



[2016] JMSC Civ 169

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 01376

BETWEEN	RUDOLPH KENNEDY	CLAIMANT
AND	WHEELS & WHEELS AUTO BROKERS LIMITED	1ST DEFENDANT
AND	KENARDO ROBINSON	2ND DEFENDANT
	(incorrectly referred to as Leonardo Robinson)	

Mr. Glenroy Mellish, Mrs. Sonja Anderson-Byfield and Mrs. Yolande Magnus-Mullings instructed by Sonja Anderson-Byfield for the Claimant

Mrs. Pauline M. Brown-Rose for the Defendants

Heard: 14th, 17th March and 14th October 2016

Negligence – Motor Vehicle Collision – Liability of Parties – Contributory Negligence – Assessment of damages

MCDONALD J

[1] The Claimant's claim is for damages for negligence in that on the 8th of November 2008, the 2nd Defendant negligently drove, managed and/or controlled a Toyota Vitz motor car in a manner that caused the said car to collide with a Toyota Hilux motor car driven by the Claimant, resulting in the Claimant suffering injury, loss and damages. The allegations of negligence has been particularised in the Claimant's statement of claim as follows:

Particulars of the Defendant's Negligence

- a) Driving at an excessive and/or improper speed under the circumstances;
- b) Overtaking without ascertaining whether it was safe to do so and when it was dangerous and/or unsafe to do so;
- c) Driving without due care and attention and without any or any adequate regard for other users of the said road including the Claimant;
- d) Failing to reduce his speed significantly in all the circumstances or to increase his vigilance;
- e) Failing to heed and/or observe the presence and turning signal of motor vehicle registered 1013 EB.
- f) Failing to give any or any sufficient warning of his approach.
- g) Failing to keep any or any proper look out.
- h) Failing to stop, slow down, swerve and/or otherwise manage and/or control the said motor vehicle so as to avoid the said collision.
- i) Driving in a reckless and dangerous manner.

Claimant's Case

[2] In the Claimant's witness statement treated as his evidence-in-chief, he said that on the 8th of November 2008 he ran some errands with his wife in Montego Bay, and was heading home to Cove Close, Flamingo Beach, Falmouth, Trelawny. It was about 5:45 p.m. and the road was dry. He was driving along the Wiltshire Highway at about 50 km/h. As he approached his exit point at Almond Tree Road, he started slowing the vehicle and put on his right indicator. He then positioned the vehicle closer to the markings in the middle of the road and came to a complete stop, as there were a number of oncoming vehicles.

[3] He looked in his rear view mirror and observed that there were approximately two (2) other vehicles behind him, travelling in the same direction and that they all came to a complete stop.

[4] He kept watching the oncoming traffic to ascertain when it was clear to cross over to Almond Tree Road. He kept glancing through his rear view and right side mirrors at the traffic behind him to ensure that it was still safe for him to turn and at this time his right indicator was still flashing.

[5] When the oncoming traffic ceased, he glanced again in his rear view and right side mirrors, looked to his right shoulder and saw only stationary vehicles and was satisfied that it was safe to turn right. He still extended his right hand signalling that he was turning right and began turning his vehicle.

[6] While into the turn, he saw a flash or glimmer of what appears to be a motor vehicle overtaking the halted traffic which was positioned behind his vehicle. The vehicle was travelling at a tremendously fast speed and did not stop or slow but continued coming at a fast speed towards his vehicle.

[7] He said that everything happened so fast after that and he was already midway through his right hand turn onto Almond Tree Road, that all he could do was to brake sharply. He felt an impact to the right side of his vehicle – it was so great that it pushed his vehicle and caused it to leave the Wiltshire Highway and collide head on in a utility pole on the left hand corner of Almond Tree Road and Wiltshire Highway.

[8] The right side front door of his vehicle was severely crushed in and could not open and so his wife and himself exited the vehicle at the left front passenger door.

[9] This vehicle is a double cab pickup. He examined his vehicle and observed that the right running board and right fender were damaged as well as the front bumper which was pressed in due to the vehicle's collision in the utility pole.

[10] The driver of the Toyota Vitz motor car who identified himself as Kenardo Robinson approached him and pleaded with him not to call the Police and admitted

responsibility for the accident. He said "Please don't call the Police. I have a repair man in Montego Bay who will repair your vehicle." He kept assuring him that there was no need to get the Police or their insurance companies involved as he would repair the vehicle at his cost. They exchanged particulars and true to his promises Mr. Robinson did repair his vehicle at his sole expense by asking his repairman Mr. C. Beckford to collect the vehicle at his house on the 27th of November 2008 and return it approximately 3 - 4 weeks thereafter in a satisfactory state of repair.

[11] In cross-examination the Claimant stated that his vehicle was a right hand drive twin cab about 15 feet long. When he came to a complete stop before turning he could see about 500 km down the road which is a straight road. About eight (8) oncoming vehicles passed him before he attempted to turn. He turned right after the last vehicle passed him. The two vehicles behind him when he was waiting to turn were 10 feet away and 15 or 20 feet respectively. There is no evidence as to the size and/or height of these vehicles. The Claimant only described these vehicles in relation to their colour, on which nothing turns.

[12] There are two lanes on Wiltshire main road each twelve (12) feet wide. When he first saw the second defendant, he was already making the turn he had crossed six (6) feet of the turn, he did not swerve or do anything to avoid the Toyota Vitz as it happened so fast. The Claimant recounted, "He came with a speed and he couldn't do anything but stand there as he rammed me into the pole."

[13] The Claimant agreed that his Toyota Hilux was a bigger and heavier vehicle than the Toyota Vitz. He said that he did not see the Toyota Vitz before the collision. He observed drag marks at the entrance of Almond Tree Road up to the telephone pole and said they were from his vehicle.

[14] The Claimant disagreed with the following suggestions:-

- When you made the right turn, you hit into the utility pole before the Toyota Vitz hit into your vehicle;

- It is not correct for you to say that it was the Toyota Vitz that pushed your vehicle and cause it to leave the Wiltshire Highway and collide with the utility pole;
- Your vehicle hit the utility pole first then the Toyota Vitz collided into your vehicle after.

[15] The Claimant is a Minister of Religion and at one time lived in England and for eighteen years of his life was a driving instructor in England.

The Defence

[16] The Defendants in their pleadings deny that the 2nd Defendant was negligent as alleged. They assert that the accident was solely caused or alternatively contributed to by the negligence of the Claimant. The 2nd Defendant specifically states that the 2nd Defendant was using the 1st Defendant's motor vehicle as the authorised driver for his own personal use which was in no way connected with any purposes of the 1st Defendant and in addition that at all material times the 2nd Defendant was not an employee of the 1st Defendant and had in fact never been an employee of theirs.

The Particulars of Negligence of the Claimant

- (a) Failing to heed and/or observe the Defendant's motor car which was in the process of overtaking.
- (b) Failing to keep a straight path.
- (c) Failing to keep any or any proper look out.
- (d) Driving without due care and consideration for other users of the road.
- (e) Failing to heed and/or observe the presence of the Defendant's motor vehicle in sufficient time or at all.

- (f) Turning or attempting to turn without first ensuring that it was safe to do so.
- (g) Turning into the path of the Defendant's motor vehicle which was in the process of overtaking motor vehicle registered 1013 EB.
- (h) Causing or permitting the said collision.
- (i) Failing to give the Defendant's motor vehicle any or any sufficient time to pass the motor vehicle being driven by him.
- (j) Failing to give any or any sufficient or timely warning of his intention to swerve right into the path of the Defendant's motor vehicle.
- (k) Changing direction when it was manifestly unsafe to do so.
- (l) Failing to stop, slow down, swerve or otherwise to manage or manoeuvre the said motor vehicle so as to avoid the said collision.

Defendants' Case

[17] Mr. Kenardo Robinson's Amended Witness Statement filed on the 17th of March 2014 was treated as his evidence-in-chief. He said that while driving along the Wiltshire Highway a Toyota Hilux was in front of him, he decided to overtake it. While in the process of so doing the driver suddenly turned right without giving any indication of his intention to turn right. He applied his brakes and blew his horn and swerved further away to the right to avoid a collision. The Hilux hit a light pole to the left of the entrance to Almond Tree Road and then his vehicle hit into the right driver's door.

[18] He said Mr. Kennedy may have put on his indicator but he did so suddenly and turned the vehicle right without stopping or giving any form of hand signal, he turned while he was in the process of overtaking. In cross-examination he said that while in the process of overtaking or maybe when he was swerving to avoid the accident that is when Mr. Kennedy put on his indicator, but it was not so, so he said maybe "if you notice."

[19] After the collision he came out of his vehicle and noticed that the Toyota Hilux was jammed up against the light pole. He signalled to the occupants of the Toyota Hilux who came out of the vehicle. Mr. Kennedy told him it was not necessary to call the Police. They exchanged documents and the Kennedys drove away. About three weeks later Mr. Kennedy called him and asked him if he was going to fix the vehicle. He told him that it was not his fault. Mr. Kennedy kept calling him about the vehicle and he decided to fix it. He stated that he repaired the Claimant's vehicle out of respect for his age and position as a pastor and not because he admitted liability or responsibility for the accident.

[20] In cross-examination the 2nd Defendant said that he was driving like one car length away behind the Claimant's vehicle and he did not notice him stepping on his brakes. He used his foot brake to slow the vehicle and hand brakes to help stop the car. The car skidded when he pulled up the hand break because the road was damp. He observed damage to the front bumper, bonnet and left head light of his vehicle. He said further that it was the left side of the vehicle that collided into the Claimant's vehicle – left side meaning the left hand head lamp and bumper and left hand side of the bumper. In re-examination he said it was not a head on collision.

[21] Ms. Memeka Smith gave evidence on behalf of the defence, she contends that Kenardo Robinson was driving slowly behind the Toyota Hilux. There was no traffic in the opposite direction and nothing travelling behind them. She noticed that the driver of the Toyota Hilux kept stepping on his brakes about five times. There was no indicator light or hand signal from the driver indicating that he was going to turn left. Kenardo started to overtake the Hilux and whilst in the process the driver suddenly turned right without any indication. To avoid the collision, Kenardo swerved further right, and pressed his horn. The Hilux hit a light post. When Kenardo swerved right he pulled up his hand brake, the vehicle skid and hit into the right driver door and right fender of the Hilux. She observed damage to the right front door of the Hilux, damage was mostly to the right fender and damage to the front where the Hilux had collided with the light post. In cross-examination she said that the bonnet of the Vitz was not damaged.

The Law

[22] It is settled law that in order to succeed in a claim for negligence, the Claimant must prove on a balance of probabilities:

- (i) that the Defendant owed a duty of care to the Claimant;
- (ii) a breach of the duty of care; and
- (iii) damage resulting from the breach.

[23] Generally, all users of the road owe a duty of care to other users of the road. Drivers of motor vehicles in particular are required to exercise reasonable care so as to avoid causing injury to other persons and/or damage to property. To this end, drivers are required to observe and obey the rules of the road. The said rules of the road are contained in the **Road Traffic Act**. My brother, Laing J has aptly summarised some of the statutory duties of drivers at paragraphs [33] – [36] of his judgment in **Elizabeth Brown v Daphne Clarke et al. and Bervin Ellis v Daphne Clarke et al. and Andrew Thompson v Daphne Clarke et al** [2015] JMSC Civ. 234 –

[33] Section 51(2) of the Road Traffic Act (“the RTA”) imposes a duty on motorist to take such action as may be necessary to avoid an accident.

[34] Section 51(1)(b) of the RTA provides that a vehicle being overtaken by other traffic shall be driven so as to allow such other traffic to pass.

[35] Section 51(1)(d) of the RTA provides that a motor vehicle shall not be driven so as to cross or commence to cross or be turned into a road if by so doing it obstructs any traffic.

[36] Pursuant to section 51 (1)(g) of the RTA a motor vehicle shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead.

[24] Additionally, the Road Code provides guidance to users of the road. Section 95(3) of the Road Traffic Act provides that –

The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but

any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

[25] Counsel for the Claimant has cited sections 51(2) and 51(1)(g) of the **Road Traffic Act** (summarised at paragraph [23] above) and has also submitted, without reference to a particular provision, that the Road Code states that drivers may not overtake at an intersection.

[26] Counsel for the Defendants cited sections 51(1)(d),(e) and (f), 51(2), 57(1) and (5) and 95(3) **Road Traffic Act**. Since sections 51(1)(d), 51(2) and 95(3) have already been summarised/set out above, I will only set out the other remaining sections referred to by counsel for the Defendants –

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

(e) proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road;

(f) proceeding from a place which is not a road into a road or from a road into a place which is not a road, shall not be driven so as to obstruct any traffic on the road;

57(1) The driver of a motor vehicle constructed to be steered on the right or off-side thereof, shall, before commencing to turn to, or change direction towards, the right, give the appropriate signal so as to indicate that direction.

57(5) Every motor vehicle constructed so as to be steered from the left or near side thereof shall be fitted on the right or off-side of the vehicle with a mechanical or illuminated device approved by the Island Traffic Authority, and such device shall be employed by the driver of the motor vehicle to indicate in a manner approved by the Island Traffic Authority the intention of the driver to turn to or change direction towards the right or of his intention to stop the vehicle and may be employed to signal to an overtaking motor vehicle to pass, or not to pass as the case may be.

[27] Counsel for the Defendants also referred to the Road Code and similarly did not make reference to a particular provision. She submitted that according to the “Jamaican Driver’s Guide Road Code”, a driver of a vehicle changing directions or turning right should do the following –

- i) Give the correct signal clearly

- ii) Signal should be properly timed
- iii) Signal must continue long enough for other persons to realize its meaning and to react accordingly
- iv) Stop to ensure that the signal is observed
- v) Make sure that it is safe do [sic] so before proceeding
- vi) If a vehicle is approaching from the opposite direction, stop and allow it to pass through before turning
- vii) Do not cut across

[28] In the Defendants' closing submissions and list of authorities filed on the 4th of April 2016, reference was made to the "Jamaican Driver's Guide Road Code" however what was included was the cover page and page 1 of the Road Code 1967 and pages 44 and 45 of the Jamaican Driver's Guide by Cliff Hylton.

[29] At this juncture I will note that the Road Code is the one prepared and issued by the Island Traffic Authority which is provided for in the Road Traffic Act at section 95. The latest/ most revised edition that this court is aware of is the Road Code 1987 and as such this is the only Road Code to which this court will have regard.

[30] Having regard to section 95(3) of the **Road Traffic Act** which provides that the failure of a person to observe any provisions of the Road Code may in civil proceedings be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings; the court considers the relevant portions of the Road Code to be –

Part 2

Driving Along

1. ...
2. ...
3. ...

4. *Always be able to stop your vehicle well within the distance for which you can see the road to be clear, and make allowance when the road is wet or slippery.*
5. ...
6. *Before you slow down, stop, turn or change lanes, check your rear view mirror, signal your intention either by hand or indicator light signals and make sure you can do so without inconvenience to others. Never make a sudden or "last minute" turn; it is very dangerous.*
7. *Do not drive in a spirit of competition with other road users. Do not race other motorists on public highways:-*
 - (a) *Well before you overtake, or turn left or right or slow down, or stop, use your mirrors ...then give the appropriate signal.*
 - (b) *Always keep a special look-out for bicycles and motorcycles particularly when turning...*
 - (c) *Do not travel too closely to the vehicle in front of you. Always leave enough space between you and the vehicle in front so that you can pull up safely if it slows down or stops...*
 - (d) ...
 - (e) ...

Overtaking

8. *Do not overtake unless you can do so without danger to others or to yourself. Before you overtake, make sure the road is clear far enough ahead and behind. Use your mirrors...Signal before you start to move out. Be particularly careful at dusk, in the dark and in fog or mist, when it is more difficult to judge speed and distance.*

Do not overtake at or when approaching the following locations:

- a. *Pedestrian crossing*
- b. *Railway crossing*
- c. *Road junction*
- d. *Curve or bend*
- e. *The brow of a hill*
- f. *Hump back bridge*
- g. *Where the road narrows*

9. *When you wish to overtake another vehicle, take the following steps:-*

(a) Before you turn to the right of the road make sure there is plenty of time to pass and return to left before meeting any vehicle coming from the opposite direction.

(b) Overtake only on the right, unless traffic is moving in queues and the traffic queue on your right is moving more slowly than you are or the vehicle ahead, signals its intention to turn right. Never use the hard or soft shoulder to overtake.

(c) After overtaking a vehicle return to the left as soon as practicable but avoid cutting in too quickly.

(d) Remember that traffic may be coming up behind much more quickly than you think. Signal before you move out. Be careful at dusk, in fog, or mist, or when it is more difficult to judge speed and distance. Be particularly careful when overtaking in rain or on a wet road surface.

10. *When overtaking make sure that you will not have to cross a continuous double or single white line in the centre of the roadway.*

11. *When you are about to be overtaken by another vehicle move closer to the left and do not increase your speed. Remember, that a vehicle may need to temporarily join the line to afford the right of way to uncoming [sic] traffic, so make provision for same.*

Turning

12. *Decide on the place you want to turn and signal your intention to do so to other road users well in advance of your turn.*

13. *Take up your proper turning position in the road approximately 100-200 feet in advance of your turn...*

14. *Make the turn correctly ...and finish the turn in the proper lane or to the left of the road you have entered.*

Liability

[31] The instant case is one essentially related to resolving questions of fact. The Court has to determine which party negligently caused the collision. Each party is contending that the other party is at fault. If the court finds liability on the part of the 2nd Defendant, a further issue arises as to whether the 1st Defendant can be made vicariously liable.

[32] Since the central issue to be resolved by this court is one of fact, namely whether the Claimant's or the 2nd Defendant's account is to be believed regard must be had to the credibility of the parties and in particular the physical evidence.

Credibility

[33] With regards to the credibility of the parties, the Claimant was consistent in his account of how the accident took place and I accept him as a more credible witness than the 2nd Defendant, Mr. Robinson, and his passenger, Ms. Smith.

[34] The 2nd Defendant and Ms. Smith were for the most part consistent in their accounts. However I do note that there were some inconsistencies in their evidence, namely –

- i. In cross-examination, the 2nd Defendant said that while he was driving behind the Claimant's vehicle he did not notice him stepping on his brakes. Ms. Smith however testified that she noticed that the driver of the Toyota Hilux kept stepping on his brakes about five times;
- ii. The 2nd Defendant omitted to mention some of the damage to the Toyota Vitz that was previously acknowledged in his witness statement, namely at paragraph 6 he stated "I looked at the damages to the vehicle I was driving and I noted that the front bumper, the bonnet and left headlamp were damaged. I drove the vehicle from the scene." Ms. Smith did not mention the damage to the Toyota Vitz in her witness statement but in cross-examination she denied that there was damage to the bonnet of the Toyota Vitz and insisted that there was only damage to the left door and left fender.

[35] With regards ii. (above) Counsel for the Claimant has submitted that the Defendants' account is inconsistent with regards to the damage to the Toyota Vitz and that there seems to be an attempt to refute their prior evidence of damage. While I am mindful of the fact that the collision took place in November 2008, the parties gave their witness statements in November 2014 and were being cross-examined on it in March

2016 (i.e. almost 8 years after the accident) and as such some allowance for fading memories must be made.

[36] Regarding the condition/state of the road, I have considered the fact that the accident took place on a Saturday evening close to 6 p.m. and I accept that there was vehicular traffic on the Wiltshire Highway and that there were vehicles travelling in the opposite direction of the Claimant and the 2nd Defendant. I do not accept the 2nd Defendant's evidence that he was driving directly behind the Claimant, I prefer the evidence of the Claimant in this regard and find that there were two (2) other vehicles behind the Claimant's vehicle. It is for this reason that the 2nd Defendant would not have been able to see the Claimant's brake lights, his indicator or his hand signal, all of which I accept were applied by the Claimant after he stopped to turn. It should be noted that although the 2nd Defendant denied the Claimant's use of a hand signal, he said "**Mr. Kennedy** (the Claimant) **may have put on his indicator but he did so suddenly and turned the vehicle right without stopping or giving any form of hand signal. He turned whilst I was in the process of overtaking.**" (emphasis added)

[37] Even if I were to find that the 2nd Defendant was driving directly behind the Claimant, the failure of the 2nd Defendant to see the Claimant's indicator light and/or hand signal undermines the assertion that he was keeping a proper look-out.

[38] I have also considered the fact that Wiltshire Highway is a straight road which is intersected by Almond Tree Road and that the Claimant is familiar with the Wiltshire Highway and in particular the right turn which leads onto Almond Tree Road, as this forms part of his route to get home. There is no evidence with regards to the 2nd Defendant's familiarity with the Wiltshire Highway or the frequency with which he travels it, but I note that he denied in cross examination that the place where the collision took place was an intersection or road junction and that he stated that it was merely a track road. His reference to Almond Tree Road as a "track road" may be due to the fact that he was not well acquainted with that portion of the road and as such did not see or anticipate that there was a road junction approaching when he decided to overtake the Claimant from more than two (2) car lengths away.

[39] In any event I find that the 2nd Defendant was in breach of paragraphs 8 and 9 of the Road Code which state –

8. *Do not overtake unless you can do so without danger to others or to yourself. Before you overtake, make sure the road is clear far enough ahead and behind. Use your mirrors...Signal before you start to move out. Be particularly careful at dusk, in the dark and in fog or mist, when it is more difficult to judge speed and distance.*

Do not overtake at or when approaching the following locations:

c. Road junction

9. *When you wish to overtake another vehicle, take the following steps:-*

(a) Before you turn to the right of the road make sure there is plenty of time to pass and return to left before meeting any vehicle coming from the opposite direction.

*(b) **Overtake only on the right, unless** traffic is moving in queues and the traffic queue on your right is moving more slowly than you are or **the vehicle ahead, signals its intention to turn right.** Never use the hard or soft shoulder to overtake.*

(c) After overtaking a vehicle return to the left as soon as practicable but avoid cutting in too quickly.

- b) The 2nd Defendant and his passenger Ms. Memeka Smith gave evidence that after the Toyota Hilux turned right suddenly, the Toyota Vitz swerved further to the right to avoid a collision and that the Toyota Hilux hit the light post and that it was after the Toyota Hilux hit the light post that the Toyota Vitz hit into the right driver's door. More specifically, Ms. Memeka Smith described the event as follows, *"...the Hilux suddenly turned right without giving any indication of his intention to turn right. To avoid a collision Kenardo swerved further right. I saw when he pressed the horn. The Toyota Hilux hit a light post to the left entrance of a minor road on the right. **When Kenardo swerve right he pulled up the hand break and then the vehicle slide and hit into the right driver's door and right fender of the Hilux.**"* (emphasis added) In my view this account supports the Claimant's Particulars of the Defendants' Negligence, namely that the 2nd Defendant was-

- i. *Driving at an excessive and/or improper speed under the circumstances;*

- ii. *Driving without due care and attention and without any or any adequate regard for other users of the said road including the Claimant;*
- iii. *Failing to reduce his speed significantly in all the circumstances or to increase his vigilance;*
- iv. *Failing to stop, slow down, swerve and/or otherwise manage and/or control the said motor vehicle so as to avoid the said collision; and*
- v. *Driving in a reckless and dangerous manner.*

[40] I do not accept the 2nd Defendant's explanation for the use of the hand brake, namely that the road was damp.

Physical Evidence

[41] In determining liability the court ought to have regard to the physical evidence. In **Calvin Grant v David Pareedon et al.** (Supreme Court Civil Appeal No. 91/87, delivered on the 4th of October 1988) the Court of Appeal commended the approach of Theobalds J regarding the careful consideration of physical evidence as eminently reasonable and logical. At page 3 of the said judgment, the reasoning of Theobalds J was enunciated as follows –

Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth.

[42] Generally, the physical evidence tends to support the Claimant's case. With regards to the location of damage to the Toyota Hilux, I accept that there was damage to the right front door, the right fender, the right running board as a result of the impact from the Toyota Vitz and the front bumper from the impact with the light pole. With regards to the Toyota Vitz, I accept that there was damage to the front bumper, the bonnet and the left headlamp as a result of the collision into the Toyota Hilux. Considering the size of the respective vehicles and the location of damage, I am of the view that these factors support the Claimant's assertion that the collision was caused by

the 2nd Defendant's attempt to overtake at a road junction from two cars behind. The location of damage also supports the Claimant's assertion the Toyota Vitz was travelling at such a great speed that it collided with the right side of his vehicle with such force that it (i) pushed his vehicle and caused it to leave the Wiltshire Highway and collide head on in a utility pole and (ii) pressed the right door in, forcing the Claimant to exit from the left passenger door. I find that it is more probable that the 2nd Defendant's speed that caused the collision rather the road surface being damp or slippery as the 2nd Defendant and Ms. Smith contend. In any event, if the 2nd Defendant perceived the road surface to be damp or slippery he ought to have exercised even more care when driving and in particular when overtaking (see: paragraphs 4 and 9(d) of the Road Code).

[43] The Parties do not agree on the point of impact i.e. when the collision took place. However I find that on a balance of probabilities, the Claimant stopped mid-way through his right turn onto Almond Tree Road when the 2nd Defendant collided into the right side of the Toyota Hilux and that the impact was so great that it pushed the Toyota Hilux causing it to leave the Wiltshire Highway and collide head on into the utility pole on the left corner of the Almond Tree Road and Wiltshire Highway. The Defendants' contention that the Toyota Vitz slid/skid and hit into the Toyota Hilux after swerving to the right of the Wiltshire Highway after the Toyota Hilux collided with the utility pole on the left side of Almond Tree Road, does not seem plausible.

[44] Curiously, Counsel for the Defendants submitted, in the Defendants' Response to Claimant's Submissions, that there is no marked divergence in the evidence of the parties on where the accident took place. She submitted "it is not in dispute that **after** the collision the Claimant [sic] vehicle came to rest at a utility pole to the left at the entrance of Almond Tree Road...It is submitted that nothing turns on the exact location of the collision." (emphasis added) However, this submission does not accord with the defence, the witness statements of the 2nd Defendant and Ms. Smith or even Counsel's previous assertion, in the Defendants' Closing Submissions, that "It is the Defendant's case that the Claimant collided with a utility pole at the entrance at Almond tree lane [sic] **before** the collision with the defendants' vehicle." (emphasis added)

Relevant Authorities

[45] Counsel for the Claimant cited the case of **Challoner v. Williams and Croney** [1975] 1 Lloyd's Rep 124 which is factually similar to the instant case. In **Challoner** the plaintiff, Mr. Challoner, brought an action against the 1st Defendant, Mr. Williams, and the 2nd Defendant, Mr. Croney, claiming damages as a result of a motor vehicle collision. At the time of the collision the plaintiff was a passenger in Mr. Croney's motor vehicle. Mr. Williams was driving his motor vehicle in a convoy with two other vehicles behind him, he realized that he had taken a wrong turn and decided to turn back. He had been driving in the centre of the left hand carriageway and in order to turn, he slowed down, indicated and moved out towards the centre of the road to make a right hand turn. He did not see Mr. Croney's car overtaking from two cars behind. Mr. Croney crashed into the right hand side of Mr. Williams' car and Mr. Challoner was injured

[46] At first instance the trial judge held Mr. Williams and Mr. Croney to be liable and equally to blame for the accident which injured the plaintiff. Mr. Williams appealed on the basis that he was not negligent and that the whole blame and liability for the accident rested on Mr. Croney. On appeal, their Lordships found that Mr. Williams had done nothing wrong as he had checked the position of the two vehicles behind him and it was Mr. Croney who should have ensured it was safe to overtake. As such the whole of the responsibility rested with Mr. Croney.

[47] Megaw LJ at page 126 enunciated as follows –

I would not for one moment disagree with the view that one who is minded to turn his car across the road had got a duty, and a high duty, of care to traffic that may be using that part of the road and may be inconvenienced or put in danger by the manoeuvre of a car turning across. That applies both to traffic coming in the other direction, with which one would normally primarily be concerned, and also with the possibility that someone may be seeking to pass the turning car, travelling in the same direction. But, in the circumstances here, I am afraid, with great respect to the learned Judge, that I am unable to see how it is suggested that it would have helped or increased safety in any degree if Mr. Williams had, as the Judge says he should have done, stopped before making the passage of across the offside half of the of the road. Of course he has a duty to take all reasonable care to make sure that he is not inconveniencing something which may be coming outside him. But Mr. Williams, according to his own evidence, had so looked.

[48] I note that in **Challoner** there was a dip in the road, which may have obscured visibility and this fact does not align with the instant case, but in my view this does not substantially distinguish this case as I have found that the 2nd Defendant was attempting to overtake in an unsafe location prohibited by the Road Code (see: paragraph 8(c)).

[49] While Counsel for the Defendants' submitted that the reasoning in **Challoner** ought not to be adopted, no other authority was submitted that was more factually similar to the instant case. In fact, the authorities cited by Counsel for the Defendants' such as, **Grealis v Opuni** [2004] RTR 97, **Sorrie v Robertson** 1944 JC 95 and **Clarke v Wakelin** (1965) 109 Sol Jo 295 involved collisions between motor vehicles and motorcycles/mopeds/pedal cycles, respectively, and as such they were not of much assistance.

[50] I am inclined to find that in the instant case the Claimant, like Mr. Williams, fulfilled his duty to take all reasonable care and that the collision was negligently caused by the 2nd Defendant who breached the **Road Traffic Act**, the Road Code and his duty to take reasonable care.

Additional Considerations

[51] I wish to state that I have placed little to no reliance on the fact that (1) Claimant claimed to be a Driving Instructor for several years; and (2) the 2nd Defendant paid for the repairs to the Toyota Hilux. In my view neither (1) nor (2) are determinative of the issue of liability.

Vicarious Liability

[52] Having found liability on the part of the 2nd Defendant, the issue to be resolved is whether the 1st Defendant may be made vicariously liable for the negligence of the 2nd Defendant. It is not in dispute that the 1st Defendant is the owner of the Toyota Vitz that was driven by the 2nd Defendant and that the 2nd Defendant was duly authorised to use the vehicle.

[53] On this point, Counsel for the Claimant referred the Court to **Rambarran v Gurrucharran** [1970] 1 All ER 749, a decision of the Privy Council hearing an appeal from Guyana, it is useful to set out the head note in full –

Although ownership of a motor vehicle (which at the time of an accident is being driven by another for his own purposes and without the knowledge of the owner) is prima facie evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver, that inference may be displaced by evidence that the driver had the general permission of the owner to use the vehicle for his own purposes, the question of service or agency on the part of the driver being ultimately a question of fact.

[54] I note that that **Rambarran v Gurrucharran** was approved and followed by the Court of Appeal in **Eric Rodney v Alan Werb and Alan Werb v Eric Rodney and Patricia Philpotts (Representative of the Estate of Lascelles Philpotts, Deceased)** [2010] JMCA Civ 43. In reference to **Rambarran** which confirmed and clarified the locus classicus, **Barnard v Sully** (1931) 47 TLR 557, Phillips JA at paragraphs [42] - [43] opined –

*[42] Finally on this aspect of the appeal, counsel for Mr. Rodney relied on the Privy Council case of **Rambarran v Gurrucharran**. The principles established in **Barnard v Sully** were again confirmed and somewhat clarified. In the judgment of the Board it was stated:*

“Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A’s ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence.”

The facts of this case were that the son of the appellant, while driving the appellant’s car, collided with a car owned by the respondent...The Privy Council affirmed the decision of the learned trial judge and decided that the evidence adduced by the appellant having been accepted by the learned trial judge, was sufficient to overcome the inference that the son was driving as his agent or servant.

*[43] This case makes it clear that where the only known fact is that the defendant is the owner of the vehicle, the court will draw the inference that at the time of the incident, the car was being driven by the owner or his servant or agent. However, if other facts are known which are accepted by the court, then the question of service or agency will be determined on an assessment of all the evidence. **The onus is on the owner of the vehicle to provide sufficient credible evidence to satisfy the court that the driver is not his servant or agent. What this case says is that he could do this in two ways: he could show the object of making the journey in question, and that it served no purpose of his, or he could assert that***

the vehicle was not being driven for any purpose of his and provide such supporting evidence. (emphasis added)

[55] Counsel for the Defendants submitted that the Claimant has failed to establish agency between the 1st and 2nd Defendant and is asking this court to find that the 1st Defendant is not vicariously liable. To this end, it was submitted that no evidence was led to suggest that the vehicle (Toyota Vitz) was being used for the 1st Defendant's business/purposes and that no suggestion was made to the 2nd Defendant that he was so doing.

[56] However, I am unable to agree with Counsel for the Defendants submission as the onus was on the registered owner of the vehicle i.e. the 1st Defendant to rebut the presumption of agency.

[57] I note that the Defendants in their Further Amended Defence asserted (at paragraph 2 on the third page) –

The Defendants will say that:-

2. *“The Second Defendant will specifically states [sic] that at all material [sic] the second defendant was using the first defendant's motor vehicle as the authorised driver thereof for his own personal use which was in no way connected with any purposes of the first defendant and in addition that at all material times the second defendant was not an employee of the first defendant and had in fact never been an employee of theirs.”*

[58] While it is clear that the Defendants were presenting their defence jointly, I do not regard paragraph 2 (above) to be sufficient for the purpose of rebutting the presumption of agency. Based on the authorities, it is clear that the onus is on the owner of the vehicle (i.e. the 1st Defendant) to provide sufficient credible evidence to satisfy the court that the driver is not his servant or agent. In the instant case it is the driver of the vehicle who is seeking to rebut the presumption, however even if the court were to accept this assertion it is only contained in the pleadings and as such there is no evidence before the court in support of this assertion. No witness statement was filed on behalf of the 1st

Defendant and in the 2nd Defendant's witness statement there is no mention of the purpose for which he was driving the vehicle. It is well established that pleadings do not constitute evidence (see: CPR rule 29.2 which states how facts are to be proved).

[59] Based on the foregoing, the presumption of service/agency has not been rebutted, accordingly I find that the 1st Defendant is vicariously liable for the negligence of the 2nd Defendant.

[60] On the issue of liability, judgment is given for the Claimant against the 1st and 2nd Defendants. The issue of damages will be determined presently.

ASSESSMENT OF DAMAGES

General Damages

[61] In the Amended Particulars of Claim the Claimant pleaded that he had suffered the following injuries:

- a) Cervical myelopathy with spinal cord compression
- b) Prolapsed C3-4 Cervical disc with significant spinal cord compression and myelomalacia

These injuries were duly noted in the medical report of Dr. Carl Bruce, Consultant Neurosurgeon, dated the 12th of February 2010. Dr. Bruce subsequently explained that the diagnosis of cervical myelopathy with spinal cord compression is a loss of the normal cord function in this case due to a prolapsed intervertebral disc.

[62] In the said February report, Dr. Bruce indicated as follows-

Treatment

"An urgent anterior cervical decompression (discectomy), fusion and plating was recommended. This was performed on December 23, 2009 and a massive prolapsed disc was found and removed"

Follow Up

He had followed up on February 12, 2010, and is still undergoing physiotherapy. He is now able to walk and drive, he is also able to climb stairs. Some residual symptoms remain including cramps in the hand and difficulty lifting the left foot.

He will need neuropathic pain medication intermittently and will need radiographs to monitor for bony cervical fusion.

Progress

We expect further improvement, but base [sic] on his injury and current status we estimate him to have a 15-25% whole person impairment using the American Medical Association Guidelines to the evaluation of permanent impairment.

[63] In a further medical report dated the 26th of August 2013, Dr. Bruce referred to his previous report and stated “*He was seen 12/02/2010, 06/11/2010 in post surgery follow up. Despite surgery he had a 25% whole person impairment due to the injury suffered.*” There was some mention of a persistent and severe burning in the left shoulder which affects the fingers and joints which are described as numb and weakened. The report indicates that despite exercises the Claimant feels weak and cannot stand without leaning forward and requires support on the desk or podium while speaking in church. There was mention of occasional giddiness and the need to take pain medication intermittently. There was also mention of neck pains and it was stated that the Claimant’s main problem remains his motor function. To that end, he has difficulty dressing himself and in particular putting his left leg into his pants. Dr. Bruce made the following assessment –

Assessment

Reverend Kennedy has a permanent neurological deficit with long tract pyramidal signs due to the injury suffered at the time of the motor vehicle accident. At this stage he has achieved maximum medical improvement. Using the American

Medical Association guidelines for the evaluation of permanent impairment I would estimate his deficit at a 25% whole person impairment.

He will need to continue ongoing exercises and intermittent anti-inflammatory medicine.

[64] There is also a medical report dated the 19th of July, 2013 by Dr. Charlotte A. Lawrence-Bedasse, General Practitioner, who first saw the Claimant two (2) years prior to the accident, on the 6th of November 2006. She noted that at that time the Claimant presented with symptoms of right orchitis and was treated for same. She also noted that he was already on treatment for angina and hyperlipidemia but there was no other significant history or finding.

[65] The next time Dr. Lawrence-Bedasse saw the Claimant was on the 12th of November 2009, which would have been about a year after the accident. At this time the Claimant presented with a history of numbness in his hands, he complained of pain and weakness in the muscles of his lower limbs especially in the mornings. Dr. Lawrence-Bedasse mentioned that there was no significant clinical finding and laboratory investigations were done. The Claimant was again seen by Dr. Lawrence-Bedasse a month later, on the 9th of December 2009. When he returned he complained of weakness in the lower limbs, cramps in his hands and reported stumbling while walking. The Claimant was referred to another doctor for further evaluation who subsequently referred him to Dr. Bruce for surgery.

[66] It is noted that Dr. Lawrence-Bedasse states that the prognosis regarding the Claimant's symptom of, *inter alia*, numbness in his hands is outside of her expertise however she does indicate in a letter dated the 6th of December 2012 that to the best of her knowledge and belief the Claimant had no previous history of numbness in his hands prior to October 2009.

[67] In the response to questions put to Dr. Bruce (dated the 14th of August 2014) he stated that –

- i) Trauma can cause a disc herniation which will then overtime cause symptoms to worsen. Mr. Kennedy was not asymptomatic for over a year but were progressive which is not unusual;
- ii) Yes his symptoms started after the accident and worsened overtime and the prolapsed disc is consistent with the mechanism of trauma;
- iii) It is unlikely that these symptoms would appear and be of such severe nature without the accident during such a short period of time;
- iv) Mr. Kennedy's complaints were not due to aging but occurred on a background of cervical spine degeneration.

[68] Based on the foregoing, I find that there is sufficient evidence associating the injuries pleaded with the accident.

[69] The Claimant has given detailed evidence in his witness statement of the injuries received, the pain suffered and the treatment obtained over a lengthy period of time. He describes his road to healing as long and painful. Since undergoing surgery in December 2009, the Claimant says that he continues to experience difficulty dressing himself, making a fist, gripping objects, back pains, weakness in his legs, standing for extended periods without giddiness, and unsteadiness in his walk. He can no longer drive a manual car and has sold his Toyota Hilux and replaced it with an automatic car.

[70] Although he finds the cost of professional physiotherapy prohibitive, the Claimant stays that with the assistance of his wife he does daily exercise. He however does not feel that he is half the healthy and active man that he once was. Prior to the accident, the Claimant says that in addition to being a Minister he was the chief musician at his church as he was a professional guitarist since 1948. He is unable to play the guitar as his fingers cannot grip the guitar for an extended period of time without pain or numbness. The Claimant is also unable to stand to deliver his sermons and has resorted to sitting and has subsequently handed the sermon to a new Minister.

[71] Counsel for the Claimant has suggested six (6) cases as being instructive in assessing general damages which includes pain and suffering and loss of amenities:

- 1) **Pogas Distributors Ltd v Clinton Grant & Anor. Consolidated with Oswald Francis v Clinton Grant & Anor. Consolidated with Freda Claire McKitty v Pogas Distributor Ltd and Ors.** Suit No. C.L. 1987/P212, C.L. 1993/F022, C.L. 1993/M038 (date of award January 28, 1994) – The Claimant in the third claim, Ms. McKitty, a 27 year old Administrative Assistant, sustained cervical spine injury and had residual neurological deficits as a consequence of damage to the spinal cord. She had problems with the motor movements of her left hand and was unable to play musical instruments. She was originally assessed as having 20% PPD of the whole person. She was originally awarded \$1,000,000.00 for general damages for pain and suffering and loss of amenities. On appeal, the Court of Appeal considered that 10% PPD was more appropriate and reduced the award for general damages to \$600,000.00. This would update to \$6,012,897.68.
- 2) **Katharine Lundy v James McNaught et al.** Suit No. C.L. 1995, Khans Vol. 4 pg 171- 172 (date of award April 4, 1997) – The Claimant was a 55 year old Teacher/Peace Corps. Officer who was injured in a motor vehicle collision. She sustained the following injuries – bruised scalp, cut in head, severe whiplash, damage to the cervical spine with subluxation between C6 and C7, disruption of left pedicle of C6, displaced spinal chord and parathesia in left upper arm. She had to undergo surgery to her spinal chord and spinal fusion. She was left with limited movement in the neck, post traumatic stress and permanent loss of motion at C6 and C7. She could not longer engage in physical activities for prolonged periods. While there was no assessment as to PPD, she was awarded \$1,100,793.00 for general damages for pain and suffering and loss of amenities. This would update to \$5,975,660.18.
- 3) **Stephanie Burnett v Metropolitan Management Transport Holdings Ltd et al** Claim No. 2006 HCV 00678 (date of award December 11, 2006) – The Claimant

was a 69 year old vendor who was injured in the process of boarding a bus when the bus drove off. Her body became trapped in the door and her lower body was dragged on the outside for some distance. She was diagnosed with compression of the lumbar nerve roots, degenerative disc disease and acute chondromalacia of the left patella. Physical therapy did not appear to ease her pain and surgical decompression was deemed necessary. She was assessed as having 13% PPD (pre-surgery) and was awarded \$3,000,000.00 for general damages for pain and suffering and loss of amenities. This would update to \$6,993,000.00.

- 4) **Jackson v Charlton et al.** JM 2001 SC 33 (date of award May 4, 2001) – The Claimant, a 26 year old Clerk, was injured in a motor vehicle accident. She suffered pains in the neck, left rib cage and left elbow with severe pains persisting to the lower back and neck. She was diagnosed with L4/L5 lumbar disc prolapsed with a 8% PPD of the whole person. An award of \$1,800,000.00.00 was made for general damages for pain and suffering and loss of amenities. This would update to \$7,311,029.80.
- 5) **Yvette Madden v Metro Car Rentals Ltd et al.** Claim No. 2006 HCV 00678 (date of award May 13, 2008) – The Claimant, a 63 year old, was evaluated as having a muscular and ligamentous strain as well as a prolapsed intervertebral disc injury. She was assessed as having a 10% PPD which was subsequently upgraded to 11% as a result of developing accident associated hypertension. Morrison J remarked that the Claimant had to visit a number of professionals on a multitude of occasions. She is partially reliant on a wheel chair and has to follow a special regime for the rest of her life. He found that her entire being, mental, physical and emotional has been compromised. An award of \$3,500,000.00.00 was made for general damages for pain and suffering and loss of amenities. This would update to \$6,383,802.82.
- 6) **Merdella Grant v Wyndham Hotel Company** Suit No. C.L. 1989/G.045 (date of award July 7, 1996) – The Claimant, a 54 year old Nursing Supervisor, sustained injuries when a chair collapsed beneath her and caused her to fall backwards.

She suffered a lumbar injury and her PPD was assessed at 25% of the total person. Her condition was expected to worsen with time and she would need physiotherapy for the rest of her life and bi-annual visits to the doctor. She was prohibited from lifting. An award of \$1,400,000.00.00 was made for general damages for pain and suffering and loss of amenities. This would update to \$8,081,723.63.

[72] Counsel for the Claimant has urged the Court to make an award of \$8,387,000.00 for general damages by placing reliance on the case of **Merdella Grant v Wyndham Hotel Company**.

[73] Prior to considering the appropriateness of the award suggested, I wish to note that based on the Court's calculations using the August 2016 CPI of 233.1, the award of \$1,400,000.00.00 made in July 1996 (when the CPI was 40.38) would update to \$8,081,723.63. Accordingly, this sum will be considered as Counsel for the Claimant's suggested award.

[74] It was submitted that the PPD and severity of pain and suffering and loss of amenities of the Claimant in **Merdella Grant**, most resemble that of the Claimant in the instant case. I accept that both Claimants were assessed as having 25% PPD and that this is the only authority cited with the same percentage, the others being lower or not assessed at all. I also accept that there are similarities between the Claimants, such as having to give up their occupations prematurely and live more sedentary lifestyles and prolonged standing became impossible. While I do not regard that such an award would be grossly excessive, it may not be appropriate as there are some distinctions. Apart from the difference in the source of injury which Counsel mentioned, it cannot be ignored that Merdella Grant was rendered immobile at various times following the accident, her lower back pain which radiated to her left leg was so severe that she had to be given an injection and placed on bed rest. It was also discovered that she had chronic herniation of a disc and the Orthopaedic Surgeon opined that her condition would worsen overtime.

[75] Merdella Grant was required to do physiotherapy for the rest of her life and to visit the Doctor bi-annually. She was also forbidden from lifting and was also prescribed counselling. There is no intention to diminish the Claimant's impairment however I do not regard them to be on par with Merdella Grant. While the Claimant has stated that he is unable to afford professional physiotherapy there is nothing to suggest that he is required to do so for the rest of his life. In any event, he is able with his wife's assistance to do daily exercises with an exercise bike and gym bench.

[76] Counsel for the Defendants has not submitted anything in relation to **Merdella Grant**, but she has asked the court not to place any reliance **Katharine Lundy v James McNaught**, **Jackson v Charlton**, and **Yvette Madden v Metro Car Rentals Ltd et al**. Instead, she has urged the Court to find that **Freda Claire McKitty v Pogas Distributor Ltd and Ors**. provides the best guidance on the award to be made. It was submitted that there were similarities in terms of the injuries but it was acknowledged that there was a difference in the level of impairment. I regard the injuries to be quite similar to the Claimant in the instant case but the difference in the level of impairment when it was reduced to 10% PPD is significant. As such the award of \$600,000.00 (updated to \$6,012,897.68) which related to a 10% PPD would not be adequate.

[77] I agree with Counsel for the Defendants' submission with regards to **Katharine Lundy v James McNaught**, I do not find it to be a useful guide. The Claimant in that case suffered numerous injuries which the Claimant in the instant case did not, but even more there is no assessment as to PPD.

[78] I find the cases of **Jackson v Charlton**, **Yvette Madden v Metro Car Rentals Ltd et al** to be somewhat incomparable as the levels of impairment being 8% and 11%, respectively, are less than half of the Claimant in the instant case. I do note that the Claimant in **Yvette Madden**, was rendered partially reliant on a wheel chair which is not true of the Claimant in the instant case. Similarly, **Stephanie Burnett v Metropolitan Management Transport Holdings Ltd et al**, as Counsel for the Claimant rightly pointed out, the Claimant's PPD of 13% was assessed pre-surgery whereas the

Claimant's 25% PPD assessment is post surgery. These cases are however useful as a guide. I note that the awards, when updated range from \$6,383,802.82 - 7,311,029.80.

[79] In the circumstances, I find that an award of \$7,900,000.00 would be appropriate for pain and suffering and loss of amenities.

Special Damages

[80] Special damages have been agreed in the sum of \$2,499,071.52 (subject to liability being established) and the Court awards this sum.

Disposal

[81] It is hereby ordered -

1. Judgment entered in favour of the Claimant against the 1st and 2nd Defendants with damages assessed as follows:

General damages - pain and suffering and loss of amenities in the sum of \$7,900,000.00 with interest at 3% p.a. from the 3rd of April 2012 to today's date;

Special damages - \$2,499,071.52 with interest at 3% p.a. from the 8th of November 2008 to today's date.

2. Cost to the Claimant to be agreed or taxed.