also came to a stop. She then proceeded into the lane and stopped to ensure that there were no vehicles travelling from the direction of Naggo Head towards Bayside before making the right turn. She recounted looking to her left and right and upon seeing that the road was clear, she proceeded to make a right turn in the direction of Bayside. Immediately after she completed

the turn and straightened her vehicle in the lane she saw an object flying towards her and she came to a complete stop and held her steering. She then felt an impact to the front right section of her car and realised that the object was a motorcycle and the rider had been flung onto the bonnet and windshield of her car.

[14] Mrs Noteman said when her vehicle came to a stop it was positioned straight in her lane as the collision took place on her side of the road with the motorcycle falling in front of her car. She said the motorcyclist had been travelling in the direction of Naggo Head and overtaking the line of traffic heading in that direction. She observed damage to the right headlamp, right side of the front bumper, top right section of her windshield, bonnet and the roof of her car. She paid eleven thousand five hundred and eighty-seven dollars and ninety-eight cents ($11,587.98) to MSC McKay (Ja.) Limited for an assessor's report which estimated the reasonable cost of repairs to be three hundred and twenty-three thousand, two hundred and thirty-eight dollars and ten cents (S323,238.10). She was without the use of her vehicle for ten (10) days and suffered losses of two thousand two hundred and fifty dollars (S2,250.00) per day for ten (10) days.

[15] She was cross examined and stated that when she came to the intersection to exit Mt Royal Estate she was there for about a minute. She maintained that the truck and line of traffic behind it had come to a stop before she entered the lane. She said that when she stopped in the lane she could see clearly down to the Naggo Head side, but couldn’t see anything beyond the truck on the other side. She explained that she knew she could proceed as the truck had stopped and by saying she had been given clearance she meant it did so by stopping. She insisted that it was right after she made the turn and straightened up that she saw the bike, but conceded that when she looked to her right she did not see as far as when looked to left. She initially stated that she did not see what was happening in the left lane as she wasn’t paying attention to it but later clarified that she had seen the bike overtaking the traffic on the left while travelling in her lane.

Agreed Documents

[16] During the course of the trial a number of documents were agreed by the Parties these were as follows;

1. Medical report prepared by Hugh T.D. Barned dated July 19th, 2013 (Green)
2. Medical report of Dr Ravi Sangappa dated the 9th of January 2014 (Green)
3. Receipt dated 9th October 2013 in sum of $2,000
4. Assessors report prepared by MSC McKay dated November 26th, 2012
5. Receipt from MSC McKay for report dated December 2, 2012
6. Interim medical report prepared by Dr. Khalilah Bullock dated April 1st 2013 (Mundell)
7. Medical report prepared by Dr Sangappa dated January 9th, 2014 (Mundell)
8. Receipt issued by Oasis Health Care Ltd for $4000
9. Receipt issued by Oasis Health Care Ltd for $25,000

Submissions on Liability and Quantum
Damion Green as Claimant

[17] In this claim, Mr Green occupied the unique position of being represented by two separate Counsel in respect of his respective roles as Claimant and Defendant. Mr Neale who appeared for him as Claimant commenced his submissions by identifying what he believed were the issues for these Court's determination namely; whether the collision was caused by the negligence of the Defendant, whether the Claimant was contributorily negligent, the nature and extent of the injuries sustained by the Claimant and the quantum of damages, if any, recoverable by Mr Green.

[18] He relied on the decision of ***Glenford Anderson v George Welch [2012] JMCA Civ 43*** in which Harris JA made it clear that in a claim for tort, the evidence must show that a duty of care was owed, this duty was breached and the Claimant suffered damage as a result. Counsel also asked the Court to consider the provisions of Section 51(2) of the Road Traffic Act as well as the decision of ***Jowaynne Clarke (bnf Anthony Clarke) and Anthony Clarke v Daniel Jankine***

in which Thompson-James J emphasised that a driver of a vehicle owes a duty of care to other road users whom he reasonably foresees are likely to be affected by his driving. The decision of ***Natalie Grey v Donald Pryce and An'or [2015] JMCA Civ 118*** in which P Williams J, as she then was, made similar observations was also cited.

[19] On the issue of contributory negligence Mr Neale relied on the ***Natalie Grey*** decision in which the definition provided by Lord Birkenhead LC in ***Admiralty Commissioners v SS Volute [1922] 1 AC 129*** was restated by the Learned Judge as follows ;

> *'the test is whether the claimant is in the ordinary sense of this business…contributed to the accident'*

Counsel also highlighted the Judges reference to the dictum of Lord Denning in ***Froom v Butcher [1975] 3 All ER 520*** where he made it clear that contributory negligence is 'a man's carelessness in looking after his own safety'. The Learned Judge also noted that an individual would be guilty of contributory negligence if he ought reasonably to have foreseen that his failure to act as a reasonable prudent man may cause hurt to himself.

[20] Mr Neale conceded that there were inconsistencies in the Claimant's evidence but sought to persuade the Court that these were primarily due to the fact that he had a difficulty understanding the questions posed by Mr Wisdom. He submitted that it should be noted that on several occasions Mr Green indicated that he did not understand the question and asked to have it explained. Counsel argued that in spite of rigorous cross examination Mr Green answered the questions once he understood them and was neither evasive or aggressive. He contended that by way of contrast, the Defendant refused to answer straight forward questions even when pressed and was unable to give a clear answer on several occasions.

[21] Counsel argued that although Mr Green had conceded that he couldn't see to the left of the truck his remark that he had not been going fast was in fact sufficient to discharge his duty of care. He contrasted this response to that of the Defendant

where she stated that when she looked to the right she could not see as far as when she looked to the left and argued that this was strong evidence of her failure to keep a good lookout. Mr Neale submitted that if the evidence of Mr Mundell that the truck stopped suddenly, were to be accepted, the Court should find that the Defendant wasn't given clearance but had entered the roadway forcing the truck to stop and in doing so had failed to keep a proper lookout. He questioned the Defendant's assertion that she could see the roadway and posited that if she could see as clearly as she had asserted she would have seen the motorcycle and not a flying object or bright light. He also submitted that in light of the slow pace at which the traffic was travelling, it was unlikely that the bike had been speeding as the damage to the vehicles would have been far more severe if speed had been a factor. He urged the Court to find that the physical damage to the vehicles was more consistent with Mr Green's account than that of Mrs Noteman who he said had failed to discharge her duty of care having proceeded from a minor road to the major road in circumstances where it was unsafe to do so.

[22] On the issue of quantum of damages, Counsel noted that the Claimant Green has pleaded the sum of $203,495 as special damages. In respect of general damages, he relied on two authorities, the first being ***Dalton Barrett v Poincianna Brown and Leroy Bartley2003HCV01358*** in that matter the Claimant suffered mechanical lower back pain and mild cervical strain. He was pain free by October 2003 and his period of incapacity was 9 to 10 months. He suffered no whole person impairment (WPI) and was awarded JMD $750,000 in November 2006 (38.2) for general damages which Counsel updated to $2,106,675.39 using the January 2021 CPI of 107.30. The other authority cited was ***Melford Ricketts v Claudius Dennis2006HCV04152,*** that Claimant suffered injuries to his neck and back and was diagnosed with whiplash and incapacitated for 4 months. He also suffered no WPI. His award was $950,000 in May 2008 which updates to $2,084,560.32. Counsel argued that the Claimants injuries are far more serious than the Claimants in both matters as he also suffered WPI and a reasonable award would be $2,200,000.

Damion Green as Defendant

[23] In her submissions, Mrs Campbell asserted that although Mr Mundell had pleaded negligence on the part of both defendants, his evidence had failed to disclose any act of negligence. She submitted that upon an examination of the remaining accounts, it is evident that Mrs Noteman had caused or contributed to the accident as not only did she fail to keep a proper lookout, she also emerged from a minor road to a main road without ensuring it was safe to do so and then failed to take any or sufficient action to avoid the accident.

[24] She submitted that although Mr Green's account was inconsistent as to when and where he saw Mrs. Noteman's car, it was clear based on her account that her vehicle would have been hidden by the truck and other vehicles. She stated that this submission found support in the evidence of Mr Mundell who stated he had seen the truck but only saw the van after the collision. She also asked the Court to take particular note of Mr Mundell's evidence that although the bike was in the process of overtaking, it remained on its correct side and Mr Green was blowing his horn. Mrs Campbell also highlighted Mr Green's evidence that he had slowed down as he approached the intersection. She contended that the physical damage to Mrs Noteman's vehicle was more consistent with Mr Green's account that her vehicle had been slanted across his lane at the point of impact.

[25] She relied on the principles enunciated in the decision of ***Foskett v Mistry [1984] RTR 1*** and argued that Mrs Noteman had failed to keep a proper lookout in that she had not seen the motorcycle which would have been plainly visible to the average person and as such, negligence can be inferred. She submitted that even if the road was clear when Mrs Noteman started the turn she remained under a duty to keep a continuous lookout and the fact that the collision occurred immediately on her straightening her vehicle meant the motorcycle would have been visible to her as she proceeded onto the roadway. She pointed out that a reasonable and prudent driver on Jamaican roads would anticipate the possibility that in rush hour traffic motor or pedal cyclists are likely to overtake a line of slow moving vehicles and the fact that one vehicle had stopped did not mean that all

other users would yield their right of way. The dictum of Uthwatt in ***L.P.T.B v Upson [1949] 1 All ER 60*** was cited in support of this point, where he stated as follows***;***

> *'I dissent from the view that drivers are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians will behave with reasonable care. It is common experience that many do not. A driver is not...in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.,*

[26] Counsel also made reference to ***Steve Thompson v Errol Ali etal [2016] JMSC Civ 105*** where similar comments were made by the learned judge. Mrs Campbell submitted that because Mrs Noteman was changing her direction of travel, she was under a duty to ensure that the main road was clear before attempting to enter it in keeping with the provisions of Section 51(1) of the Road Traffic Act. Reliance was also placed on the remarks of Phillips J.A in ***Dalton McLean v Steve Cespedes [2016] JMCA App 11*** where she stated as follows;

> *All road users have a duty to manoeuvre their vehicles in a manner which does not endanger other users of the road. In circumstances where crossing the path of another vehicle is being executed, the driver carrying out the manoeuvre must do so in a manner which does not endanger anyone and only when it can be done safely. This includes having a clear view of the roadway ahead, checking the speed of the vehicle which is being crossed and ensuring that after crossing any other manoeuvre can be completed safely.*

[27] Mrs Campbell asked the Court to find that Mrs Noteman misjudged the distance and speed of the motorcycle, created a hazard when she drove into the intersection and made no attempt to avoid the accident save and except for stopping her vehicle. She commended to the Court the provisions of Section 51(2) of the RTA as well as the dictum of Havers J in ***Lang v London Transport Executive 1959 WLR 1168*** in support of this point where he stated;

> *If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind*

of a reasonable man, then there is no negligence in not having taken extraordinary precaution. '

[28] On the issue of contributory negligence, it was acknowledged that if any liability attached to Mr Green it would be on this basis. In respect of evidence provided by Mundell that Mr Green was driving fast, Mrs Campbell argued that case law has shown that speed by itself does not amount to negligence and in order to determine if there was contributory negligence, the Court should consider causation as well as blameworthiness. She sought to distinguish the authority of ***Powell v Moody (1996) 110 Sol Jo 2015*** in which the Court had apportioned liability between a motorcyclist and a motorcar which had emerged from a side road. Counsel argued that while the greater proportion was borne by the motorcyclist in that case in the instant matter Mr Green had been riding alongside the traffic and at no time rode on the opposite side of the road.

[29] On the issue of quantum she relied on the case of ***Leonard Green v Rexton Gordon Khan Vol 4, page 178*** in which the Claimant suffered soft tissue injuries including the loss of one testicle. The updated sum awarded for pain and suffering was $699,346. Mrs Campbell submitted that given the fact that Mr. Mundell only suffered injury to the groin and no loss, the appropriate award would be $350,000. She asserted that Mrs Noteman would only be entitled to recover sums for the repair of her vehicle.

Renardo Mundell

[30] In submissions advanced on behalf of Mr Mundell, Ms Thomas identified what she believed to be the issues for the Court's consideration. She also acknowledged the importance of the Court making a determination as to whether a duty of care was owed to the Claimant, if it had been breached and if there was damage as a result of this breach. She relied on the decision of ***Bourhill v James Young 1941 S.C. 395*** in which this duty had been examined. Ms Thomas also made reference to the provisions of Sections 51 (1), (2), (3) and 32(i) of the RTA as well as ***Nance v British Columbia Electric Company Ltd [1951] AC 601*** in respect of the

common law and statutory duty of drivers to exercise reasonable care while operating their vehicles on the road.

[31] Ms Thomas argued that Mr Green breached this duty of care by failing to slow down or stop when he entered the intersection. She asserted that if this had been done the collision could have been avoided. She also pointed out that Mr Mundell's account that Mr Green could not safely make a stop was unchallenged and the inference to be drawn from same was that he had been travelling at an unsafe speed when he entered the intersection.

[32] Ms Thomas submitted that Mrs Noteman had also breached her duty of care as she entered the intersection in circumstances where the truck took up most of the lane and she could not see beyond same. Counsel argued that on a review of the evidence, the point of impact was in the intersection as Mrs Noteman exited Mt Royal Estate and not after she had straightened up. Ms Thomas asked the Court to note that by Mrs. Notemans' own account she was aware of motorcycles riding on the offside of the traffic and should also have allowed for this possibility before moving out. Counsel referred to the case of ***Woodham v JM Turner*** which involved the collision of a coach exiting from a minor road and a motorcycle which was engaged in the process of passing a vehicle at the head of the line of traffic on the offside. She noted that in that case the Court had apportioned liability equally and asked that the same be done in the instant case.

[33] In respect of the quantum of damages to be assessed, Counsel cited two authorities, the first was ***Adrian Smith v Stanford Bartley C.L. 1989/S 179*** in which the Claimant suffered trauma to his testicles, right knee, forehead, bilateral rib fracture and liver contusion. He ultimately had surgery to remove his right testicles the award for general damages in June 1992 was $100,000 which updates to $1,746,774.19 using the March CPI of 109.30. The authority of ***Shaun Hylton v Wizard Washington and Patrick Dacosta [2014] JMSC Civ 242*** was also cited in which the Claimant suffered muscle spasms affecting his back and groin, pain in the abdomen and a splinter injury to the left eye. The award of

$500,000 in October 2014 updates to $631,062.36. Counsel submitted that in light of the injuries sustained by Mr Mundell as well as the lingering effects of same, an award in the amount of $700,000 would be appropriate.

Alicia Noteman

[34] Mr Wisdom submitted that in order to arrive at a decision on liability, the Court should give careful consideration to the credibility of the parties, the probability of their respective accounts and the physical/extrinsic evidence. He asserted that an examination of Mr Green's account reveals that he failed to keep a proper lookout. He made reference to Mr Green's witness statement and viva voce evidence and noted that he was inconsistent as to when he saw the Rav 4. Counsel submitted this was indicative of the fact that Mr Green was either an unreliable witness who had failed to keep a proper lookout or was being untruthful.

[35] On the issue of credibility, Counsel referred the Court to the decision of ***Alvan Hutchinson v Imperial Optical Limited and Hugh Foreman C L H035/1999*** in which McDonald-Bishop J stated as follows;

> *"It is the Claimant who must satisfy the Court on a balance of probabilities that he has proven the allegation of negligence against the Defendant. It has to determine which of the accounts put forward by the Claimant and the Defendant is more believable. Credibility plays a pivotal role in this exercise, and the Court in assessing credibility will have due regard to the demeanour of the witnesses.»*

[36] He also cited the decision of ***Cranmer King v Jamaica Public Service Limited & Leslie Bryan C L K 013/1984*** (June 23, October 20, 1988, June 5, 1989 and April 3, 1990) in which Bingham J highlighted the importance of the credibility of the witnesses in finding that the Plaintiff's inconsistency had undermined his reliability as a witness.

Overtaking

[37] On the question of whether Mr Green had been of overtaking at the time of the collision, Mr Wisdom highlighted that again there were differences in his account as whereas initially he had stated that he had been overtaking the vehicles in his

lane, he later stated that he had not been overtaking and at the time of the collision his bike was not moving. Counsel also highlighted Mr Green's remark of having 'jucked his brake' as clear evidence that contrary to his earlier statement the bike had been in motion. The account of Renardo Mundell as to point of impact was also described as unreliable as he had conceded in cross examination that his view of events happening in front of him would have been blocked by Green.

Physical and extrinsic evidence

[38] Mr Wisdom asked the Court to find that the account of Mrs. Noteman was most consistent with the extrinsic evidence. He described Mr Green's account as improbable as his motorcycle had been travelling in close proximity to the cars in his lane when it was hit in the same lane by the Rav 4, yet neither his bike nor the Rav 4 hit any other vehicle. He contrasted this to the account of Mrs Noteman which placed the motorcycle in her lane to the right of her vehicle and asserted that this was borne out by the photos which showed the damage to her vehicle being to the right front section. Counsel also asked the Court to find that it was more consistent with real life that Mr Green had been riding in the other lane instead of being 'hitched up' on the other vehicles in his lane.

Speeding

[39] Mr Wisdom submitted that whereas it was highly probable that Mr Green had been speeding as he rode alongside or overtook the vehicles in his lane, it was unlikely that Mrs Noteman would have been speeding having just entered Port Henderson Road from Mt Royal Estate. He argued that based on the extensive damage to both vehicles and the fact that the pillion rider had been thrown into the windshield, it was likely that the motorcycle had been speeding. He made reference to the case of ***Clarke v Winchurch and others [1969] 1 WLR 69*** in which the driver of a car was pulling out across the front of a stationary bus in order to turn in the opposite direction. He collided with a moped which had overtaken the bus on its offside. The Court found the rider of the moped to be entirely liable.

[40] Mr Wisdom noted that this case was cited with approval and relied on in the Court of Appeal in Jamaica in ***Joshua Tucker v Lascelles Chin and Neil Chin SCCA No. 30/2000*** and the following paragraph was cited with approval:

> *The moped rider, after all, if he was keeping his eyes open, could see for himself that the bus had stopped, and in the circumstances, he must have realized that something was going on ahead of the bus, This could only be that some vehicle was seeking to come out ahead of the bus. In that situation the moped rider, if he had been keep a good look-out and driving at a proper speed and at a proper distance from the bus, should have no difficulty in dealing with any emergency that might be caused by the car driver's vehicle poking its nose out in front of the bus.*

[41] He also commended the decision of ***Powell v Moody [Vol 110] Solicitor's Journal 1966*** in support of his contention that Mrs. Noteman had discharged her duty to other road users and Mr. Green should be found either wholly liable for the accident or to bear the greater portion of the liability.

Quantum

[42] Mr Wisdom submitted that, Mrs. Noteman is entitled to special damages to cover the cost of the assessment from MSC McKay, the reasonable cost of repair of her vehicle and loss of use of her vehicle for 10 days the sum total of which is $357,326.08. In respect of the claim by Mr Green he argued that only if the Court found liability on the part of Mrs Noteman should consideration be given to an award for him. He submitted that for special damages his claim was for the cost of medical reports and visits as well as transportation expenses which amount to $57,000.

[43] On the issue of General Damages, Counsel argued that based on the agreed medical evidence, the relevant injury for Mr Green was the wound to his right leg and pain to his chest. He asked the Court to take particular note of the report of Dr. Sangappa who examined the Claimant 4 months after the incident and noted that the injury to his leg had healed and he was discharged from treatment. In respect of the quantum of the award he relied on the following authorities**,**

Donovan Champagnie v The Attorney General for Jamaica & Lyndon Wright, Suit No CL1997/C442, Gilbert McCleod v Keith Lemard reported in Khan's vol. 3 page 234 and ***Junior Robinson v Devon Barrows et al Claim No. CL2—1/T143 unrep delivered December 22, 2006***. Mr Wisdom recommended that in the circumstances, an appropriate award for Mr Green would be in the region of $700,000.00 - $900,000.00.

[44] In respect of Renardo Mundell, Mr Wisdom accepted that his claim for special damages for medical visits, reports and transportation expenses would amount to $36,000. In respect of general damages, he submitted that the relevant injury was a soft tissue injury to the groin area. He made reference to the report of Dr. Sangappa who noted that 2 months post incident the injury to Mr Mundell's scrotum had subsided and he had shown fair recovery from his injuries. On the quantum of damages to be awarded, Counsel asked that regard be had to the following authorities, ***Boysie Ormsby v James Bonfield and Conrad Young (Suit No CL 1992/ 017), Tamah South v George Ergos Suit No CL 1987/333*** and ***Derrick Munroe v Gordon Robertson [2015] JMCA Civ 38***. He also submitted that an award in the region of $300,000.00 - $400,000.00 would be appropriate.

Discussion and Analysis

[45] It is agreed between the Parties that there was a collision between the two vehicles at the intersection of Mt Royal Estate and Port Henderson Road sometime after 6 pm on the 1st of November 2012.They also agree on the direction in which the vehicles were travelling at the time that the collision occurred. There is also no dispute that the front of the motorcycle was extensively damaged and the right headlamp, fender, windshield and roof of the Rav 4. This case turns substantially on the credibility of the witnesses as there was no independent evidence in respect to liability.

Issues

[46] The Court has to decide, on a balance of probabilities:

a. whether the defendants owed a duty of care to the claimants, and if so, whether there was breach of that duty; specifically, did Ms Notemam fail to keep a proper lookout and suddenly and without warning turn into the path of the motorcyclist Mr Green thereby causing the collision;
b. Whether Mr Green was travelling at an excessive speed and failed to keep a proper lookout on entering the intersection thereby riding into the path of the Rav 4 driven by Mrs Noteman as she executed her turn onto the main road.
c. Whether the defendants' actions caused injury and loss to the claimants and if so were they foreseeable;
d. Whether Mr Green and Mrs Noteman by their own action, contributed to the injuries and loss sustained by all the Parties; and
e. the quantum of damages, if any, to be awarded.

[47] The principles in relation to the law of negligence were laid down in the locus classicus of ***Donoghue v Stevenson [1932] UKHL 100*** where Lord Atkins stated as follows:

> *'a reasonable care must be taken to avoid an act or omissions which a reasonable man can foresee may cause injury to a neighbour".*

This principle was judicially considered by our Court of Appeal in ***Glenford Anderson v. George Welch [2012] JMCA Civ.43*** which has been reviewed above.

[48] In ***Donoghue v Stevenson*** (supra), the care that is to be taken is based on the foreseeability test and the standard is that of the ordinary reasonable man placed in the same circumstances as the defendant. As such in cases involving persons who are road users the standard of care is that of the ordinary and reasonable

road user. Section 32 (1) of the Road Traffic Act imposes a general duty on all motorist to drive with due care and attention for all other road users. It states:

> "*if any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence"*

[49] Section 51(1) of the Road Traffic Act provides rules that all drivers of motor vehicles should observe. The relevant sections are outlined below;

> *51(1) (c) 'a motor vehicle shall not be driven alongside of or overlapping, as so as to overtake other traffic proceeding in the same direction if by so doing it obstructs any traffic proceeding in the opposite direction'*
>
> *51(1)(d) a motor vehicle "shall not be driven so as to cross or commence to cross or be turned in a road if by doing it obstructs any traffic;"*
>
> *Section 51 (1)(e) a motor vehicle "proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road";*

[50] Section 51(2) cautions every driver that they have a duty to take necessary action to avoid an accident. It 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 motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."*

[51] The issue of Res Ipsa Loquitur has also been raised on the part of the Claimants Green and Mundell on the basis that they had been struck from the bike by the Rav 4 which was being driven by Ms Noteman which had unexpectedly emerged into their path at the relevant time. While there were no submissions on the point, the application of this legal principle was examined by our Court of Appeal in the decision of ***Coke v Rhooms etal [2014] JMCA CIv 54*** where Brooks JA stated as follows;

> *In Shtern v Villa Mora Cottages Ltd and Another [2012] JMCA Civ 20, Morrison JA, in his characteristically thorough style, assessed the*

> *application of the doctrine of res ipsa loquitur. In his judgment, with which the other members of the court agred, he cited the leading cases on the doctrine and, at paragraph [57], summarised the relevant principles: "[57] Res ipsa loquitur therefore applies where (i**) the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Lindsell, [19th Ed], para. 8-152 provide an illustrative short-list from the decided cases: 'bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns'); (ii) the thing that inflicted the damage was under the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place. As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on Henderson v Jenkins & Sons [[1970] RTR 70, 81 – 82], that 'Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine'.**" (Emphasis supplied)*

[52] Having outlined the relevant considerations, His Lordship then went on to find as follows;

> *It is fair to say, based on the highlighted portion of that extract, that the present case is not one where there is "no evidence as to why or how the [collision] took place". Constable Coke both pleaded in his particulars of claim and testified as to what occurred. Res ipsa loquitur, therefore, does not apply in this case.*

Applying these legal principles to the instant case, it is clear that there is evidence from at least two of the Parties as to how this collision occurred and as such this principle would not apply.

Whether the defendants owed a duty of care to the claimants, and if so, whether there was breach of that duty; specifically, did Ms Notemam fail to keep a proper lookout and suddenly and without warning turn into the path of the motorcyclist Mr Green thereby causing the collision.

Whether Mr Green was travelling at an excessive speed and failed to keep a proper lookout on entering the intersection thereby riding into the path of

the Rav 4 driven by Mrs Noteman as she executed her turn onto the main road.

[53] Although, these issues had been listed separately, they have been dealt with together in light of the consolidated claim and counterclaim. The provisions of Section 51 of the Road Traffic Act as well as the authorities cited make it abundantly clear that the driver of a motor vehicle owes a common law as well as statutory duty to other road users. Sections 51(1) and (2) clearly outline the responsibility of the operator of a motor vehicle to make turns and overtake in a manner that is safe to other road users as well as the duty to take all reasonable steps to avoid an accident. As users of the roadway, there can be no dispute that both Mr Green and Mrs Noteman were under a duty to comply with these requirements.

[54] From the evidence of Mr Green, it was apparent that although he was responsible for driving his motorcycle along the Port Henderson Road in a manner that was in keeping with his common law and statutory duties, he was not entirely aware of his environment and what was happening around him. An example of this is found in the fact that although his pillion rider who was seated behind him had observed that the truck which was at the head of the line of traffic had come to a sudden stop as it reached the intersection, Mr Green never saw the truck if his account is to be believed. This situation is of particular importance in light of Mr Mundell's evidence that they were in the process of passing the truck at the point when it stopped and immediately after this the collision occurred. This portion of evidence, which was unchallenged by Mr Green provides cogent support for the argument that Mr Green had not been keeping a proper lookout at the point when the collision occurred.

[55] Further support was provided for this conclusion by the fact that Mr Green's evidence was contradictory as to when he saw the vehicle and where. In his witness statement, he outlined that he saw the Rav 4 emerge in front of a Coaster bus which was heading in the opposite direction but in his evidence in chief he resiled entirely from this account and stated that the first time he saw the Rav 4 it

was on Port Henderson Road immediately before it collided with his bike. His changing accounts raised questions not only in respect of his credibility as a witness but also as to the reliability of his account.

[56] It was clear that although he had sought to paint a picture in which he had slowed down at the intersection, he was never really aware of the intersection or of the possibility of a vehicle emerging from the opposite direction. By his own admission, he was unable to see what was happening to the left of the vehicles to his left and given that he had been riding along on the outside of these vehicles he simply continued to do same. He was unaware of what was happening to the left of the truck and was in the process of passing same while travelling at a rate of speed that made it impossible for him to stop suddenly exactly as described by Mr Mundell.

[57] I did not believe Mr Green's account that he was not travelling fast as by his own account he was unable to say the speed at which he had been travelling, although he sought to explain away by stating that he had not checked his speedometer. As someone who, the evidence revealed, was not a first time rider/driver, it would have been a simple question to answer. I found that Mr Green was deliberately evasive and I am persuaded that this was in an effort to bury the true rate of speed at which he had been travelling.

[58] Although Mr Mundell was seated behind Mr Green, I found that he was observant and fully cognizant of his surroundings. He had no reason to provide a malicious account against his stepfather and I was persuaded that his evidence had the ring of truth. I accepted his evidence of the manner in which his stepfather had been driving including his statement that his stepfather had been overtaking the slow moving vehicles in the line of traffic. Section 51(c) as well as ***Powell v Moody*** and ***Joshua Tucker v Lascelles Chin etal*** emphasise the importance of the rider/driver of the overtaking vehicle keeping a proper lookout and driving at an appropriate speed and distance in order to ensure that there is no difficulty in dealing with an 'emergency' such as occurred in the instant case. From a review

of the evidence herein it is clear that Mr. Green did not comply with these requirements and in doing so bears some liability for this collision.

[59] In respect of Mrs Noteman, the evidence revealed that at the time of the collision she was on her way to work. She was expected to arrive at 7 pm and from her account it was 6:40 pm. She arrived at the intersection where she waited for a minute before entering the intersection but under cross examination this response was adjusted to about a minute. It was clear that the traffic heading in the opposite direction was heavy and she would have needed to cross it in order to turn in the opposite direction and get to work. According to Mrs Noteman the truck man gave her clearance to enter the intersction but under cross examination she admitted that no signal or physical indication was given, the truck had merely come to a stop. The account of Mr Mundell, which I accept, makes it clear that this was a sudden stop.

[60] What is evident is that as soon as this happened Mrs Noteman drove into the intersection in line with the front of the truck and then sought to complete her manoeuvre by crossing over into the lane heading into the opposite direction. Section 51 (1)(d) as well as the principles enunciated in ***Foskett v Mistry*** and ***L.P.T.B v Upson*** emphasise the importance of such a manoeuvre being done cautiously and while keeping a proper lookout for other users of the roadway. It was evident from her response that while Mrs Noteman recounted looking both ways before moving, her view of the direction from which the truck was travelling was somewhat impeded and this was particularly the case when she was immediately in front of the truck which she described as taking up most of the lane. In spite of this impediment, Mrs Noteman did not take the precaution of inching out into the other lane to complete her manoeuvre but drove right across in order to complete her turn in order to get to work. It was in these circumstances that she collided with the bike having emerged unseen by Mr Green, who I have already found had also failed to keep a proper lookout.

[61] It was also clear from the evidence that on seeing the bright lights of the 'object flying' towards her, that Mrs Noteman's immediate response was to come to a stop and hold her steering wheel. She took no action to avoid the collision and when asked why she didn't swerve she indicated there was nowhere to swerve to. From her own account the collision occurred in the centre of her lane and if the Court were to accept this as true she could have swerved to her left in order to avoid this 'head on collision.' In any event, I did not believe her account that the accident occurred in her lane as she has described. On the point of impact, I accept the evidence of Mr Mundell and Mr Green that this was in their lane as Mrs Noteman turned out from Mt Royal Estate. I found that this assertion is supported by the physical evidence as the damage to the right front section of the Rav 4 is consistent with the vehicle turning out into the pathway of the oncoming vehicle.

Whether the defendants' actions caused injury and loss to the claimants and if so were they foreseeable;

[62] In light of the findings above, it is apparent that Mr Green and Mrs Noteman were under a duty of care to other road users and by the actions that I have noted above, committed a breach of same. There has been evidence provided by all the Parties as to the loss and injury suffered as a result of the collision which took place that day. In support of their written and viva voce account, documentary evidence has also been placed into evidence in proof of same. This evidence had been agreed and on a careful review of same, I am satisfied that loss and damage occurred and this will be addressed in a more fulsome manner in the course of this judgment.

Whether Mr Green and Mrs Noteman by their own action, contributed to the injuries and loss sustained by all the Parties

I am persuaded on a balance of probability that the liability for this collision rests on both motorists who by their actions and omissions contributed to same. It is evident however that while they are both liable, the greater liability rests on Mr Green as the truck had stopped to allow Mrs Noteman to access the roadway and

had Mr Green been complying with his common law and statutory duties he could have avoided the collision even in circumstances where Mrs Noteman had emerged unexpectedly in his path. I am satisfied that the appropriate apportionment taking into account the circumstances of this case is in the range of 75:25 and this apportionment would apply to the damages assessed.

The quantum of damages, if any, to be awarded to the Parties

Special Damages

[63] The issue of special damages did not appear to be controversial. In considering the appropriate sums to be awarded, I noted that there were some differences between what had been pleaded and what was eventually proved in evidence or by agreement. As such, I was satisfied that the appropriate sums to be awarded are as follows;

1. Mr Damion Green – the sum of $67,000 to cover the cost of the medical report of Doctors Sangappa and Barned as well as Transportation expenses. Interest at the rate of 3% to run from the 1st November 2012 to today's date.

2. Renardo Mundell – the sum of $40,000 to cover the cost of the medical reports from Doctors Sangappa and Bullock as well as transportation expenses. Interest at the rate of 3% to run from the 1st November 2012 to today's date

3. Alicia Noteman – the sum of $357,326.08 to cover the cost of the assessment from MSC McKay, the reasonable cost of repair of her vehicle and loss of use of her vehicle for 10 days. Interest at the rate of 3% to run from the 1st November 2012 to today's date.

General Damages

[64] On the subject of the quantum of damages to be awarded for pain and suffering a number of authorities were cited by the respective Attorneys as to what would be

the appropriate award in light of the injuries sustained by Mr Damion Green and Mr Renardo Mundell. In my outline of the respective cases of the Parties, I have made specific reference to the injuries which I am satisfied were sustained by these individuals. I note that what was stated in the medical reports agreed differed in a number of respects from what was laid out in the pleadings.

[65] In respect of Mr Green who sustained soft tissue injury to the chest, a degloving wound to the right leg and complained of ongoing pain to the leg, I was persuaded that the cases of ***Gilbert McLeod v Keith Lemard*** and ***Junior Robinson v Devon Barrows*** were more consistent with the nature and seriousness of the injuries sustained. In the ***Gilbert McLeod*** case, the Claimant sustained pain and tenderness to his chest, multiple abrasions to right thigh and lacerations to his right foot. The award of $100,000 when updated using the CPI for April 2021 is $2,626,829.26. In the ***Junior Robinson*** case that Claimant sustained a fracture to his right foot, abrasions and lacerations to his left hand, wounds to the left side of his body and injuries to the head, face and eye. The award of $400,000 updated would be $1,096,335.07. In light of the severity of the injuries sustained by Mr Green which still negatively impacts his quality of life, I am satisfied that the appropriate award for him in the circumstances is $1.6 million which would be apportioned in keeping with the 75:25 ratio. Interest at the rate of 3 % to run from 18th of May 2014.

[66] In respect of Mr Mundell, his injuries were noted to be soft tissue injury to the scrotum with ongoing pain. The authorities which seemed most comparable were ***Leonard Green v Rexton Gordon, Shawn Hylton v Wizard Washington etal*** and ***Derrick Munroe v Gordon Robertson***. In the ***Derrick Munroe*** case, that Claimant suffered pain in the chest, lower back pain, tenderness in the region of the joints as well as other areas. The award updates to $936,521. It is clear from the medical evidence as well as the account of Mr Mundell, that although he had largely recovered from his injury, he still suffers its after effects and has to self-medicate using over the counter drugs. I have taken this into account along with the fact that the nature and severity of his injuries would justify an award in the

sum of $700,000. This sum would be apportioned by 75 % being borne by Mr Green and 25% by Mrs. Noteman. Interest at the rate of 3% to run from 13th of January 2016 in respect of claim again Mr Green. In respect of Mrs. Noteman interest to run at the same rate from the 7th of February 2016.

Costs

[67] On **2014HCV00970** - Mr Green is to be paid 25% of his cost on the claim and 25% of his cost on the Counterclaim. Mrs. Noteman is to be paid 75% of her costs. On **2015HCV00970-** Mr Green is to pay 75% of Mr Mundell's cost. Mrs. Noteman is to pay 25% of same.