[2023] JMSC Civ. 41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV05609

BETWEEN	**LEROY HARVEY**	**CLAIMANT**
AND	**SYLVESTER GOSLIN**	**FIRST DEFENDANT**
	PETER GUTHRIE	**SECOND DEFENDANT**

IN OPEN COURT

Ms. Jamila Maitland and Ms. Monique Thomas instructed by Campbell McDermott for the Claimant.

Ms. Houston Thompson instructed by Dunbar & Company for the First Defendant.

The Second Defendant absent and unrepresented.

Heard: February 14, 2023 and March 21, 2023.

Motor Vehicle Accident – Negligence – Res Ispa Loquitur – Apportionment of Liability -- Assessment of Damages.

PETTIGREW COLLINS J.

INTRODUCTION

[1] The claimant, Leroy Harvey, filed a Claim Form and Particulars of Claim on November 20, 2015. The claimant claims against the first and second defendant damages for negligence arising out of an accident which took place

on October 3, 2013, along Montpelier Main Road in the parish of Saint James. The accident involved three motor vehicles; a Toyota Hiace motor vehicle licenced 7215 FY (driven by the claimant), a Benz van licenced 9032 FP (driven by the second defendant) and a Toyota Hiace bus licenced PG 3517 (driven by the first defendant). The claimant avers that the defendants negligently drove their motor vehicles, causing or permitting their vehicles to collide with the claimant's motor vehicle, causing the claimant to suffer personal injury, loss and damage.

[2] The second defendant, did not participate in this trial. An interlocutory judgment in default of acknowledgment of service was entered against him on September 20, 2017, at binder 777 and folio 209. There has been no application before the court to set aside that judgment. Thus as far as he is concerned, the issue of liability has been determined and he will only be referenced as is necessary in addressing that issue. These proceedings will be treated as the assessment of damages against him.

[3] It is the claimant's claim that upon reaching Montpelier Main Road, and while he was travelling in his correct lane on the left, the second defendant who was travelling in the opposite direction, pulled out from his queue of moving traffic on to the left, attempting to overtake the line of traffic. He failed to enter into the right lane of traffic ahead of a trailer and collided head on with the claimant's vehicle in the left lane. Upon collision with the second defendant, the claimant' vehicle was thereafter hit from behind by the first defendant, who was travelling behind the claimant.

MATTERS NOT IN DISPUTE

[4] It is not in dispute that the vehicle travelling behind that which was being driven by the claimant was the Toyota Hiace bus which was being driven by the first defendant. It is also not in dispute that the first defendant's vehicle collided with the rear of the claimant's vehicle. There is no dispute that the Benz that overtook the line of traffic, collided head-on with the claimant's vehicle. Additionally, it is not disputed that the roadway along which the accident

occurred was straight, that it was daylight, that the roadway was wet from rain earlier in the day and that the roadway was not wide enough to accommodate the simultaneous passing of three vehicles alongside each other. Further, it is not disputed that to the left of the left lane was an embankment (referred to as a banking by the parties).

FACTS IN DISPUTE

[5] It is the claimant's assertion that he was driving his Toyota Hiace motor vehicle when the accident occurred. However, the first defendant asserts that the claimant was the passenger in the Toyota Hiace and not the driver. In fact, it is the evidence of the first defendant as well as his witness that the claimant was aided in exiting the vehicle and that he was assisted in exiting from the passenger side of the vehicle. The claimant disagrees that the first defendant assisted him from the vehicle. It is also disputed that the claimant's vehicle was stationary after being hit by the second defendant and that it was while the claimant's vehicle was in that stationary position that the first defendant's vehicle collided into the rear of the vehicle. It is the first defendant's account that he had stopped some 10 feet from the claimant's vehicle, when the impact from the collision between the claimant and second defendant's vehicle pushed the claimant's vehicle onto his. Lastly, the injuries occasioned to the claimant as a result of the collision is in dispute.

CLAIMANT'S CASE

[6] The claimant stated that he came to a stop upon seeing the second defendant overtake the line of traffic. He said that he could not swerve left or right because of the embankment to the left and the traffic to the right. He stated that immediately after the collision with the second defendant, and while being stationary, he felt an impact to the rear of his vehicle, caused by the first defendant's vehicle. He also stated that he had applied his brakes and did not

let up on his brakes until after the second collision. He maintained that his body was pushed forward, then backwards on impact from the collisions.

FIRST DEFENDANT'S CASE

[7] It is the first defendant's assertion that the collision was caused by the negligence of the second defendant. He asserted that he was travelling behind the claimant from Chester Castle to Montpelier Main where the accident occurred. He stated that upon observing the second defendant overtaking the line of traffic, he stopped his vehicle as close as possible to the left where the embankment was, but there was not much that he could have done in order to prevent the collision, given the presence of the embankment to the left and the line of traffic to the right. He maintained that both his and the claimant's vehicles stopped before the accident and that it was the impact of the collision between the second defendant's vehicle and that of the claimant, that pushed the claimant's vehicle onto his. He averred that he was not speeding, but was travelling about 50 or 60 kilometres per hour.

ISSUES TO BE DETERMINED

[8] The issues for determination before this court are:

Whether the doctrine of res ipsa loquitur is applicable in this case.

Whether the claimant was the driver of his motor vehicle.

Whether the collision between the claimant's vehicle and the first defendant's vehicle was due to the negligence of the first defendant in any way.

If the claimant is to recover damages from the first defendant, how should damages be apportioned between the defendants.

DECISION

[9] There is liability on the part of the first defendant. Liability on the part of the second defendant was previously determined in an interlocutory judgment in default. There is a greater degree of culpability on the part of the second defendant. Given how the incident unfolded, the case is treated as one involving several tortfeasors, rather than joint tortfeasors. Judgment is entered in favour of the claimant, with liability as well as damages against the first defendant assessed at 30% and against the second defendant at 70%.

CLAIMANT'S SUBMISSIONS

[10] Counsel for the claimant submitted that it is trite law that negligence arises where there is a breach of a legal duty to take care that results in damage to an individual to whom the duty is owed to. Accordingly, all road users have a legal duty to exercise reasonable care when operating a motor vehicle. It is the driver's duty to observe and obey the rules of the roadway, as contained under the ***Road Traffic Act***. Counsel relies on ***section 95(3)*** of the ***Road Traffic Act***, to say that failure on the part of any road user to observe the road code may be relevant to criminal or civil proceedings. Specifically, ***Part 2*** of the ***Road Code (1987)***, which speaks to users not exceeding the speed limit, keeping as near left as practicable, not travelling too close to the vehicle in front and always be able to stop one's vehicle well within a safe distance, are relevant considerations in these proceedings.

[11] Ms. Maitland contended that while ordinarily it is the claimant who must prove negligence, in this case, the claimant may rely on the doctrine of res ipsa loquitur against the first defendant or against both defendants. Counsel asserted that the doctrine applies and as such, the defendant must put evidence before the court to rebut the presumption arising by virtue of the operation of the doctrine. The question she said, is whether the second defendant's actions caused the second collision between the claimant and the first defendant. On this point counsel argued, the answer is a resounding no, since the claimant avers that the vehicle driven by him was never pushed back

into that being driven by the first defendant. She maintained that there were two separate collisions. Counsel argued that at no point was the claimant impeached on this point.

[12] Counsel in essence asked the court to reject the first defendant's evidence in cross examination that he was driving at 50 to 60 kilometres per hour and was about four car lengths away when he started to apply his brakes, that he came to a complete stop and the claimant's vehicle was pushed back some 10 feet into his vehicle. She alerted the court to the conflicting evidence in paragraph 3 of his witness statement where he stated that there was about a car length (which he estimated to be approximately 12 feet) between himself and the claimant. Counsel submitted that it is not a mere inconsistency but a blatant lie being told by the first defendant when he insisted on the distance of four car lengths even when he was confronted with the contents of his witness statement on cross examination. She also asked the court to compare the evidence of the witness Mr Duhaney to the effect that they were travelling about 1 ½ car length behind the claimant and going at a moderate speed.

[13] Her submission was that the first defendant was definitely travelling close to the claimant which explains why he had to swerve in an attempt to avoid the collision. As such she contended, the second collision to the rear of the claimant's vehicle was entirely independent of the one to the front of his vehicle caused by the second defendant, and was solely due to the first defendant's negligence.

[14] Counsel pointed out that the damage to the rear of the claimant's vehicle was more significant than the damage to the front of the vehicle. Counsel asked the court to accept that there were two collisions and therefore each defendant is jointly or severally liable for the injuries, losses and damages sustained by the claimant.

[15] In relation to damages, Counsel asked the court to consider the age of the claimant, he being a 53 years old male, and the injuries suffered by him. She detailed those injuries as: blunt trauma to head; neck injury; muscle spasm of the lower back; moderately severe central spinal stenosis; L4-S1 disc

herniation; and L4-L5 disc bulge. His injuries counsel submitted, have produced severe discomfort and limits his ability to live at the standard to which he had become accustomed.

[16] Counsel also submitted that the pain the claimant endured is incapable of being quantified, but the best must be done in monetary value to compensate him and in that regard, she relied on Lord Reid's guidance in ***H. West & Son Ltd*** (1964) A.C. 326 to the effect that a claimant "…*must be compensated so far as money can do it, for that and for the mental strain and anxiety which results".* Counsel relied on the cases of ***McLean, Evoni v Pepsi Cola Bottling Co. Ltd and King, Kirk Anthony*** *[2014] JMSC Civ. 55* and ***Cecelia Buchanan v Seacoast Trucking Service Ltd & Brian Thompson*** *Claim No. 2008 HCV000638,* as guides for injuries similar to that of the claimant's.

[17] Counsel further submitted that in the ***McLean*** case, the injuries suffered by the claimant were: mild whiplash injury, mild soft tissue injury to the right shoulder, mild mechanical lower back pains, and resolved triggering of fingers of both hands. In the medical report of June 13th, 2013, the doctor indicated that the claimant reported only occasional tingling sensation in the fingers and that she was able to perform "all activities of daily living at home and at work" and examination of the cervical spine revealed "no localized tenderness and there was full active range of motion of the cervical spine and the neurovascular status was intact in both upper extremities". An award of $2,000,000.00 was made for pain and suffering and loss of amenities in April 2014, which updates to $3,110,024.45.

[18] In ***Cecelia Buchanan's*** case the claimant's injuries included: cervical lordosis, mild whiplash injuries, neck pains, mechanical lower back pains, mild contusion to left shoulder, mild parallel headaches and mild intermittent pains along the medical aspect of the left knee. The whole person disability was 5%. The claimant returned to work three months after the accident but had to stop working again. At the time of the award, she was not working. Up to the time of trial, she continued to have pain in her back and knee and when she sat low she had to be assisted up. An award of $2,000,000.00 was made in May 2009, which now updates to $4,746,268.66.

[19] The case of ***Lawford Murphy v Luther Mills (1976) 14 JLR p. 119*** was relied on by counsel for the proposition that in any action, a claimant who seeks to recover special damages must specifically plead and prove same. The claimant who intends to prove his claim must do so by tendering receipts of expenses incurred and when no receipts are available, the claimant will have to show that those sums were reasonably incurred as a result of the injures. Counsel urged that when there is no challenge by the defendant to an item of special damages, it is inferred that it is accepted and is not in dispute, as such, the court may make an award without further proof (***White v Crawford 27 JLR p. 259***). Counsel highlighted that the claimant claims special damages in the amount of $553,864.00.

FIRST DEFENDANT'S SUBMISSIONS

[20] Counsel Miss Thompson submitted that since it is the claimant who has brought the defendant before the court, it is he who must prove his allegations on a balance of probabilities, the cause of action being that of negligence. She relied on the dictum of Lord Wright in ***Lochgelly Iron & Coal Co. Ltd v McMullan*** *[1934] A.C. 1* for an analysis of the law of negligence. Counsel also submitted that the claimant must satisfy the court of the following in order to be successful in his action:

1. A duty of care is owed to him;

2. There has been a breach of that duty; and

3. He has suffered damage as a breach of that duty.

[21] In determining whether a duty of care was owed, counsel contended that the question in the particular circumstances is, was it reasonably foreseeable that the claimant would have been harmed if the defendant did not exercise due care. If the answer is yes, the court must then determine whether there is a breach of that duty of care. Counsel relied on the formulation of Lord

Wilberforce in ***Anns v London Borough of Merton*** *[1977] 2 ALL ER 492 at 498*.

[22] Counsel reminded the court that when deciding whether there has been a breach of the duty of care, the court should consider whether a reasonable man placed in the position of the defendant would have acted as the defendant did. In doing so, the court should assess the risk factor, namely the likelihood of harm, seriousness of the injury and the importance or utility of the defendant's conduct and the cost and practicability of measures to avoid harm. Upon the court's determination that the defendant breached his duty of care, the court must establish whether the claimant suffered damage as a result and whether the breach was the direct cause of the damage suffered.

[23] In continuing her submission, counsel argued that the evidence of the claimant does not infer any negligence on the part of the second defendant, he cannot say the defendant was speeding, or that he was not travelling at a safe distance behind him. Counsel insisted that the first defendant's evidence remains unchallenged that he had been travelling behind the claimant's vehicle for a good distance before the accident occurred and that it was the second defendant who caused the collision.

[24] Counsel submitted that the court should be guided by the principle enunciated by the Court of Appeal in the judgment of ***James Mitchell & Aaron Gordon v Leviene McKenzie & Dorrell Gordon*** *SCCA 104/1991 delivered October 21, 1992*. She urged that the principle is applicable although the facts are not similar to those of the case at bar. The relevant principle to be garnered from that case she said, is set out at page 5 of the judgment where it was said that in determining liability, one must determine the ultimate cause of the accident, by looking at the facts and seeking to establish the act that led to the accident. According to counsel, the claimant's evidence speaks to the negligence on the part of the second defendant that resulted in the head on collision with the claimant's vehicle.

[25] She asked the court to accept the evidence of the first defendant. She proffered that he is a credible and consistent witness in his account of the accident.

Counsel submitted that it was the combination of the inclined roadway, the wet road and mostly the forceful impact of the collision with the Benz van that more likely than not caused the claimant's vehicle to move backwards after the collision. The further submission of counsel was that because of how fast everything occurred and the restriction of movement, there was nothing the first defendant could have done in the circumstances to avoid the accident.

[26] Counsel contended that if the court should find that the first defendant bears responsibility for one of the collisions, it would be almost impossible to apportion the injuries, since the accidents occurred within a short time span of each other. The submission is that the first collision caused the greater impact and even the claimant's evidence was that the second defendant was driving at a fast speed.

[27] Counsel asked the court to have regard to the cases of ***Shoucair v Smith*** *[suit no. C.L. 1988/SI86]*; ***George Wint v Vincent Goloub*** *page 211* ***Khans's Volume 4*** and ***Bruce Walford v Garnett James Fullerton and anor,*** when determining general damages.

[28] In the case of ***Shoucair v Smith*** *(supra),* the claimant suffered whiplash and pain in the face, neck and lower back for a period of one week. Pain relievers were used and general damages for pain and suffering and loss of amenities was awarded to the Claimant on the 27th of September 1990, in the amount of $10,000.00. This amount updates to $553,043.47 using the Jan 2023 CPI of 127.2.

[29] In the case of ***George Wint*** the plaintiff suffered moderate to severe tenderness over the lower back with pain on bending and he was awarded $30,000 in December 1995, which updates to $274,532.37. In the case of ***Bruce Walford (Supra),*** the claimant had lower back, bottom and neck pain, as well as abrasion to the gluteal region and was unable to work for two weeks. Treatment included analgesics, muscle relaxants and physiotherapy. He was awarded $700,000 in December 2012, which updates to $1,208,141.11.

[30] Counsel asked the court to bear in mind the medical report of Dr Martin Taylor who treated the claimant at Cornwall Regional Hospital. She noted that Dr

Taylor indicated that all injuries were resolved and that as of July 24, 2015, the claimant's injuries would have been without sequelae and that the claimant had indicated that his pain predated the accident. The doctor's findings she furthered, was supported by radiological testing which indicated that his injuries were long standing. Consequently, counsel stated, the claimant's history of back pains must be taken into consideration when determining the award for damages.

[31] The further submission of counsel was that the sum of special damages proved by the claimant is $334,000.00. Counsel submitted that compensation sought by the claimant for a visit to Dr Gilbert evidenced by receipt dated 18/9/2014, in the sum of $5,000.00 and in the name of Leslie Campbell, as well as receipt evidencing a visit on 20/8/2014, were not referenced in the medical report of Dr. Gilbert, nor in the claimant's witness statement. Counsel adverted to the numerous receipts that were tendered in respect of the purchase of various car parts, and noted that there was also a damage assessment report provided to the court showing a total figure of $339,000.00, inclusive of cost for parts and labour. She submitted that awarding the claimant sums for the parts said to have been purchased as well as the sums reflected in the damage assessment report, would amount to double compensation.

[32] Finally, counsel maintained that the claimant has not provided proof of the rental of a vehicle, nor loss of earnings. She insisted that a letter from a Justice of the Peace as proof of earnings is wholly insufficient, as the Justice of the Peace was not the claimant's employer at the time. She claimed that given the nature of his job, the claimant ought to have been able to provide proof of his earnings, Counsel also observed that the claimant did not provide proof that he was unable to work for an extended period of time and therefore he is not entitled to any award of damages in respect of loss of earnings.

DISCUSSION

LIABILITY

[33] This court sees no need to engage in a discourse on the law of negligence. It has been too often traversed in the courts. Suffice it to say that the claimant must establish to the requisite standard, that is, on a preponderance of the probabilities that he was owed a duty of care by the defendant, that there was a breach of that duty and foreseeable damage resulted. The claimant has however said that the circumstances of the case are such that the onus of proof has shifted to the defendant. I will commence with an examination of that assertion.

Whether the doctrine of res ipsa loquitur is applicable in this case.

[34] It is the claimant's contention that the doctrine of res ipsa loquitur is applicable in the instant case, therefore the defendant must put evidence before the court to rebut the presumption arising as a consequence. Earle CJ in **Scott v London & St Katherine Docks Co**. (1865) 150 ER 665 at 667 explained the concept thus:

> *"where a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care…When all the facts are known the maxim helps the plaintiff to discharge the onus placed on him to prove negligence".*

[35] In **Clifford Baker v The Attorney General & Det/Cpl Lewis**, CLB 274 of 1983, unreported, delivered October 8, 1986, Smith, J. explained the doctrine. He said:

> *"By this doctrine where an accident happens which by its nature is more consistent with it being caused by negligence for which the defendant is responsible than by other causes, the burden of proof shifts to the defendant to explain and to show that the accident occurred without any fault on his part. The defendant need not prove how and why the accident*

happened. It is sufficient if he satisfies the court that he personally was not negligent or at fault".

[36] The import of the doctrine is therefore that the accident would not have happened without negligence, and the thing that inflicted the damage was under the management and control of the defendant. There must also be no evidence as to how or why the event took place. Once there is some explanation as to how the event occurred, the doctrine cannot be invoked.

[37] There is no question in my mind that the doctrine is not applicable in this case. Both the claimant on the one hand and the first defendant and his witness on the other, gave their version as to how the incident happened. It is for the court to decide on a balance of probabilities, which of those accounts it accepts. The claimant is therefore required to prove his assertion that the first defendant was negligent.

Was the claimant the driver of his motor vehicle

[38] The first defendant Mr Goslin contends that the claimant was not the driver of his motor vehicle at the time of the accident as he alleges. Both the defendant and his witness admit that Mr Harvey was not known to them before. Mr Goslin said that the interaction between himself and Mr Harvey lasted a couple minutes that day because he was the one who opened the vehicle door in order to facilitate Mr Harvey exiting the vehicle. Mr Duhaney said it was he and Mr Goslin who assisted the claimant from the passenger side of the vehicle. Both Mr Goslin and his witness said that they had greater interaction with the driver that day.

[39] What emerged from events that transpired prior to the commencement of the trial, is that Mr Harvey is unable to read and write. It means that he ought not to have been able to obtain a driver's licence. Whether or not he is the holder of a driver's licence was not explored in the proceedings before me but from all indications, he is. The reality in Jamaica is that the lack of literacy though it should be a barrier to being able to hold a drivers licence, and logically to drive freely on our roads, is not. The query cannot be answered on that assessment.

[40] The medical evidence shows that Mr Harvey had blunt trauma to his head. The doctor did not say whether this injury was based on his observation or whether it was recorded based on what the claimant told him. There is nothing to say that there was a cut. The first defendant and his witness said that Mr Harvey was bleeding from the head that day. Incidentally, when asked if the impact from the collision with the Benz was so hard that he hit his head, Mr Harvey said no, he went front way then back, and that it was his neck that was injured. The incident is said to have occurred on October 3, 2013 and the doctor's report indicates that Mr Harvey was seen on October 5, 2013 by him. From all indications, Mr Harvey had been seen at the Cornwall Regional Hospital prior. There is no medical report from that institution. Surely, if there was a wound to his head, it ought to have been noticeable to Doctor Taylor at the time of his examination. It is difficult to accept that the doctor would have observed a wound and simply referred to it as blunt trauma, without somehow indicating the presence of a discontinuity of the skin. Reference to blunt trauma in my understanding suggests the absence of any opening of the skin.

[41] Considering the evidence of the first defendant and his witness that Mr Harvey was bleeding from the head, that neither of them knew him before, combined with the absence of evidence from the doctor indicating that Mr Harvey had a wound or even a scar indicating a recent wound, it is likely that the first defendant and his witness are both mistaken or deliberately lied that Mr Harvey was the individual seen with the bleeding head.

[42] It remains perplexing as to why Mr Harvey denied that he had complained to Dr Taylor about an injury to the head. The court considers the probability that he lied to the doctor, since it could not be a case where the headache was insignificant so that he may have forgotten that he had experienced a headache. I make this observation because of the claimant's evidence from his witness statement that after the accident, he was feeling pain all over his body, especially to his head, neck and back, and that after his treatment at and release from hospital, he was still feeling pain to his head. On a balance of probabilities, I accept that Mr Harvey was the driver.

[43] Even if I am wrong in that assessment, it is not challenged that Mr Harvey was inside the vehicle on the day in question and more probable than not, received some injury. This is a matter which affects Mr Harvey's credibility. However, as will be seen, my determination as to liability on the part of the first defendant turns primarily on my assessment of his own evidence and that of his witness.

Whether the cause of the collision between the claimant's vehicle and the first defendant's vehicle was due to the negligence of the first defendant in any way

[44] The claimant's attorney at law placed much emphasis on the claimant's assertion that there were two collisions and that the second collision occurred shortly after the first. This court's view is that whether one takes the claimant's account or the first defendant and his witness's version, there were two collisions. There was the collision with the second defendant's Benz motor vehicle as well as the collision with the first defendant's vehicle. On either version, the time frame between the collisions was very brief. The real question is whether the claimant's vehicle had come to a stop and was in a resting position when the first defendant's vehicle collided into it, or whether the impact from the collision with the oncoming second defendant's vehicle pushed the claimant's vehicle into the first defendant's vehicle.

[45] There is conflict between the first defendant's evidence in cross examination that he was driving at 50 to 60 kilometres per hour and was about four car lengths away when he started to apply his brakes, and the evidence contained in his witness statement at paragraph 3, where he stated that there was about a car length between him and the claimant (approximately 12 feet according to him).

[46] Of interest, is the evidence from the witness statement of Mr Duhaney, the first defendant's witness, to the effect that the first defendant's vehicle was travelling approximately a car length and a half behind the claimant's vehicle. In cross examination, this distance changed to about 3 to 4 car lengths, as did the evidence of the first defendant in this regard. The fact of the changed evidence

during cross examination on the part of the first defendant and his witness is suggestive of collusion between them on that point.

[47] It was also the evidence of Mr Duhaney in cross examination, that when the claimant's vehicle came to a stop, the first defendant's vehicle was still moving. Mr Duhaney stated further, that when the claimant's vehicle came backwards, the first defendant's vehicle swerved to the left in an attempt to avoid being hit by the claimant's vehicle. None of that is consistent with the first defendant's evidence in his witness statement that the bus in front of him stopped and he stopped about a car length behind it and that he had stopped as close as he could to the left embankment and that it was after he had stopped that the claimant's vehicle was pushed back onto his vehicle. The first defendant initially denied that he had swerved. He explained that he stopped in "that direction". In the context that that evidence was extracted, he must have meant that he pulled as close to the embankment as he could.

[48] He also explained that Mr Harvey's vehicle was further right but still in the left lane. This positioning was demonstrated in court. He eventually conceded that he had swerved and insisted that he had said so in his witness statement. Whereas he did not use the word swerve in the witness statement, the effect of pulling as far left as he could in circumstances where it must have been done very suddenly, is undeniably an act of swerving. This evidence of course indicates that any pulling to the left was done before he stopped.

[49] In cross examination, the first defendant's evidence was that when the collision took place with the Benz and Mr Harvey's vehicle, he was some 10 feet behind Mr Harvey because they had both come to a stop but immediately after, he said that when he was four car lengths behind Mr Harvey, and also 4 car lengths away from the Benz, the Benz was actually on Mr Harvey's vehicle. He explained that "actually" means "close". He pointed out a distance which was about 3 ½ feet. That evidence clearly indicates that to him the accident must have been imminent. According to the first defendant, at that point (3 to 4 car lengths away) he had started braking. It begs the question then, that if he saw that the Benz was almost upon Mr Harvey's vehicle when he was 4 car lengths

away, why did he get as close as the 10 feet that he said he stopped behind Mr Harvey's vehicle.

[50] When the first defendant and his witness's evidence is compared with that of the claimant, I find the claimant's version more probable, that is, that his vehicle was not pushed back into the first defendant's vehicle, but that the first defendant's vehicle did not stop in good time, and hit the claimant's stationary vehicle. This court admits of the probability that the claimant's vehicle having been hit from the front by an oncoming vehicle which from the evidence was travelling fast, could have been pushed backwards by the impact, but the evidence of the first defendant and his witness taken together, does not support that that is what transpired.

[51] I am firmly of the view that if the collision between the Benz and Mr Harvey's vehicle had not happened, that between Mr Harvey's vehicle and that of the second defendant more likely than not, would never have happened. It does not mean however that because there was the collision between Mr Harvey's vehicle and the Benz, that between Mr Harvey and the first defendant was inevitable. There was also negligence on the part of the first defendant. The evidence of the first defendant and his witness that the first defendant was driving at a moderate speed of 50 to 60 kilometres per hour is accepted. However, I find that the distance that he was travelling behind the claimant shortly before the accident was more probable than not, a car length or a car length and a half, as each had said in his witness statement.

[52] This court questions whether a distance of a car length or a car length and a half was a safe distance, having regard to the speed of 50 or 60 kilometres per hour which the defendant and his witness estimated the defendant's was travelling. I think that it was not. It does not require an expert to recognize that that was not a safe braking distance. The second defendant was therefore not adhering to the road code which required him to not travel too close to the vehicle in front and always be able to stop his vehicle well within a safe distance.

[53] The first defendant ought to have foreseen that in the event there was need to stop suddenly, there would not have been sufficient distance between his

vehicle and that of the claimant to enable him to come to a safe stop. There was therefore negligent conduct on his part. In **Brown & Lynn v Western SMT Co** (1945) SC 31, the observation was made that the following driver is "bound so far as reasonably possible, to take up such a position, and to drive in such a fashion, as will enable him to deal successfully with all traffic exigencies reasonably to be anticipated" Another way of saying the same thing, is that he should be prepared for foreseeable emergencies. The observation is apposite in the circumstances of this case.

Apportionment

[54] **McGhee v National Coal Board** [1972] 3 All ER 1008 is authority for the proposition that a defendant will be liable to a claimant if the defendant's breach of duty has caused or materially contributed to the injury suffered by the claimant, even if there are other factors for which the defendant is not responsible, which contributed to the injury.

[55] The above principle is relevant not just for the purposes of establishing liability in each defendant, but is relevant when considering the question of apportioning damages.

[56] In the case of **Natalie Gray v Donald Pryce and Noel Newsome and Donald Pryce v Noel Newsome** [2015] JMSC Civ. 118, P. Williams J as she then was, at paragraphs 65 and 66 of her judgment, gave some guidance on the matter of apportioning liability. She said that:

> 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." - 20 - 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 us that the question of apportioning blame "is one of fact, opinion and degree."*

[57] The greater degree of blameworthiness for the accidents occurring, is undoubtedly to be attributed to the driver of the Benz motor vehicle. The general principle is that where two tortfeasors cause different damage to the same claimant, the cause of action against each tortfeasor is entirely distinct, one from the another and the claimant can recover from each tortfeasor only that part of his damage for which the particular tortfeasor is responsible.

[58] What follows in this paragraph is more relevant to the question of assessment of damages but it is convenient to address it at this juncture since it is also relevant to the question of apportionment. In this particular instance, there was personal injury as well as property damage. There was damage to the back of the claimant's vehicle as well as damage to the front. It may be fair to say that the damage to the back was occasioned by the negligence attributable to the first defendant, whereas that to the front was attributable to that of the second defendant.

[59] The suggestion to the first defendant was that the damage to the back of the claimant's vehicle was greater than the damage to the front. The assessor has treated with the damage to the vehicle in such a way as to allow the court to be able to assess separately the damage occasioned by each collision. It is relevant to note that the assessor's report shows that the cost to repair the rear section of the vehicle is $176,000.

[60] For reasons that have not been explained, there are no photographs showing the damage to the front of the vehicle. The cost of repairs is not necessarily concomitant with the degree of damage, although more often than not, that will probably be the case. While the court is in a position to say what is the value of the damage to each portion of the vehicle, consideration must be given to the degree of blameworthiness for the accident in this case, the two separate collisions.

[61] Although as a factual matter the claimant's injuries was attributable to one collision or another, or each specific injury was attributable to one or the other, the claimant was not able to say. It is not unreasonable that he was not able to

say and indeed not practicable that he would have been able to say which of his injuries was occasioned by which collision.

[62] Where there is joint liability, that is to say, a case of joint tortfeasors, then each tortfeasor is responsible for the total amount of the claimant's damages, although he is not permitted to make double recovery. However, in a case of several tortfeasors, each tortfeasor is only responsible for an amount of the claimant's damages proportionate to his respective fault. There may be a case of several tortfeasors, where each defendant is responsible for a separate tort and both torts combine to produce the same damage.

[63] It seems to me that this matter ought to be treated as a case of several tortfeasors where each defendant is in a sense responsible for a separate tort and both torts combine to produce the same damage, at least, as far as the personal injury is concerned. I conclude that each is responsible for a different tort because of the two distinct collisions. I say both torts produced the same damage because it is virtually impossible to say whether it was one or both collisions which resulted in the personal injury. It would in my view be unreasonable to ask a claimant to be able to establish in the circumstances of this case, which collision occasioned what particular injury. Although the damage to the different sections of the claimant's motor vehicle may be separately attributed to each defendant, it may not be practical to treat with the damage to the motor vehicle separately from the personal injuries for the purpose of categorization into joint responsibility or several, responsibility. Ultimately, it is a question of apportionment. The first and second defendants shall be liable in the ratio 30/70 to the claimant, on the question of liability as well as damages.

GENERAL DAMAGES

[64] Counsel in her submissions identified the claimant's injuries as blunt trauma to head, neck injury, muscle spasm of the lower back, moderately severe central spinal stenosis, L4-S1 disc herniation; and L4-L5 disc bulge.

[65] The claimant's pleaded injuries are L5 S1 disc herniation, L4-5disc bulge and lower back trauma. In his witness statement, he explained that after the accident, he was feeling pain all over his body, especially to his head, neck and back. He said that after his treatment at and release from hospital, he was still feeling pain to his head. He said that as a result he attended upon Dr Taylor. According to him he was still feeling pain, so he saw Dr Gilbert. He went on to say that he attended physiotherapy for the pain.

[66] Dr Taylor's report indicates that the claimant was seen by him on October 5, 2013 and then his complaints were elevated blood pressure, blunt trauma to head, deceleration neck injury and muscle spasm of the lower back. He said that by July 24, 2015 when he next saw the claimant, the blunt trauma to the head, the deceleration neck injury and the spasms to the lower back had resolved. Thus he was no longer suffering from the injuries that could be attributed to the accident.

[67] The medical report of Dr Don Gilbert, a consultant orthopaedic surgeon is dated June 17, 2014. He saw the claimant on February 5, 2014. He said the claimant advised that he had mild back pain prior to the accident but said that the pain was then much more severe and prevented him from lifting objects. He spoke of the MRI revealing the disc herniation and disc bulge earlier mentioned. Importantly. Dr Gilbert opined that the claimant's disc herniation at L5 S1 was of long standing and predated the accident. He explained that the lower back pain was due to degenerative disc disease and facet joint arthropathy that predated the accident, but became more symptomatic as a result of the accident. Dr Gilbert opined that the claimant had not reached maximum medical improvement and so his disability could not be assessed.

[68] It is entirely safe to say that as at July 2015, the claimant was no longer suffering from the effects of the accident. At least one injury of which the claimant complained pre - existed the accident. The doctor's view is that the injury was aggravated by the accident in question. The problem with the L5 S1 disc was an aggravation of a pre-existing condition. A tortfeasor must take his victim as he finds him. That is not to say that a pre - existing injury must not to be taken into account. It is also safe to say that disc herniation and spinal stenosis are

not two separate injuries but are causally related. Also lower back pain would be the physical sensation resulting from the one or the other.

[69] The cases of ***Shoucair v Smith (supra and George Wint v Vincent Goloub*** (supra) are dated and ought not to be utilized as guides at this time. Moreover, in relation to **Shoucair** in particular, the claimant's physical pain lasted for a very short time, unlike in the present case. Compared to the case of **George Wint**, the present claimant's suffered injuries to other areas of his body apart from his back. The case of **Bruce Walford** is of greater assistance to the court. That claimant's injuries are comparable although there was no complaint of pain to the bottom in this instance. In **Bruce Walford** however, the pain was said to have lasted for only two weeks. This court is mindful of Dr Gilbert 's report that the claimant had a history of back pain, although the claimant denied this. The claimant's denial in cross examination that he suffered an injury to his head must also be borne in mind.

[70] It is the claimant's evidence that he visited Dr Gilbert because he was still feeling pain. According to the claimant, he was still feeling pain to his lower back at the time of giving his witness statement which was June 2022. This evidence of must be met with some level of scepticism. At least the cause of the pain at that point must at least be questionable. This is so since based on Dr Taylor's report, the spasm to the lower back had resolved by the time of the claimant's visit July 2015. His first visit to Dr Gilbert was February 2014. It is important to note that at the time of his visit to Dr Gilbert, it was the finding that his lower back pain was due to the L5 S1 disc herniation, which was the long standing problem resulting from degenerative disease.

[71] In both cases cited by the claimant, the injures were more significant in the sense that there were injuries to more areas of the claimants' bodies than is the case with the present claimant.

[72] Having regard to all the factors discussed, I believe that a reasonable sum for pain and suffering is 2.1 million dollars.

SPECIAL DAMAGES

Loss of use of motor vehicle

[73] Counsel for the first defendant contends that the claimant is not entitled to money for loss of use of his vehicle because he produced no proof that he rented a vehicle. The claimant's evidence which was not refuted, is that he was a bread salesman. The evidence of the first defendant was that whereas he drove his vehicle away from the scene of the accident, the claimant's vehicle had to be removed by a wrecker. The inference from that evidence is that the claimant's vehicle could not be driven. Even if he did not hire a replacement vehicle, it stands to reason that he would have lost the use of his motor vehicle for a period.

[74] He gave evidence that it took him some four years to repair his vehicle. This evidence was not contradicted. He has asked for loss of use for a period of two weeks. He is in my view entitled to loss of use for a reasonable period, that period being a reasonable time that it would have taken for the repairs to his vehicle to be carried out. The assessor's report indicated that the time it would require for the repairs to be done is 3 days. That information is understood by me to main actual working time spent on effecting the repairs. It would be reasonable to expect that time was required to source parts. The claimant also needed time to have the assessment done. In all the circumstances, I believe that 7 days is reasonable. The claimant is entitled to $42,000 claimed for loss of use.

Cost of repairs to motor vehicle

[75] The defendant in submissions seem not to be contesting that the claimant is entitled to the costs of repair to his motor vehicle. The claimant claimed the sum of $339,000 as evidenced in his particulars of claim. I agree with Miss Thompson that the defendant is not entitled to sums reflected on the receipts for vehicle parts purchased, as well as the sums reflected in the assessor's report. The assessor's report was tendered and admitted in evidence as exhibit

3. The sum reflected in that report includes the cost of parts and labour. The claimant is not permitted to recover the sums evidenced by the receipts labelled exhibits 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 which all reflect being issued upon the purchase of vehicle parts. The total sum reflected on those receipts is $91610.11.

Receipts for medical services

[76] The defendant's attorney has said that the claimant should not recover the sums reflected on receipts dated August 20 2014 and September18, 2014, because those visits are not mentioned in Dr Gilbert's report. Dr Gilbert detailed that he saw the claimant on February 5, 2014 for the purposes of assessment and writing the medico legal report. He did not say that he had not seen the claimant on any other occasion. Even though the claimant did not specifically refer to these visits in his witness statement, it does not necessarily mean that the visits were not made or that such visits were not referable to the accident.

[77] A notice of intention to tender into evidence hearsay documents was served on the first defendant. Those receipts were among the documents referred to and exhibited to the notice. If counsel wished to object, she ought to have done so. She ought to at least have cross examined the claimant on the matter. She did not. The first time there was any suggestion that the claimant ought not to recover the sums on those receipts was in submissions. The claimant produced a receipt showing that he did an MRI on March 12, 2014 (exhibit 22). He is entitled to that sum.

[78] There is no basis on which the claimant should be denied the sums indicated on exhibits, 4, 5, 6, 7, 8, 9,10, 21 and 22. Those sums amount to $109,500.00. Of those exhibits, 4, 5 and 6 are receipts evidencing payment for physiotherapy. 7,8 and 9 are in respect to payments made to Dr Gilbert. and 10, 21 and 22 relate to payments made to Dr Taylor, the assessor, and for the MRI respectively. For the reason expressed in the preceding paragraph, he ought not to be denied those sums. The claimant is entitled to $490,500 as special damages.

A REMINDER

[79] Counsel are reminded of the provisions of rule 39.1 of the Civil Procedure Rules relating to the filing of trial bundles, and in particular, rule 39.1(6) and (7) (all sub rules) as too often, including in this case, those directives were not followed.

CONCLUSION

[80] Having regard to my assessment of the evidence, judgment is entered in favour of the claimant against the first defendant. As was indicated, these proceedings have been treated as the assessment of damages against the second defendant. In my assessment, the simplest way to resolve this matter is to consider firstly, that had the second defendant not been negligent, this incident might not have happened. There is a greater degree of culpability on the part of the second defendant. Secondly, there were two distinct collisions. Thirdly, it is in the circumstances impossible to determine what precise injury to the claimant must be attributable to each collision and consequently, each defendant. Fourthly, there is evidence as to the cost to repair each portion of the claimant's vehicle. This is not however a basis on which the court can assess each defendant's share of damages overall, even if it would logically have provided a basis for assessment of one aspect of the special damages. Bearing those factors in mind, the first and second defendants shall be liable in the ratio 30/70 to the claimant.

[81] The following orders are made:

1. Judgment is entered in favour of the claimant with liability of the first defendant assessed at 30% and that of the second defendant assessed at 70%.

2. General damages are assessed in the sum of $2,100,000.00 with interest at the rate of 3% per annum from May 12, 2017, (the date of service of the claim form to the date of judgment.

3. Special damages are assessed in the sum of $490,000.00 with interest at the rate of 3% per annum from October 3, 2013, the date of the accident until judgment.

4. Costs to the claimant against the first and second defendants in the ratio 30:70 respectively. Such costs are to be taxed if not sooner agreed.

A. Pettigrew Collins J
Puisne Judge