[2023] JMSC Civ. 88

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV6099

BETWEEN	**DAMION SILVERA**	**CLAIMANT**
AND	**RAY DAWKINS**	**FIRST DEFENDANT/ANCILLARY CLAIMANT**
AND	**RONALD WILSON**	**SECOND DEFENDANT/FIRST ANCILLARY DEFENDANT**
AND	**DAVID JAMES**	**THIRD DEFENDANT/SECOND ANCILLARY DEFENDANT**

Mrs Tamara Riley Dunn instructed by Nelson Brown Guy & Francis, for the claimant.

Mrs Suzette Campbell instructed by Burton Campbell and Associates for the first defendant/ancillary claimant.

Mr Leon Palmer and Mr. Duncan Royes instructed by Williams McKoy & Palmer for the second defendant/first ancillary defendant.

The third defendant/second ancillary defendant absent and unrepresented.

Negligence - Motor vehicle accident - Res ipsa Loquitur - Contributory negligence – Apportionment of liability – Assessment of Damages – Whether claim for lost wages which was not pleaded should be allowed.

Heard: February 6, and 7, and May 19, 2023

PETTIGREW-COLLINS J

BACKGROUND

[1] This case involves two collisions as part of the same incident which occurred on the 12th day of December 2007. In the first collision, the claimant was a passenger in a Toyota Hiace bus which collided into the rear of an International motor truck driven by the third defendant and which was travelling immediately ahead. The claimant thereafter exited the vehicle. The second defendant, the owner of the International motor truck came along shortly afterwards. He was instructed by the police to load the damaged Hiace onto the International motor truck which was equipped as a wrecker. The second collision occurred while the Toyota Hiace bus was being loaded onto the motor truck. The claimant was standing along the roadway behind the motor truck, when another motor vehicle, a Toyota Townace, driven by the first defendant, collided with the rear of the International motor truck, pinning the claimant to the rear of the motor truck. As a result, the claimant suffered injuries.

THE CLAIM

[2] The claimant filed a claim form and particulars of claim on December 10, 2010. On December 16, 2010, he filed an amended claim form. On January 24, 2013, he filed a further amended particulars of claim. In this claim, he seeks to recover from the first, second and third defendants, damages for negligence.

[3] It is the claimant's case that the second defendant's International motor truck, which was travelling ahead of the Hiace in which he was a passenger, suddenly and without warning came to a stop resulting in the collision. He said that whilst the owner of the motor truck was hoisting the Hiace bus onto the second defendant's truck (which he referred to as a wrecker), a Toyota Townace bus, driven by the first defendant, came along and collided into him, pinning him to the rear of the motor truck.

[4] The claimant particularized the negligence on the part of the first defendant (the driver of the Toyota Townace) as follows:

a) Driving at an excessive and/or improper speed;

b) Failing to keep any or any proper lookout;

c) Driving without any due attention or care and without any regard for other users of the road;

d) Failing to take heed or to observe the presence of the vehicle bearing registration number 7800 FB;

e) Failing to reduce his speed significantly in all the circumstances or to increase his vigilance;

f) Failing to stop, to slow down, to swerve or in any other way so as to manage or control the said motor truck as to avoid collision.

[5] He then itemized the particulars of negligence on the part of the second and third defendants (owner and driver of the motor truck respectively) as follows:

a) Failing to keep any or any proper lookout;

b) Driving without any due attention or care and without any regard for other users of the road;

c) Failing to stop, to slow down, to swerve and in any other way so to manage or control the said wrecker so as to avoid collision;

d) Failing to place hazard lights or reflectors around the International motor truck so as to warn on comers that it was in the process of loading a disabled vehicle onto its flat bed.

[6] The claimant claims:

a) Damages

b) Interest on such damages at such rate and for such period as this Honourable Court shall deem for pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) Act

c) Costs

d) Further or other relief

DEFENCE OF FIRST DEFENDANT

[7] The first defendant said that he was driving in the right lane along the Nelson Mandela Highway towards Kingston when he came upon a wrecker which was stationary, with no overhead or hazard lights. He said he applied his brakes and swerved right but nonetheless collided into the wrecker and injured the claimant who was standing along the highway.

[8] The first defendant further stated that the accident was caused and/or contributed to by the negligence of the claimant and/or the second and third defendants or of both.

[9] He particularized the negligence of the second and third defendants as:

a) Stopping and/or allowing their motor truck to remain on the driving surface of the highway;

b) Stopping and/or allowing their motor truck to remain on the driving surface of the roadway at night without any lights or reflectors on the vehicle;

c) Failing to give any or any sufficient warning to other road users of the roadway as to the presence of the motor truck along the highway;

d) Failing to have ay or any due regard for other users of the roadway.

[10] He then particularized the negligence of the claimant as:

a) Standing in the roadway with his back towards oncoming traffic;

b) Standing in the roadway behind an unlit stationary vehicle on a highway at night;

c) Failing to keep any or any proper look out whilst standing in the roadway;

d) Failing to give any signal or warning of his presence behind the stationary vehicle;

e) Failing to have any or any due regard for his own safety.

[11] The first defendant admitted that the claimant suffered the injuries as set out in the medical report of Dr. Carlos Wilson, dated January 18, 2008.

DEFENCE OF SECOND DEFENDANT

[12] The second defendant denied the claimant's account of how the first accident occurred and said that he would rely on the affidavit of the third defendant sworn to on the 28th June 2012 and filed the 29th June 2012. It must be observed, however, that the third defendant has not participated in the trial.

[13] He alleged that at around 7:30pm, whilst the claimant watched the process of the motor bus being loaded onto the flat bed of the International Motor Truck in the right lane of the dual carriageway in the vicinity of the overhead bridge, the first defendant drove in a negligent manner causing the Townace to collide into the claimant and the rear section of the International Motor Truck.

[14] He denied that the injuries, loss and damage suffered by the claimant were caused as a result of the negligence of the defendants jointly and severally and instead said that any injury suffered by the claimant was as a result of his being hit by the Townace motor bus which was driven by the first defendant.

[15] The second defendant also denied negligence as set out in the Amended Particulars of Negligence and said that at the time when the first defendant's vehicle collided into the rear of the International motor truck, the International motor truck was stationary, with its park lights on and that there were also park lights on the disabled Toyota Hiace motor bus which was already loaded on the flat-bed of the International Motor truck.

ANCILLARY CLAIM

[16] An ancillary claim was filed on July 4, 2018 by the first defendant, against the second and third defendants for, an indemnity and/or contribution against any damages he is liable to pay to the claimant, Mr. Silvera.

The ground on which the ancillary claim was made is in essence that the second ancillary defendant negligently stopped and/or parked the motor vehicle along the highway without reflectors or light causing him to collide with the flatbed. The ancillary claimant also asked the court to determine the following matters not only between the claimant and defendants but also between the ancillary claimant and the ancillary defendants:

1) The issue of liability for the accident

2) The quantum of damages to be recovered by the claimant

3) Whether the ancillary claimant is entitled to an indemnity from the ancillary defendants.

ANCILLARY DEFENCE

[17] The first ancillary defendant disputed the ancillary claim on the basis that when the first defendant/ancillary claimant collided into the rear of the flatbed truck, all park lights were on the vehicle and that reflectors were also attached to them and were visible to all motorists who were travelling behind the parked vehicle and he was negligent in not observing them. He further alleged that the ancillary claimant was negligent in that he drove in a reckless and dangerous manner and at too fast a speed having regard to all the circumstances. Further, he failed to stop, slow-down or turn aside or so drive and operate his motor vehicle so as to avoid running into the rear of the first ancillary defendant's parked vehicle.

ISSUES

[18] The issues arising in this claim are who is liable for the collision and if there is liability on the part of more than one individual, how should that liability be apportioned. The questions of contributory negligence and the applicability of the doctrine of res ipsa loquitur also arise. The issues and the various sub-issues will be addressed under the following headings:

1. Preliminary matters – the question of admissibility of documents and evidence in relation to matters admittedly not pleaded will be discussed.

2. Whether the claimant was contributorily negligent

3. The application of the doctrine of res ipsa loquitur – the case against the first defendant

4. The case against the second and third defendants – the first collision.

5. The case against the second and third defendants – the second collision.

6. Apportioning liability - the ancillary claim.

7. The claim for special damages

8. The claim for general damages

FACTS NOT IN DISPUTE

[19] It is not in dispute that the accidents giving rise to this claim occurred along the Mandela Highway on or about December 12, 2007. There is no dispute that the Toyota Hiace bus collided into the back of the second defendant/ancillary claimant's stationary International motor truck/flatbed truck/wrecker, which was driven by the third defendant.

[20] The following matters are also not in dispute:

(a) That the second defendant/ancillary claimant arrived on the scene and was manoeuvring the apparatus of the motor truck in order to load the Hiace bus onto the said truck.

(b) While doing so, the Hiace motor bus driven by the first defendant/ancillary claimant came along and collided in the rear of the motor truck and also struck the claimant, pinning him to the rear of the motor truck.

(c) There is no dispute on the part of the second defendant/ first ancillary defendant as to the injuries suffered by the claimant as a result of the accident.

FACTS IN DISPUTE

[21] It was the claimant's evidence that the incident occurred just after they came from under the bridge. From his evidence however, the impression was given that it was not very close as the first defendant/ancillary claimant who in cross-examination explained that the bridge provided some cover.

[22] It is disputed whether there were park lights or reflectors on the flat bed/wrecker and/or on the Hiace bus atop the wrecker so as to alert oncoming vehicles to the presence of the flat bed on the roadway.

[23] It is disputed that at the time of the accident, the place was sufficiently lit. The claimant, in his statement, stated that the road was well-lit and there was a streetlight on the road. The second defendant/first ancillary defendant also says that there were streetlights on the road. However, the claimant in cross-examination stated that the place was "not dark, dark". The first defendant/ancillary claimant insists that it was dark.

[24] The intensity of the rainfall at the time of both accidents is also disputed. The claimant and second defendant/first ancillary defendant allege that it was drizzling while the first defendant/ancillary claimant said that it was raining heavily when he collided with the wrecker.

[25] The speed at which the first defendant/ancillary claimant was travelling is also in dispute. The claimant alleges that the first defendant/ancillary claimant was negligent by travelling at a speed above what was reasonable for the road conditions that existed at the time of the accident. However, neither the claimant nor the second defendant/first ancillary defendant provided any evidence as to the speed at which the first defendant/ancillary claimant was travelling at the time of the accident.

[26] The existence of a lay-by on the highway is disputed. The first defendant/ancillary claimant insists that there was a lay-by. The claimant on cross-examination, referred to a little soft shoulder with dirt and said that there was a driveway which

could be used to go back in the opposite direction. The second defendant/first ancillary defendant gave evidence that there was a layby which was asphalted, and which was about two feet wide and therefore was not wide enough for the motor truck to have pulled off onto that area.

PRELIMINARY MATTERS

[27] Mrs Suzette Campbell on behalf of the first defendant/ancillary claimant, made an application at the commencement of the trial to have certain paragraphs of the claimant's witness statement struck out on the basis that the offending paragraphs contained evidence in relation to matters that had not been pleaded. She made the observation that the claimant had not included in his particulars of claim, a claim for lost wages, and he should therefore not be permitted to give evidence in that regard. I declined to strike out the paragraphs.

[28] The law is that special damages must be specifically pleaded and proven. In the case of **Claudette White v Cyril Mullings and Eldred Mullings** [2017] JMSC Civ. 111, D. Frazer J (as he then was) addressed the question of whether a claim is restricted to the causes of action specifically pleaded in the claim form. He expounded on the relevant law as follows:

> *[15] In **Akbar Limited v Citibank** NA [2014] JMCA Civ 43, Phillips J.A. considering the issue of whether the defendant had specifically pleaded and proven his claim for special damages, observed at paragraph 64 that:*
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> > *The important point is that the defendant must not be taken by surprise. The defendant is entitled to know the type of claim being made by the claimant and the amount that is being claimed. However, as stated by Harris JA in **Grace Kennedy Remittance Services Ltd v Paymaster (Jamaica) Limited and Paul Lowe**, SCCA No 5/2009, judgment delivered 2 July 2009, endorsing Lord Woolf's judgment/dicta in **McPhilemy v Times Newspaper** [1999] 3 All ER 775, once the general nature of a claim has been pleaded, if the witness statements are exchanged those statements may supply particulars of a claim. There is thus*

> *no longer the need for extensive pleadings. They are not superfluous, they are still required to mark out the parameters of the case of each party and to identify the issues in dispute, but the witness statements and other documents will detail and make obvious the nature of the case that the other party has to meet. In* ***Eastern Caribbean Flour Mills v Ormiston St Vincent and the Grenadines*** *Civil Appeal No 12/2006 delivered 16 July 2007, Barrow JA at paras [43] and [44] also endorsed the principles declared by Lord Woolf and stated: "[43] … therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand pleadings to mean with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case. [44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings…*
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> *[16] It appears therefore that the concern of the court is to ensure that the defendant knows the case that he has to meet. The pleadings serve to establish the parameters of such a claim and the issues which arise. The witness statements and other documents should thereafter provide the details and particulars in relation to that claim.*

[29] As was said in **McPhilemy** (supra), pleadings are essential to mark out the parameters of a case. In circumstances where a claimant makes a claim for special damages but did not specifically claim lost wages, it cannot in my estimation be said that the parameters of the case that the defendant is to meet has been clearly defined in the particulars of claim. There was no reference made in this instance to a claim for lost wages. This is so in the light of the stated requirement that the defendant is entitled to know not just the type of claim being made by the claimant, but he must also know the amount that is being claimed. Witness statements were filed and exchanged since June 13, 2012. From paragraphs 59 to 63, the claimant detailed his claim for lost wages. He explained the basis of his claim. He stated what he did to earn and how much he earned per week from each employer. At a trial in February 2023, the defendants could hardly be able to say that they were not aware of the claim that they were required to meet.

[30] The import of Rule 8.9 was considered in **Alcoa Minerals of Jamaica Incorporated v Marjorie Patterson** [2019] JMCA Civ 49. At paragraph 16 of that judgment, the following observation was made:

> *"… Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet… The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is 'special' in the sense that fairness to the defendant requires that it be pleaded…. The claim which the present plaintiffs now seek to prove is one for unliquidated damages, and no question of special damage in the sense of a calculated loss prior to trial arises. However, if the claim is one which cannot with justice be sprung on the defendants at the trial it requires to be pleaded so that the nature of that claim is disclosed… …a mere statement that the plaintiffs claim 'damages' is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendants are entitled to fair warning."*

[31] The Judicial Committee of the Privy Council's decision of **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack** [2010] UKPC 15 was discussed in **Alcoa Minerals**. Subsequent to my ruling, I became aware of the case of **Rasheed Wilks v Donovan Williams** in which Edwards JA also referenced **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack**. In that case, the claimant claimed damages for negligence but failed to give details of the damages claimed. She however filed a list of documents and a witness statement speaking to funeral expenses and wages although there were no pleadings in the statement of case in relation to those items. She was allowed to amend her statement of case to include particulars of general and special damages to include lost years, in a context where unlike our rules, provision was made for amendment where a claimant sought to change his statement of case. The Court of Appeal determined

that the amendment was a change of the statement of case. On appeal to the Privy Council, it was argued that the claimant did not need an amendment, anyway, as the claim had included a claim for damages and the particulars could be provided in other documents including in a witness statement.

[32] At paragraph 36 of her judgment Edwards JA in stating the Board's decision, said:

> *[36] The Privy Council, referring to the claimant's duty in rule 8.6 of the CPR to set out, in her statement of case, a statement of facts on which she relied (which is similar to rule 8.9(1) of our CPR), and the duty in rule 8.10(4) to attach a schedule of any special damages claimed, held that the claimant having omitted to do so, an amendment of the statement of case was necessary. The Board considered, at para. 15,* ***McPhilemy v Times Newspapers Ltd and others*** *[1999] 3 All ER 775, and Lord Woolf's pronouncement in that case on the continued requirement for pleadings to "mark out the parameters of the case" and to "make clear the general nature of the case of the pleader". The Board also held that a detailed witness statement or a list of documents could not be used as a substitute for a short statement of all the facts relied on by the claimant.*

[33] Edwards JA continued her exposition of the law at paragraphs 37 and 38 as follows:

> *[37] In determining whether the amendment ought to have been allowed, since it was submitted it could be made without causing any prejudice to the defendant, the Board took the view that this was not the proper approach in the post CPR era. Furthermore, it found that the overriding objective did not assist the claimant. The Board considered the 'plain' language in Part 20 of the CPR (somewhat different from our Part 20) which circumscribes when changes to the statement of case may be made with and without permission, and took the view that, if a statement of case contained allegations which were sufficiently made, it need not be amended. In such a case, further particulars could be provided in a witness statement. It, however, held fast to the view that, in the case before it, the omission from the statement of case of a short statement of the heads of loss that were being claimed meant that an amendment was required which amounted to a "change" in the statement of case within the meaning of rule 20.1(3), and*

there had been no change of circumstances since the first case management conference, as the rule required, for permission to be granted. The Board further took account of the 'litigation culture' in Trinidad and Tobago and the purpose for which the rules had been drafted, which was to "introduce more discipline into the conduct of civil litigation and defeat the endemic laissez-faire interpretation to the rules" (see para. 31). The appeal was, therefore, dismissed.

*[38] The case of **McPhilemy v Times Newspapers Limited** was also cited by the appellant. This case held that pleadings were not made superfluous because of the requirement for witness statements, but that pleadings were still necessary "to mark out the parameters of the case being advanced by each party and to identify the issues and extent of the dispute between the parties". In that regard, it said, no more than a concise statement is required. At page 793 of that case, it was said that: "What is important is that the pleadings should make clear the general nature of the case of the pleader."*

[34] At paragraph 39, Edwards JA concluded that:

[39] It is clear, therefore, that although only a short statement of facts is required, a witness statement cannot be issued as a substitute for it. Although the authorities mostly deal with the inadequacies in a claimant's statement of case, the principles would, obviously hold true for a defendant's statement of case.

[35] Straw JA opined at paragraph 27 of **Trudy-Anne Silent-Hyatt v Rohan Marley and Jason Walters** [2023] JMCA Civ 24 that *"the authorities are not indicating any relaxation of the need for specific pleadings in relation to special damages, but rather, the possibility of relaxation of the requirement for proof."*

[36] Mrs Riley Dunn relied on **McPhilemy** (supra) but as observed, in accordance with that decision, the pleadings must mark out the parameters of the case. It cannot be said that the parameters of the instant claimant's case were marked out in the pleadings, in so far as there was no reference at all to lost wages in the pleadings. It must now be considered whether Rule 8.9A which states that the claimant may not rely on any allegation or factual argument which is not set out in the particulars

of claim, but which could have been set out there, unless the court gives permission, should be invoked.

[37] Since the purpose of Rule 8.9 is to ensure that the other parties are alerted to the case that they are expected to meet, then in an instance where the other parties were alerted to the case against them several years before the trial date, this court took the view that the discretion given by Rule 8.9A to grant permission could be invoked.

[38] This case may be contrasted with **Trudy-Anne Silent-Hyatt v Rohan Marley and Jason Walters** (supra). In that case, the appellant relied on a supplemental list of documents and written submissions on liability and quantum, as well as her witness statement to supply the information which had not been pleaded. The supplemental list of documents and written submissions had both been filed after the completion of the evidence. The respondent therefore was never afforded the opportunity to cross examine based on information provided via those documents included in the supplemental list of documents which were not put in evidence.

[39] This court recognizes as held in **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalac** (supra) and various other cases that the fact that the information is disclosed via the list of documents and evidence is set out in the witness statement will not be sufficient to satisfy the requirement that the claim for lost wages must be pleaded. In the instant case, the documents relied on were all admitted in evidence with the result that there was an opportunity to cross examine on them. Further, as will be explained in the ensuing paragraphs, the intention to rely on them had been previously indicated. This court is not seeking to rely on a relaxation of the rule per se, requiring specific pleadings in relation to special damages, but rather on a discretion invested in the judge by a separate but related rule.

[40] Mrs Campbell also voiced objection to the claimant admitting into evidence documents in support of the claim for wages. The objection to those documents was twofold. Counsel stated firstly, that the claim for lost wages could not be

sustained for the reason discussed in the preceding paragraphs and also, she had not been served with a notice of intention to tender into evidence hearsay documents. Notwithstanding that no document captioned “notice of intention to tender into evidence hearsay document” or any similar designation had been served, the court allowed the documents into evidence.

[41] The discourse which follows forms the basis for doing so. Section 31E of the **Evidence Act** allows for the admission of first-hand hearsay documents into evidence. Pursuant to subsection (1), the statement is admissible as evidence of the facts stated therein, if direct oral evidence given by that person of those facts would have been admissible. Subsections (2) and (3) of that section provide as follows:

> (2) *Subject to subsection 6, the party intending to tender such statement in evidence shall at least 21 days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered and as to the person who made the statement.*
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> *(3) Subject to subsection (4) every party so notified shall have the right to require that the person who made the statement be called as a witness.*

[42] The **Evidence Act** does not prescribe the format of the notice to be given. Thus the practice has developed whereby a document usually headed “Notice of Intention to Tender into Evidence Hearsay Documents” or some similar designation stating that the documents to be tendered are served on the opposing party. The court takes this opportunity to remind counsel that it is good practice to file and serve such a notice.

[43] In this instance, the documents sought to be tendered and which were in fact allowed into evidence were included in the claimant’s list of documents. It was also indicated in the list of documents that the claimant intended to rely on those documents. Admittedly, copies of the documents would not have been provided to

the defendants through this avenue unless the defendant undertook to pay the cost of copying, in accordance with rule 28.17(4). There is no suggestion or indication that that happened in this instance.

[44] More importantly in the context of this case, the claimant appended to his witness statement copies of the documents he sought to rely on in proof of his income and made it abundantly clear in his witness statement filed since 2012, that he intended to rely on those documents. Even if it is not the correct procedure, the fact is that he appended the documents. The documents giving information about the claimant's employment came purportedly from his employers. If direct oral evidence had been given by those employers about the information contained in the documents, then that evidence would have been admissible. Thus, whilst notice was not given in the usual and expected manner, I find that sufficient notice of the claimant's intention to tender the documents in evidence was given. That notice was also given way in advance of the 21 days required. Critical to my decision to apply the provisions of Rule 8.9A in this instance, is the fact that the documents relative to the information not pleaded were disclosed and the defendants were fully aware of the case they would meet.

CLAIMANT'S EVIDENCE

[45] It is the claimant's evidence that on the day in question, it was around 6:30 PM, and the road was well lit and it was drizzling lightly. It is his evidence that upon approaching the Nelson Mandela Highway, coming into Kingston from St. Ann, the motor bus in which he was a passenger started travelling in the right lane and he looked through the windscreen and saw the wrecker driving in front of the motor bus. He said that suddenly and without warning, the wrecker came to a stop. He said that the driver of the vehicle in which he was a passenger Mr. Waite " jammed" on the brakes and turned the steering wheel but the bus began to slide and slammed t into the back of the wrecker. The claimant said the impact caused him to be jolted from his seat and his knees to slam hard into the back of the driver's

seat. It was the claimant's evidence that the incident occurred just after they came from under the overhead bridge.

[46] He said that he exited the vehicle and saw that the front of it was pinned underneath the wrecker. The driver of the wrecker, the third defendant, apologised to them and explained that he had stepped on his brake suddenly to avoid hitting a vehicle in front of him. The claimant said that about half an hour later, a police officer who was passing by stopped and took their statements, ordered the third defendant/second ancillary defendant to load the motor bus onto his wrecker and carry it to the Ferry Police Station.

[47] It is also the claimant's evidence that the police officer took two passengers in the motor bus who had been badly injured to the hospital and that by this time the second defendant/first ancillary defendant, had arrived on the scene. He began along with the third defendant/second ancillary defendant strapping the bus and pulling it onto the flat bed of the wrecker.

[48] It is the claimant's evidence that he was asked to watch the back of the wrecker and shout to them when the chain was drawn tight enough to pull the bus up on the flat bed. He said he was standing close to the soft shoulder in the right lane of the highway behind the wrecker and that Mr Waite, the driver of the Hiace in which he was travelling stood beside him to his left. At this point they had been in the right lane of the Nelson Mandela Highway for around an hour.

[49] The claimant said he then heard the loud sound of tyres screeching and when he turned to see where the sound was coming from, he saw the headlights of a vehicle coming straight towards him. He said he screamed and held his hands before him but before he could run, he felt the vehicle hit him directly in his lower body. He felt his body lift off the ground and his back hit the back of the flat bed. He said he was pinned between the flat bed of the wrecker and the vehicle.

[50] He stated that the vehicle thereafter rolled back and he felt his body drop to the ground and he rolled onto the grass of the soft shoulder of the highway. He said that he was then carried to the Kingston Public Hospital.

WHETHER THE CLAIMANT WAS CONTRIBUTORILY NEGLIGENT

[51] **In Nance v British Columbia Electric Railway Co Ltd** [1951] 2 ALL ER 448 Viscount Simon, at page 450 of the judgment, gave valuable guidance on the question of contributory negligence. He said:

> *"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendants to the plaintiff to take due care, is, of course, indubitably correct. But* ***when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full****. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in* Davies v Swan Motor Co (Swansea) Ltd *to which the Chief Justice referred. This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in cases relating to running-down accidents like the present such a duty exists. The proposition can be put even more broadly.* ***Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle.*** *If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by this want of care in crossing the road, for he would owe to the plaintiff no duty to take care…" (Emphasis in the original)*

[52] In the case of **Kevin Brooks v Christopher Edwards** consolidated with **Dahlia Byfield v Christopher Edwards** 2018 JMSC Civ. 167, Thomas J observed at paragraphs 44 and 45 of her judgment that:

> *44. A Claimant will be found guilty of contributory negligence if there is evidence that he did not act as a reasonable and prudent man in circumstances where he ought reasonably to have foreseen that if he did not act as a reasonable and prudent man, he might hurt himself, taking into account the possibility of others being careless. (See Denning, L.J. in:* ***Jones v Livox Quarries Ltd.*** *- [1992] 2 Q.B. 608, at 615), Where the Defendant raises contributory negligence the burden of proof on a balance of probability rests on him (see* ***Caswell v Powell Duffryn Associated Collieries Ltd.*** *[1940] A.C. 1).*
>
> *45. Therefore in order to establish contributory negligence the Defendant must prove on a balance of probability that the Claimant is partially to be blamed for his own injuries. That is, that he failed to take actions that he could reasonably have taken, acting as a wise and prudent road user to avoid injury to himself. The failure of the Defendant to give evidence at the trial does not automatically result in him failing on this issue. Where he participates in the trial through his attorney at law by cross examination of the Claimants, the court must examine the evidence to see whether there is admission on the part of the Claimants either by direct evidence or inescapable inference of contributory negligence. Once the Claimant is found to be contributory negligent, the award in damages should be reduced based on his percentage of contribution as determined by the court.*

[53] Mrs Campbell on behalf of the first defendant made reference to the portion of the **Island Traffic Authority Road Code** which provides that a pedestrian should avoid walking in the roadway with his back turned to traffic, that he/she should use the sidewalk and footpaths where they exist and walk on the side of the road facing traffic. Further, he should ensure that he can see vehicles before walking on the roadway.

[54] Mrs Campbell also submitted that by his own admission, the claimant stated that he was on the asphalted surface of the roadway with his back towards the first defendant's oncoming vehicle.

[55] Counsel then referred to **Qamili v Hily** [2009] EWCA Civ 1625, where the court held that it is possible that even a complete failure to observe a pedestrian on the part of a driver until the moment of impact was not in and of itself, presumptive of negligence.

[56] It was also the submission of counsel that the first defendant cannot be presumed negligent since he failed to see the claimant before the collision, as the darkness of the roadway and the unexpected presence of the claimant standing on the roadway in the absence of evidence that he was wearing brightly coloured clothing, must all be taken into consideration.

[57] Reliance was placed on the case of **Foskett v Mistry** 1984 RTR 1. In that case, the claimant, a sixteen-year-old boy, ran down a parkland slope on to a busy road and collided with the nearside of the defendant's car near the windscreen, sustaining serious injury. The defendant had not seen him before he ran into the car. A driver coming in the opposite direction had seen the claimant and thought he was going to run into the road. The judge at first instance dismissed the claim. The defendant was found to be negligent, though the claimant was guilty of contributory negligence to the extent of 75%.

[58] May LJ made the observation that:

> *"The root of liability is negligence, and what is negligence depends on the facts with which you are to deal. If the possibility of the danger emerging is reasonably apparent then to take no precaution is negligent: but if the possibility of the danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions."*

[59] There is also dispute surrounding the location of the claimant. It is accepted by all that he was to the rear of the flat bed. The claimant puts his position as being to the right rear section of the flat bed motor truck, while both the first and second defendants state that he was in the middle of the right lane behind the truck. For reasons that will be explained, his precise location is in my view irrelevant.

[60] As to whether the claimant was in anyway engaged in assisting with the hoisting of the Hiace onto the flatbed, I consider that his pleaded case was simply that he watched the process of the motor bus being loaded onto the flatbed. He did not specifically say that he was asked to do so as he said in his evidence. On a balance of probabilities, I accept that he was in fact asked to watch and that he was doing so. It means that he was not simply standing idly at the back of the truck but was assisting with the process of loading the Hiace onto the flatbed. The matter of not wearing brightly coloured clothing cannot be a valid consideration since the claimant was fortuitously present at the scene. He certainly had not planned to be present there so that he could have dressed appropriately to be standing behind the flat bed on the roadway, but was there because of the accident.

[61] Whether he was standing to the left, in the middle or to the right section, the evidence accepted by this court is that the claimant was standing immediately behind the body of the flat bed and there was no part of his person extending into the roadway whether to the left or right of the rear of the vehicle. That is, he was not lateral to the flatbed; his complete person was essentially sheltered by the flat bed. The inescapable inference is that any vehicle that hit him where he stood, would inevitably have run into the rear of the flatbed. The claimant could hardly have reasonably envisaged being hit by a motor vehicle whilst he was standing in that location.

[62] It makes no practical difference in the view of this court, that his back was turned to oncoming traffic. It could not be said in the instant case that the possibility of danger was reasonably apparent. It is reasonable to say that it probably would never have occurred to a reasonable pedestrian standing in the position where the claimant stood, that he was exposed to danger from oncoming vehicular traffic.

THE APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR – THE CASE AGAINST THE FIRST DEFENDANT

[63] In **Scott v London & St Katherine Docks Co**. (1865) 150 ER 665 at 667 Earle C J formulated the doctrine in this way:

> *"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".*

[64] Mrs Riley Dunn submitted that the principle of res ipsa loquitur is applicable in the circumstances and thus there is no onus on the Claimant to prove negligence, but the onus would instead be on the first defendant/ancillary claimant to prove the absence of negligence on his part in keeping with the principle established in **Clifford Baker v The Attorney-General and Detective Corporal Lewis** (1986) 23 JLR 407.

[65] In that case, it was held that the doctrine of res ipsa loquitur stipulates that where an accident happens which by its nature is more consistent with its being caused by the negligence of the defendant than by other causes, the balance of proof shifts to the defendant to explain and to show that the accident occurred without fault on his part. In that case the plaintiff was injured when he had almost completed crossing the road. Thus it would seem that the accident was as a result of the defendant's negligence. The defendant, however, chose not to give evidence and so did not attempt to discharge the burden. The plaintiff therefore succeeded.

[66] In the present case it is, on any view, safe to say that the criteria for the applicability of the doctrine has been met relative to the case against the first defendant/ancillary claimant. The Townace was under the management and control of the first defendant/ancillary claimant. In the ordinary course of things, a vehicle traveling on the highway would not run into the rear of a stationary vehicle

which is situated on the roadway if proper care is exercised. The fact that such sequence of events as explained by the claimant occurred, is prima facie evidence that the accident occurred for want of care, even considering the first defendant's account that the roadway was dark. It required some explanation on the part of the first defendant to rebut that presumption.

[67] Mrs. Campbell, on behalf of the first defendant/ancillary claimant, submitted that a resolution of the following factual issues will lead to a determination of liability in the claim:

a) Whether the first defendant failed to keep a proper look out having regard to the condition of the road at the time of the accident?

b) Was the roadway dark at the time of the accident?

c) Did speed contribute to the accident?

d) Whether sufficient effort had been made by the first defendant to avoid the accident?

e) Contributory negligence

[68] Even if I were to be wrong in saying that the doctrine of res ipsa loquitur is applicable, the evidence which this court accepts supports a finding that there was negligence on the part of the first defendant/ancillary claimant. The first defendant/ancillary claimant says it was dark, the road was wet, it was raining heavily and so visibility was poor. It was also his evidence however, that he was travelling at 40 miles per hour. Mrs Campbell's submission on this point is that neither the claimant nor the second defendant/first ancillary defendant has provided evidence as to the speed of the first defendant/ancillary claimant.

[69] This court is mindful of the fact that in his witness statement, the first defendant/ancillary claimant estimated his speed at 40 kilometres per hour but on cross examination, he said that he was travelling at 40 miles per hour. Mrs Campbell said that although the evidence is inconsistent, this evidence must be

assessed against his general level of understanding and also other facts in the case. Counsel urged that it is clear that the first defendant/ancillary claimant does not see a distinction between kilometres per hour and miles per hour and that it is also unlikely that emerging from under a dark overpass as he said he did just before the accident, he would have been checking his speedometer to know the exact speed at which he was travelling and to recall it with precision ten years after the accident.

[70] It is true as counsel said that the first defendant/ancillary claimant is not a man of great intelligence as evidenced by his lack of understanding of the meaning of the word 'lit', for example, when it was suggested to him that the road was well lit. But surely someone of senior years who is a licenced driver must have appreciated the distinction between kilometres per hour and miles per hour.

[71] This court clearly recalls the effort made by counsel and the several opportunities given to the first defendant/ancillary claimant to correct his evidence by indicating that he was travelling at 40 kilometres and not 40 miles. He was specifically asked by his attorney at law whether it was 40 miles or 40 kilometres and he responded that it was forty miles. This is what transpired:

Q: In your witness statement at paragraph 3, you said the speed limit was 80 kilo and you were driving at 40 kilo. When asked the question by Counsel, you said 40 miles per hour. Do you see that there is a difference between kilometres per hour and miles per hour?

A: Yes

Q: Paragraph 3 of your witness statement said 40 kilos, when cross examined, you said 40 miles. Which of the answers is true?

A: Witness hesitates.

Court: Repeats question

A: 40 miles

Q: Did you check your speedometer or is this an estimation

Objection: Answer of witness is clear

Campbell: Mi Lady.

Court: Not necessary, but go ahead.

Court: Was it an estimate of your speed or did you look at speedometer

A: I was looking at it

Q: When

A: While driving

Q: While driving when

A: On Mandela Highway going to the bridge

[72] The fact that the first defendant/ancillary claimant said in his witness statement that it was 40 kilometres, does not make it truthful or correct that he was in fact travelling at 40 kilometres per hour. Further, it was counsel who asked the first defendant whether he estimated the speed, or he had looked at his speedometer. Whether he was being truthful or not when he said that he looked at the speedometer, this court accepts that his true estimate of his speed was forty miles per hour.

[73] The fact that the claimant had no broken bones and his injuries were not more severe in circumstances where the first defendant/ancillary claimant's vehicle made direct contact with him does not, as counsel urged, mean that the vehicle could not have been travelling at 40 miles per hour. Counsel also observed that there is no evidence of damage to either the first or second defendant's vehicles following the second accident. This she submitted suggests that the impact did not

result from high speed, and that the first defendant may have been travelling below his stated limit and/or that his vehicle slowed significantly when he braked.

[74] It was not the first defendant/ancillary claimant's case that he just drove up and hit the claimant without attempting to stop. Indeed, according to his pleaded case he swerved to the right, and his evidence was that he had braked but that his bus collided with the back of the truck.

[75] The second defendant/first ancillary defendant said he spoke to the first defendant/ancillary claimant who told him that because the rain was drizzling, his vision was impaired and by the time he saw the truck, he could not stop in time to avoid the collision.

[76] In evidence before me, the first defendant/ancillary claimant accepted that there were no vehicles travelling ahead of him at the time of the collision. Thus, as Mrs Riley Dunn submitted, there is no evidence that anything on the road may have impeded his sightline. Regarding the first defendant/ancillary claimant's assertion that he is not negligent because there were no markings or signal to road users that the right lane was blocked by the flatbed truck and bus, Mrs Riley Dunn opined that there is no real explanation as to how he would have been able to see cones and triangles on the ground in the dark but not a standard flatbed truck measuring 16 to 20 feet long, 8.5 feet wide and 5 feet tall (high). It must be remembered however, that cones or triangles used for such purposes are illuminated and they usually glow in darkness.

[77] Mr Palmer submitted that the area had sufficient lighting for the second defendant/first ancillary defendant to have seen the signage on his truck and positively identified it when he passed in traffic, and to have connected a chain to the undercarriage of the disabled bus to carefully hoist it up onto the flatbed truck. Counsel further submitted that there must therefore have also been sufficient lighting for the first defendant/ancillary claimant to have seen the flatbed truck and the bus so that he could have avoided the collision.

[78] This court recalls the evidence of the claimant that the roadway was well lit and that the streetlights were used to guide their actions in getting the bus loaded on the flatbed of the wrecker. However, in cross examination, he said he could not remember if that area of the road was lit. In fact, in response to Mrs Campbell, his response was that it was dark "but it was not that dark, dark," but he reverted to his original position in re - examination. The second defendant/first ancillary defendant, in his witness statement, also said that the area where he saw his truck parked was well lit by streetlights. On a balance of probabilities, I reject the evidence that the road was well lit with streetlights and accept the first defendant/ancillary claimant's evidence that the road was dark.

[79] It is also the evidence of the second defendant/first ancillary defendant that the park lights on the flatbed were on and that the flatbed had reflectors and that the Hiace which was atop had on reflectors as well as park lights on. I entertain doubts about the park lights being on the flatbed truck or the Hiace, or that the Hiace had reflectors, but accept on a balance of probabilities that the flatbed had reflectors. There was extensive cross examination as to whether there was any kind of signalling to oncoming traffic that there was an obstruction. The second defendant/first ancillary defendant accepted that there were no warning cones or triangles. I accept that the accident occurred a short distance beyond the bridge and that visibility may have also been impacted based on the location.

[80] Mr. Palmer submitted that nowhere in either the first defendant/ancillary claimant's Witness Statement or the Amended Defence is there any reference to his having headlights or any other lights on his vehicle. I however accept his evidence in cross examination as well as the claimant's evidence that the headlights of the first defendant/ancillary claimant's vehicle were on.

[81] Even though my finding is that reflectors may have been on the flatbed, the additional illumination from cones or triangles or some other warning device more probable than not, would have made a difference. The absence of that additional illumination however, did not excuse the first defendant/ancillary claimant totally

since the headlights from his own vehicle, would have provided illumination enabling him to see objects on the roadway.

[82] Regarding the weather, Mrs Campbell submitted that while the claimant and second defendant/first ancillary defendant allege that it was only drizzling, the first defendant/ancillary claimant gave evidence that it was raining heavily at the time of the accident. She submitted that this issue may be resolved having regard to the fact that there is evidence that the roadway was not only wet but that it had water on it, which supports the evidence of heavy rain. I entertain doubts that it was raining heavily. If it was, then it meant that was one additional reason why the first defendant/ancillary claimant ought to have been driving at a much slower speed than he admitted. It goes without saying that an added element of danger exists when one is driving in heavy rainfall since visibility would also be affected.

[83] The evidence supports a finding that the first defendant/ancillary claimant was negligent in failing to keep a proper lookout, in travelling at a speed above what was reasonable given the condition of the roadway as he recalls existed on the night of the accident and also by failing to swerve or otherwise manage the vehicle in such a manner so that the collision could have been avoided.

LIABILITY OF THE SECOND AND THIRD DEFENDANTS – THE FIRST COLLISION.

[84] The claimant said that on the occasion of the first collision, the road was well lit and it was drizzling lightly. It is the evidence of the claimant that he saw the wrecker driving in front of the motor bus. He said that the wrecker was only a few feet in front of the bus and the bus was travelling 50 to 60 miles per hour. He said that suddenly and without warning, the wrecker came to a stop. He said that Mr Waite, the driver of the Hiace bus, jammed on the brakes and turned the steering wheel but the bus began to slide and slammed right into the back of the wrecker. The third defendant did not participate in the trial and so we are left with the claimant's account. It is of course open to the court to examine the claimant's account and

determine if it discloses negligent conduct on the part of the third defendant and by extension, the second defendant.

[85] Mr. Palmer, on behalf of the second defendant, urged that the questions for the court to consider are: whether the driver of the bus was keeping a safe distance between the wrecker and his bus, what is to be regarded as “only a few feet”, as the claimant described the distance between the bus and the wrecker, and whether the speed of 50-60 miles per hour was a safe speed for a motor bus on a wet road.

[86] Counsel rightly submitted that because the driver of a vehicle travelling ahead stops suddenly, that fact may not necessarily be sufficient to establish negligence. He further urged that the driver of the vehicle following, must show that he was travelling at a safe distance behind the leading vehicle, and as such was able to cope with the exigencies of the road, including sudden stopping. Furthermore, that if the driver of the leading vehicle stopped as a matter of emergency, the following vehicle, if it was being driven at a safe distance, should also be able to cope with the emergency.

[87] ***Section 95(3)*** of the ***Road Traffic Act***, then in force, makes it clear that a failure on the part of any road user to observe the road code may be relied upon as tending to establish liability in civil proceedings. ***Part 2*** of the ***Road Code (1987)***, speaks to motorists not exceeding the speed limit, and not travelling too close to the vehicle in front and always being able to stop one’s vehicle well within a safe distance.

[88] The case of **Clift v Andrew Hawes and Motor Insurers Bureau** [1999] EWCA Civ J1124-3, demonstrates that where there is a collision to the rear of a motorist’s vehicle by another motorist, the question of where negligence lies will be largely dependent on the precise circumstances leading up to the collision.

[89] In that case, there was a four-vehicle collision. The first collision occurred when a car hit a taxi, then hit the central reservation of the road, somersaulted, and landed. There was debris left on the roadway. Another car which was travelling 55 to 60

miles per hour drove over a piece of metal. The metal damaged the vehicle. Another car travelling 60 to 70 miles per hour slowed considerably when the driver saw the debris. The claimant, a motor cyclist collided into the rear of this vehicle.

[90] The claimant was found to be partly at fault in failing to stop before colliding with the last-mentioned car. He did not maintain enough distance behind that car. The first defendant whose car had overturned was found to be negligent and liable for all the loss and damage that occurred. There was no liability on part of the driver of the car that had driven over the metal nor on the part of the driver who slowed and into whose rear the claimant cyclist collided.

[91] This court is satisfied that the claimant in the instant case has a fair idea of distances, as his estimate of a distance of 20 feet as given in relation to another aspect of the case, seemed quite accurate. Thus when he said in his witness statement that the bus was only a few feet from the flatbed, the necessary inference is that it was close. Given his estimate of the speed of the Hiace bus, then its driver was not maintaining a safe distance behind the flatbed.

[92] Since it is not as of course that because a motorist hits another motorist from the back that he is negligent, it follows that even if fault is to be ascribed to him, it may not be great in proportion to that which is to be ascribed to the driver following closely behind. In this case where the distance was too close, the speed was fast given the uncontroverted evidence that the road was wet and it was raining, compounded by the fact that it was already night fall, the inference of negligence on the part of the driver of the Hiace, is inescapable. Further, the claimant's evidence that the Hiace bus slid when the driver braked, is quite instructive. It was the driver's act of following too closely that required a very sudden and apparently forceful slamming of the brakes that would have led to that sliding motion.

[93] The narrative as given by the claimant does not necessarily lead to an inference of negligence on the part of the third defendant/second ancillary defendant. He however, has chosen not to participate in this trial, hence there is no explanation as to why he may have stopped suddenly. It cannot be assumed that he stopped

as a matter of emergency. That would be a matter of evidence. It is true that the claimant's evidence was that the driver the third defendant/second ancillary defendant apologised to them and explained that he had stepped on his brake suddenly to avoid hitting a vehicle in front of him. It was open to him to appear in the proceedings and explain his manoeuvre. It is arguable that statement is admissible as to the truth of its contents, but he did not attend to be cross examined upon his statement and no explanation has been offered for his absence, let alone a good one. In the absence of a full and acceptable explanation for his manoeuvre, there is some negligence to be ascribed to him for the sudden stopping. In any event, the injury to the claimant as a consequence of that collision was minimal or even totally inconsequential. He said that he hit his knee. Neither in his particulars of claim nor in any of the medical reports was there reference to the knee injury. It was nevertheless that first collision which led to the second in which the claimant sustained his injuries.

LIABILITY OF THE SECOND AND THIRD DEFENDANTS – THE SECOND COLLISION.

[94] It was the claimant's submission that in determining whether the second and third defendants/first and second ancillary defendants had done all they could in the circumstance to discharge their duty of care to other road users when lifting the damaged bus, the court should find that the second defendant's agent (the third defendant), was negligent in the manner in which he handled the flatbed truck, into which the bus in which the claimant was a passenger collided. I have already addressed that matter and take the view that the far greater degree of negligence lies with the driver of the Hiace bus, but he is not a party to this case.

[95] Mrs Riley Dunn submitted that when the flatbed truck was parked in the right lane of the highway, it became an obstruction to other users, and that it was the second defendant/first ancillary defendant's duty to do all that was possible to ensure that

sufficient forms of indicators were on the flatbed truck or surrounding it to warn all users on the road of its presence.

[96] Mrs Riley Dunn submitted that though the claimant maintains that the area was sufficiently illuminated so that the first defendant/ancillary claimant could see the flatbed truck prior to the collision, it can be argued that had warning cones, triangles or anything that could have further warned users of the highway of the accident been present, then the second accident would not have occurred and the claimant would not have been injured. This argument, it may be noted, is in conflict with counsel's own submission referenced earlier at paragraph [75], although I accept that warning devices might have made a difference.

[97] Counsel asked the court to find that the second defendant/first ancillary defendant managed his flatbed truck in a manner that caused it to constitute a danger to other road users and as such contributed to the second collision occurring.

[98] Counsel submitted that on cross examination, the second defendant/first ancillary defendant admitted that when he came upon the accident scene, his driver had not put out any safety triangles or cones to delineate the accident scene and that when he came upon the scene, he did not put up any either, even though from his testimony, he believed that his flatbed truck had these items stored in it. Counsel cited dictum from **Clift v Andrew Hawes and Motor Insurers Bureau** (supra) to the following effect:

> *"If a driver so negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper lookout, but not those who deliberately or recklessly drive into the obstruction, then the first driver's negligence may be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction collides with it or with some other vehicle or some other person."*

[99] Since it has been determined that there was negligence on the part of the second and third defendant in the flatbed obstructing the highway, then it means that the degree of negligence to be ascribed to the second and third defendants/first and

second ancillary defendant's must increase in circumstances where it has been determined that there was an omission to ensure that there was sufficient warning to oncoming traffic as to the presence of the flatbed, since its presence was a significant factor in the causation of a subsequent accident.

[100] Mrs Campbell adverted to the second defendant/first ancillary defendant's evidence where he said that he heard the screeching of brakes coming, presumably from the first defendant/ancillary claimant's vehicle, he said all he 'saw was two sets of lights coming towards me in the right lane'. Counsel submitted that the second defendant/first ancillary defendant was unable to identify a vehicle and only saw lights and that this could only have been the case if the area was dark.

[101] Counsel submitted that the first defendant/ancillary claimant is the only witness whose evidence is consistent throughout, that the area was dark at the time of the accident as he stated while there was in fact a streetlight, it was not working and that there were no reflectors on the truck to alert vehicles to its presence along the roadway

[102] Mrs Campbell also submitted that the effect of the darkness along the road was that the first defendant/ancillary claimant was unable to see the claimant on the asphalted surface of the road or the truck in sufficient time to avoid a collision and that it should be noted that he did see the truck which is why he braked to avoid a collision.

[103] I do not accept that there was a layby that could have facilitated the second and third defendants/first and second ancillary defendant's removing the flatbed from the roadway. I accept the second defendant/first ancillary defendant's evidence that there was an area about two feet wide. Regarding the claimant's evidence that at that location is a little track that is cleared out that facilitates one making a right turn going back in the direction of Spanish Town, I did not understand the area described to be a proper turn around road, but instead, a makeshift driving path which would not have facilitated the flatbed.

[104] Mr Palmer relied on the cases of **Moore v Maxwell of Ensworth Ltd** (1968) 2 AER 779, and **Parish v Judd** [1960] 1 WLR 867 regarding the failure of the second defendant/first ancillary defendant to put warning signals and flashing lights around the wrecker. In **Moore v Maxwell of Ensworth Ltd** Harman LJ stated at p.781:

> *"It is said that the Lorry owners should have provided flashing lamps or torches for their employee and his mate to stand at the rear of the vehicle and wave them or keep them flashing so as to call attention to the fact that the Lorry was there; but I do not think that is itself evidence of negligence. There was no evidence that the provision of such flash-lamps or anyhow was when the accident happened, prevalent or even known and in the absence of any evidence that it was customary or that it was the proper thing to do, I cannot think that that is evidence of negligence."*

[105] Further, Mr Palmer relied on the court's finding on appeal in **Moore vs Maxwell of Ensworth Ltd** (supra), that there was a street light some 700 yards ahead of where the lorry was parked and there was sufficient illumination of the area for the driver of the motor car, which collided into the rear of the lorry, to have seen the lorry if he was driving with a proper lookout.

[106] In **Parish v Judd** [1960] 1 WLR 867, the issue of whether a motor vehicle parked on a roadway without any light poses a danger to other motorists arose. Mr Palmer relied on the finding that a street lamp six yards from the vehicle sufficiently illuminated the roadway and the defendant's motor car and therefore the defendant was not liable in negligence. I have already indicated my findings regarding street lighting, the presence of reflectors and park lights as well as the absence of any warning device in the vicinity at paragraphs [79] to [81].

[107] It cannot be said that the use of cones or triangles was not known to the second and third defendants/first and second ancillary defendants. In fact, the second defendant/first ancillary defendant, when cross examined by Mrs Campbell, said that his truck should have cones or triangles but he wasn't sure if they were in the truck at the time. Thus in this instance, there is in fact evidence that warning

devices are known and often used in such circumstances and that it might have been prudent to use them.

[108] My findings that no type of warning device was used, that the area was not well lit and that there was, more probable than not, no park light on the flat bed and probably no reflector or park light on the Hiace bus, means that there was some negligence on the part of the second and third defendants/first and second ancillary defendants.

APPORTIONING LIABILITY - THE ANCILLARY CLAIM

[109] The case of **Sabir v Nana Osei-Kwabena** [2015] EWCA Civ 1213 involved a scenario where a pedestrian was struck by the defendant driver when almost four metres across the carriageway. The Court of Appeal considered what was the appropriate balance to strike between causative potency and blameworthiness when apportioning liability for a collision between a motorist and a pedestrian. Although the case involved a pedestrian and a motorist, there is no reason why the principles emanating from that case cannot, as far as is practicable, be applicable as between two motorists.

[110] In that case, the court confirmed the approach that there are two aspects to apportioning liability between the claimant and defendant, namely the respective causative potency of what they have done, and their respective blameworthiness. Further, it was said that the 'destructive capacity of a driven car comes into both aspects of the evaluation'.

[111] As indicated before, this court ascribes far less blame to the second and third defendants/first and second ancillary defendants in respect of the first collision than may be ascribed to the driver of the Hiace bus in which the claimant had been a passenger. While the claimant did not bring a claim against the driver of the Hiace bus, it was, open to the second and third defendants/first and second ancillary defendants to join him as an ancillary defendant. They did not.

[112] The question remains, how is liability to be apportioned between the first defendant/ancillary claimant on the one hand and the second and third defendants/first and second ancillary defendants on the other hand for the claimant's injuries. The answer to that question also addresses the ancillary claim. The failure to put warning devices in my view ought to carry less weight than the failure to drive at a reasonable speed, having regard to the condition of the road, the state of the lighting, and visibility generally, given that it was raining.

[113] The first defendant has asked that judgment be entered against the third defendant/second ancillary defendant on the basis of his non participation in the trial. Essentially, that is a judgment by default. Judgment by default may in instances be entered as an administrative act. That would not be the scenario in this instance, since there is evidence, albeit none from the third defendant/second ancillary defendant, which may form the basis for a decision in relation to him. It would therefore be unwise to determine that because of his nonparticipation, there should be full indemnity adverse to him as far as the first defendant/ancillary claimant is concerned.

[114] 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 the claimant cannot 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.

[115] In this instance, the negligence of the first defendant/ancillary claimant is distinct and separate from that of the second and third defendants/ first and second ancillary defendants. It is fair to say that this is a case of several tortfeasors as far as the first defendant/ancillary claimant on the one hand and the second and third defendants/ancillary defendants on the other hand, are concerned. Each side should bear his portion of the damages in accordance with the degree of

negligence assigned. Having regard to that finding, there would be no basis for making an order in favour of the first defendant/ancillary claimant on the ancillary claim.

[116] In that regard, liability to the claimant is to be apportioned as to 60% to the first defendant/ancillary claimant and 40% to the second and third defendants/first and second ancillary defendants. This of course does not mean that the first defendant has lost on the ancillary claim. The claim was brought jointly and severally against the defendants. The fact that 100% liability was not established against him, means that for practically, he has partially succeeded on the ancillary claim.

THE CLAIM FOR SPECIAL DAMAGES

[117] Regarding his claim for special damages, the claimant tendered in evidence an invoice from the Kingston Public Hospital (KPH) dated December 14, 2007 in the sum of $9,600.00, receipts from KPH dated January 4, 2008 in the sum of $300.00 and February 25, 2008 in the sum of $1,000.00, receipt from Meadowbrook Pharmacy dated December 14, 2007 in the sum of $2,245.57 and receipt from Ministry of National Security JCF Finance Branch dated January 9, 2008 in the sum of $1,000.00.

[118] The sums claimed in respect of special damages are $1,000.00 to obtain police report, $9,600.00 for KPH, $4,432.89 for prescription drugs, $6,000.00 to obtain medical reports, $300.00 for outpatient clinic visit, $22,100.00 for office visits and $40,000.00 for travelling.

[119] The first defendant does not dispute that the claimant would be entitled to recover the items of special damages, with the exception of the sums claimed for loss of earnings and the $40,000 for travelling expenses. This latter sum was not really addressed by the first defendant. The second defendant did not dispute the claim for special damages.

[120] Mrs Riley Dunn asked the court to bear in mind the location of the claimant's residence in Red Hills and the evidence that he visited the doctor once monthly for 6 months as well as the Kingston Public Hospital as an outpatient and that he is seeking to recover $5,000 per trip via taxi. This court does not view the sum claimed as reasonable. He has not produced tangible proof of that expenditure and he will be awarded $1,000 per trip which would be a sufficient sum to cover the cost of public transportation. That is a total of $8,000.

[121] Mr. Silvera said that he was unable to work until August of 2008 and that by then his employer had replaced him. The claimant's evidence regarding his period of incapacity is rejected. It is however, the irrefutable evidence that he was hospitalized for three days. Further, Dr Davis advised two weeks' rest upon the claimant's visit to him on December 17. It is a reasonable inference to draw that the claimant was not able to work between the accident and the 17th of December. The claimant has not presented any further medical evidence to support his assertion of his inability to work up until August. The claimant is at minimum entitled to lost wages for that three weeks' period. He will be awarded lost wages for the period of one month.

[122] The claimant presented two letters indicating his employment history and status as well as his earnings. One letter came from the manager of Flava Unit Incorporation which indicates that the claimant was employed as a disc jockey and earned $6,000 per week.

[123] The other letter came from one Fredburn Myers indicating that the claimant was employed on a contract basis and earned on average $10,000 weekly. The claimant sought to explain that he worked at both jobs during the same period. According to him, he worked with both employers on a full time basis and his employment with Mr Myers was for 5 or 7 days each week. He also stated that his employment with Mr Reid (Flava Unit) was at night time. The claimant's evidence in this regard lacks full explanation. This court is hard pressed to accept that the claimant carried out his job as a DJ 5 or 7 days each week whilst he was also

working at his day time job. It is difficult to accept that the claimant always worked both day and night. The claimant has failed to give acceptable evidence as to the frequency with which he carried out his night time job. Having rejected his evidence as to the frequency with which he carried out that activity, this court cannot speculate and he will therefore not recover any sums based on such employment. Since the court is satisfied that he was employed, he will be awarded the income he would have earned from one source only, which is his daytime employment. He will receive lost wages for a period of one month. That sum amounts to 10,000 x 4 weeks, that is, $40,000 for lost wages.

THE CLAIM FOR GENERAL DAMAGES

[124] Mr Silvera stated that immediately after the accident, he felt a sharp pain in his chest, especially when he coughed or sneezed. He said that his neck hurt so badly that for two days he could hardly move around and he had cuts and bruises to his face and hands. He said that he was admitted in the Kingston Public Hospital for three days.

[125] The claimant also itemized the particulars of injuries as follows:

a) Soft tissue-abrasions and lacerations

b) Pleuritic chest pains

c) Difficulty breathing

d) Chest, neck and back pains

[126] The claimant tendered into evidence two medical reports. The first is dated the 18th of January 2008 prepared by Dr. Carlos Wilson and the second is dated the 10th November 2009 prepared by Dr. Jeffery Davis.

[127] Based on the medical report of Dr. Carlos Wilson dated January 18, 2008, Mr. Silvera presented to the Kingston Public Hospital on December 12, 2007. He had no loss of consciousness and complained of pain in his right shoulder and chest. Upon examination, the doctor found abrasions and superficial lacerations to the right chest, left face, right leg and foot. Upon investigations, his x-rays and complete blood count were normal. He was diagnosed with soft tissue trauma-abrasions and lacerations, his treatment included analgesics, dressings and observation and he was discharged on December 14, 2007 to return for a surgical Out Patient Department appointment in three weeks' time.

[128] Based on the medical report of Dr. Jeffery Davis dated November 10, 2009, the claimant presented to him on the 17th December 2007 with complaint of mid and lower back pain and chest pain. The claimant reported that he was involved in a motor vehicle accident on the 12th December 2007 and was hospitalised for three days at Kingston Public Hospital for injuries to the chest, face, right leg and foot. The claimant said that he was taking analgesics however he continued to have pleuritic chest pain and lower back pain.

[129] Dr Davis said that his examination revealed a young man in moderate painful distress, shallow breathing because of chest pain, left tender para lumbar haematoma and dressings to the right side of the anterior chest, left face, right leg and foot. He was given cataflam, mydocalm and his dressings changed and advised two weeks rest.

[130] Dr. Davis also stated that Mr. Silvera was seen for review subsequently, approximately once monthly for a six-month period. It is noted however, that Mr. Silvera's evidence contained in his witness statement is that he visited Dr Davis initially every week for two weeks. Dr Davis further stated that Mr. Silvera's lower back symptoms had resolved completely after three months however he continued to experience pleuritic chest pain which rendered him unable to speak with much force and to sing.

[131] Dr. Davis' report indicated that his final review of Mr Silvera was the 25th July 2008 at which time Mr Silvera had regained full (premorbid) lung capacity and chest expansion without pain. Further he said Mr. Silvera was advised that he could resume normal job in entertainment as there was no indication that his injuries would result in later complications.

[132] The claimant sought to rely on a number of cases regarding the quantum of general damages. Those cases will now be looked at.

[133] In **Harris Morgan v Shane Henry**, Claim No. 2008 HCV 05002, the Claimant suffered blunt trauma to the chest. He also had an abrasion of less than one centimetre over the 7th rib in the mic clavicular line on the right side. He was treated with analgesics and the abrasion was cleaned and dressed. An award of Eight Hundred Fifty Thousand Dollars ($850,000) was made in October 2009 which updates to the sum of $1,913,628.31 using the CPI of 127.2 for January of 2023.

[134] In **Cherry Dixon-Hall v Jamaica Grande Limited** SCCA 26/2007 page 217 Volume 6 of Personal Injury Awards compiled by Ursula Khan (hereinafter referred to as "Khan"), the appellant slipped and fell on a wet floor at the Defendant's premises. The injuries that were held to be connected with the fall are moderate pain to the elbow, severe pain of the chest that was exacerbated by the slightest movements, deep breathing and cough, much like the complaints made by the claimant at bar. Though there was a fracture of the rib, it was undisplaced and not seen as serious as the treatment offered was panadeine, cataflam and bed rest. Within two (2) months it was estimated that the appellant's symptoms would be fully resolved. The sum awarded was $650,000.00 which updates to $1,580,879.54.

[135] In **Walford, Bruce v Fullerton, Garnett and Gordon, Rohan** [2012] JMSC Civil 190, the Claimant suffered from lower back pain with abrasion to the gluteal region, he was treated with analgesics and muscle relaxants and to do physiotherapy of his lower back. The Claimant was unable to work for (two) 2 weeks. An award of

$700,000 was made on the 13th of December 2012 which updates to the sum of $ 1,103,345.72

[136] In **Anna Gayle Anderson v Andrew O'Meally** 2005HCV02551, unreported, delivered April 2008 the Claimant had lower back pain and some pain in the neck and had significant pain at the time she was seen. She was assessed as having soft tissue injury to the back and was referred to a physiotherapist but did not return for reassessment. She was awarded $600,000.00 which updates to $1,234,615.38. - April CPI

[137] The claimant also relied on the case of **Garfield Scott v Donovan Cheddesingh and Phillip Campbell** Suit C.L. 1995, S 217, reported at page 276 of Volume 5, Khan. In that case the Plaintiff suffered contusions to his right shoulder and right hip, puncture wound to his left forearm, pains across his shoulder and waist and tenderness to his knees. He was disabled for forty-four (44) days. In March of 1996 the Court awarded him $300,000.00 for pain and suffering. By inflating that figure to the current consumer price index (CPI) that award is now worth $2,561,073.83.

[138] The first defendant relied on the cases of **Gilbert McLeod v Keith Lemard**, page 205, Volume 5, Khan and **Vincent Dixon v Inspector Alrick Reid and the Attorney General for Jamaica,** page 208 Volume 4, Khan. In the former case, the claimant suffered loss of consciousness, pain and tenderness to the right side of his chest, lacerations to his right foot, forehead and multiple abrasions to his right thigh, knee and leg. He was hospitalized for two days. His award for pain and suffering and loss of amenities is said to update to the sum of $858,389.26.

[139] In **Vincent Dixon** (supra), the claimant suffered multiple contusions to the chest, haematoma to the left temporal area, malar area, left clavicle, left mandibular area and scalp. The award for pain and suffering and loss of amenities is said to update to $991,472.

[140] The first defendant has evidently chosen to rely on cases in which the awards may be considered particularly low given the injuries said to have been sustained by

the respective claimants. The claimant's injuries most nearly resemble the injuries sustained by the claimant in **Gilbert McLeod v Keith Lemard** (supra), although there was no loss of consciousness on the part of the present claimant. **Harris Morgan v Shane Henry** (supra), is also useful for comparison, although it may be said that the instant claimant had far more lacerations. The court is guided by all the cases referred to by the parties. I believe in the circumstances a reasonable award for pain and suffering and loss of amenities is $2,600,000.

CONCLUSION

[141] This court finds on a balance of probabilities that the first collision was in large measure due to the negligence of the driver of the Toyota Hiace. He is not a party to this claim.

[142] Regarding the second collision, it is the finding of this court that there is no contributory negligence on the part of the claimant. Ultimately the liability is to be apportioned between the first, second and third defendants.

[143] The liability of the first defendant/ancillary claimant is greater than that of the second and third defendants/first and second ancillary defendants. The second defendant/first ancillary defendant, the owner of the motor truck, is liable by way of vicarious liability as the third defendant/second ancillary defendant was at all material times operating the motor truck as his agent and/or servant. As he was present and participating at the time of the second collision his liability there would be personal and not only vicarious.

[144] Accordingly, liability is apportioned 60% to the first defendant/ancillary claimant with 40% apportioned to the second and third defendants/first and second ancillary defendants. The first defendant/ancillary claimant is therefore entitled to a contribution of 40 percent from the ancillary defendants on his ancillary claim. In this case, however, the ancillary claim was for an indemnity only. There was no claim to damages by the first defendant/ancillary claimant against the second and

third defendants/first and second ancillary defendants. Therefore, it suffices to award damages to the claimant against the defendants on a 60 to 40 basis from the second and third defendants.

[145] The claimant is entitled to special damages to include a sum for loss of earnings as well as a sum of travelling expenses, albeit he is not entitled to the total sum claimed under those heads. The claimant is also entitled to general damages.

DISPOSITION

[146] In the result, the court makes the following orders:

With regard to the claim:

1. Judgment on the claim in favour of the claimant against the first, second and third defendants but apportioned as to 60 percent to the first defendant and 40 percent to the second and third defendants.

2. General damages assessed at a total of $2,600,000.00.

    a) The first defendant/ancillary claimant is liable for 60 percent being $1,560,000 with interest at the rate of 3% per annum from December 20, 2010, (the date of service of the claim form) until judgment, being 60% of the sum to be awarded in this claim.

    b) The second and/or third defendants/first and second ancillary defendants are liable for the sum of $1,040,000 with interest at the rate of 3% per annum from December 20, 2010, (the date of service of the claim form) until judgment, being 40% of the sum to be awarded in this claim.

3. Special damages assessed in the total of $51,432.89.

a) The first defendant/ancillary claimant is liable for the sum of $ 30,859.73 with interest at the rate of 3% per annum from December 12, 2007 until judgment, being 60% of the sum to be awarded in this claim.

b) The second and/or third defendants/first and second ancillary defendants are liable in the sum of $ 20,573.16 with interest at the rate of 3% per annum from December 12, 2007 until judgment, being 40% of the sum to be awarded in this claim

4. Lost Earnings in the total of $ $40,000.00.

a) The first defendant/ancillary claimant is liable in the sum of $24,000.00 with no interest, being 60% of the sum to be awarded in this claim.

b) The second and/or third defendants/first and second ancillary defendants are liable for the sum of $16,000.00 with no interest, being 40% of the sum to be awarded in this claim.

5. The claimant is awarded costs against the first, second and/or third defendants in the ratio 60/40. Such costs are to be taxed if not sooner agreed.

With regard to the ancillary claim:

6. The ancillary claimant is not entitled to an indemnity or contribution from the ancillary defendants.

7. The ancillary claimant is entitled to 40% of his costs on the ancillary claim against the ancillary defendants.

.....
A Pettigrew Collins
Puisne Judge