[2015] JMSC Civ. 255

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 00788

BETWEEN	**KERN GARRETT FRANCIS**	**CLAIMANT**
A N D	**PETER ALEXANDER DEPASS**	**DEFENDANT**
A N D	**PETER ALEXANDER DEPASS**	**ANCILLARY CLAIMANT**
A N D	**KERN GARRETT FRANCIS**	**1ST ANCILLARY DEFENDANT**
A N D	**MONIQUE WILLIAMS**	**2ND ANCILLARY DEFENDANT**

Lascine Wisdom-Barnett for the Claimant/1st Ancillary Defendant and the 2nd Ancillary Defendant

Racquel Dunbar instructed by Dunbar and Co. for the Defendant/Ancillary Claimant

Heard: September 19 & 20 and October 10, 2013 and November 5, 2015

TRAFFIC ACCIDENT – TWO VEHICLES APPROACHING SEPARATE STOP SIGNS AT SEPARATE INTERSECTIONS – CLAIM FOR DAMAGES FOR NEGLIGENCE – ANCILLARY CLAIM FOR DAMAGES FOR NEGLIGENCE – DUTY OF DRIVER OF VEHICLE WHEN VEHICLE BEING DRIVEN BY THAT DRIVER HAS RIGHT OF WAY – COUNTERCLAIM AND ANCILLARY CLAIM – WHETHER COUNTERCLAIM AND ANCILLARY CLAIM SHOULD BOTH BE COMPRISED IN A SINGLE COURT DOCUMENT

ANDERSON, K. J

[1] This matter pertains to a claim, counterclaim and ancillary claim, the latter-mentioned two (2) court documents having been filed by the defendant, whereas, the claim was initiated by the claimant.

[2] Those court documents were filed as a consequence of a traffic accident which occurred on January 1, 2010, at the intersection of Paddington Terrace and Liguanea Avenue, in the parish of Saint Andrew, Kingston 6. At the time when the accident occurred, the claimant was the owner of a 2005 Toyota Hilux Surf motor vehicle with licence plate no. 5934 EZ, which was then being driven by Monique Williams who was, in so having driven said vehicle at that time, as had been specifically alleged by the claimant, functioning as the claimant's servant/agent and duly authorized driver thereof.

[3] At the time of the said accident, the other vehicle involved in the accident was a 2003 Audi Sedan motor vehicle, with licence plate no. 9507 FC, which was then being driven by its owner, who is the defendant.

[4] Arising from that accident, the claimant has claimed for special damages in the sum of $510,703.00, interest and costs. The defendant has, for his part, filed a counterclaim and ancillary claim, as against the claimant and the 2nd ancillary defendant. By means of that counterclaim and ancillary claim, the defendant has sought, as against Kern Francis and Monique Williams, respectively, damages, inclusive of special damages, interest and costs.

[5] It has been alleged by each driver and owner, that the said accident was either wholly caused or contributed to, by the negligence of the driver of the other vehicle.

[6] This court, before it addresses in detail, the allegations and counter-allegations of the parties, wishes to make two (2) legal points in this judgment. Firstly, there was no need for the defendant to have filed a counterclaim and ancillary claim, as two separate documents. This was unnecessary because, with our **Civil Procedure Rules (CPR)** the 'phrase – 'counterclaim' has been substituted by the phrase – 'ancillary claim.' The

defendant's ancillary claim, as a single document, could properly have made and enabled the defendant to pursue his claim against the claimant, as well as, against the driver of the claimant's vehicle at the material time. That this is so, is made clear by the definition of the term – 'ancillary claim,' as set out in **rule 18.1 (2) of the CPR.**

[7] **Rule 18.1 (2) of the CPR** states that:

> *'An 'ancillary claim' is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and include –*
> *(a) a counterclaim by a defendant against the claimant or against the claimant and some other person,*
>
> *(b) a claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and*
>
> *(c) a claim by an ancillary defendant against any other person, (whether or not already a party).'*

It is very clear from the wording of **rule 18.1 (2) of the CPR**, that it was unnecessary for the defendant to have filed a counterclaim and ancillary claim. His ancillary claim could and should have included his claim against the claimant, as well as his claim against Monique Williams. That this is so, should have been recognized by the parties' counsel and by this court, prior to trial, at case management. The failure to do so, has caused the parties to waste time and costs.

[8] The second legal point is this: This court has noted with interest, that in neither the defendant's counterclaim, nor ancillary claim, did he aver that at the material time, the claimant's vehicle was being driven by the servant or agent of the claimant. That omission is interesting, from a legal standpoint, because it is now to be taken as accepted law in this jurisdiction, that the mere driving of a vehicle which is owned by another, does not create, in and of itself, a presumption that at the time when that vehicle was being driven, it was being driven by a servant or agent of that vehicle's owner. The case of **Launchbury v Morgans**, as adjudicated on by England's House of Lords – [1973] AC 127, has laid down that if the owner of a vehicle is to be held liable

for the negligence of the borrower or user of that vehicle, it is necessary that the owner should have some interest in the purpose (s) for which the vehicle was being used. That interest must be specific and identifiable. As such, there no longer is accepted in this jurisdiction, a presumption of agency, merely from the driving of a vehicle which is owned by another. That though, used to be the law in this jurisdiction. See: **Brown v Stamp and others** [1968] 13 WIR 146 and **Rambarran v Gurrucharran** [1970] 1 WLR 556 (P.C).

[9] As I understand the law now though, that presumption no longer applies. The **Launchbury v Morgans** case has brought that presumption to an end. There is now a duty on a claimant to place before the court, a positive averment and evidence in support, as to the driver of the relevant vehicle having been driving same, as the servant or agent of the owner thereof. As Lord Wilberforce stated in **Launchbury v Morgans** (*op.cit.*), in reference to the use by the driver, of another person's vehicle – *'it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty.'* (At 135) See: **Norwood v Navan** [1981] R.T.R. 457.

[10] In this case, there was no averment made by the defendant, in his statement of case, that at the material time the vehicle was being driven by Monique Williams, as the claimant's servant or agent, nor was there any averment made that at the material time the vehicle was being used by Monique Williams for any specific purpose, in which the claimant had a specific interest. That being so, the defendant may very well have been unable to prove his claim against the claimant. Fortunately for the defendant in that respect though, in the claimant's statement of case, it was averred that at the material time, Monique Williams was driving the claimant's vehicle as the servant or agent of the owner and with his specific authorization. Of course, that averment has not been disputed by the defendant.

[11] In the circumstances, this court has no hesitation in concluding that, at the material time, the driver of the claimant's vehicle – Monique Williams, was driving same, as the owner's agent. Accordingly, if she is held liable to the defendant, for the vehicle

accident, it follows inexorably, that the claimant, as the owner of the vehicle which she had been driving at the time of the accident, must also be held jointly and severally liable to the defendant, for same.

[12] This court will treat with the defendant's counterclaim and ancillary claim accordingly. Additionally, hereafter, this court will treat with the defendant's counterclaim and ancillary claim as constituting, collectively, a single claim against the claimant, for damages for negligence. As such, the defendant's counterclaim and ancillary claim will hereafter, in these reasons for judgment, be referred to either as, 'the defendant's claim' or 'his claim.'

The factual background

[13] In this matter, three (3) witnesses testified on the claimant's behalf namely: The claimant, Monique Williams (hereinafter referred to as, 'Ms. Williams') and Norman Orane Myrie (hereinafter referred to as 'Mr. Myrie'). It was only the defendant who testified on his own behalf. Whilst this may, at first glance, appear to be an 'inequality of arms' from an evidentiary standpoint, that inequality is not nearly as stark, from a quality standpoint, as it may be seen as, at first glance. This is so because the claimant was not, in any respect, a witness to the relevant accident and secondly, Mr. Myrie's evidence as to how the accident occurred was limited in certain important respects.

[14] There were ten (10) documents that were, by agreement of the parties, entered into evidence at trial and included amongst those documents are a police accident report, invoices, damage assessment reports, vehicle repair bill, radiology report – with the exception of that which is set out in that report, as 'indications' and a receipt – except to the extent that such receipt refers to the sum of $2,000.00.

[15] As regards the receipt which was so admitted into evidence and which is dated, '1/8/10,' this court had made it clear, when same was being admitted into evidence by consent, that the parties would be required to make submissions as regards this receipt in particular, in the event that anyone other than Mr. Depass is, to any extent,

determined by this court as being liable, or partially liable for the defendant's loss/injuries. Those submissions were presented to this court, as part and parcel of the parties' respective written closing submissions and have been duly considered by this court.

[16] Since the claimant was not in his vehicle when the accident occurred and thus suffered no injury as a consequence thereof, he has only made claim for special damages in the sum of $510,703.00, which is the sum that he paid to repair his vehicle. His final bill from Nadmic Motors, in that respect, was admitted into evidence. His vehicle was significantly damaged to its left front section, as a consequence of the accident. A loss adjuster's report pertaining to the monetary value of the damage to the claimant's vehicle, was admitted into evidence. In addition, an estimate of the repair cost for same, was admitted into evidence. That estimate was provided by B & H Auto. The repair cost was assessed as $452,014.40, while the loss adjusters' report, had estimated the repair cost to be: $424,348.33.

[17] This court will rely on the loss adjusters' report, for the purpose of assessing the financial loss suffered by the claimant, as a consequence of the accident. The loss adjusters' report can properly be viewed as having been prepared without an interest to serve, whereas, an estimate from a vehicle repairer, cannot properly be so viewed. Additionally, the actual repair cost was a significantly larger sum than either of the estimated repair costs – from B & H Auto and Orion loss adjusters respectively. This court though, will rely on the loss adjusters' report for the purpose of determining the financial loss suffered by the claimant as a consequence of the accident, since that loss adjusters' report is dated May 26, 2010 – which is significantly closer in time to the date of the accident, than the date when the final bill for work done to repair the claimant's vehicle, was prepared, that being: July 19, 2011 – a year and over six (6) months, after the accident occurred. There would undoubtedly have been significant upward price/value of parts and labour, during the year and a half time period, subsequent to the accident. The claimant would, if he is entitled to recover special damages at all, be entitled to recover for his actual, proven financial loss and not for his actual, proven

financial loss, plus inflation loss, over a period of time. The interest to be awarded on special damages, if judgment is entered in the claimant's favour, should adequately account for the claimant's financial loss, due to inflation.

[18] Monique Williams had alleged, in her evidence, that she suffered from neck and shoulder pain as a consequence of the accident and was placed on pain medication. She has however, not made any claim, arising from same, as she did not expect to receive any further treatment for same and she is happy that her life was spared.

[19] The defendant has, for his part, relied on a damage assessment report prepared on January 8, 2010 and which was entered into evidence as an exhibit, by consent. That report specifies the point of impact to his vehicle, as being the right front section. It is to be recalled at this juncture that the damage to the claimant's vehicle, as a consequence of the accident, was caused to its left front section. That assessment report concludes that repair and restoration of the defendant's vehicle would not be feasible, from an economic/financial standpoint and thus, assessed the amount of loss as being: $1,150,000.00 – this being the value of unit (vehicle) - $1,450,000.00 less the value of salvage - $300,000.00. This court will accept and act on this evidence, if it is concluded that damages are to be awarded to the defendant, subject of course though, to this court's conclusions as to contributory negligence.

[20] The defendant was diagnosed by his treating physician, after the accident – Dr. Heron Edwards, who concluded that Mr. Depass had suffered minor injuries as a consequence of the accident and those appeared, at the time of his examination of the defendant, to have been resolved. At the time of his examination by Dr. Edwards, which was conducted on January 2, 2010, the defendant complained of having headache, neck and back pain. He was diagnosed as having musculoskeletal spasm of the neck, following the accident. Accordingly, the defendant is seeking to recover general and special damages, interest and costs.

[21] Among the special damages sums being claimed by the defendant, is the sum of $9,458.75 for assessor's fees. This sum is, as claimed for, duly proven and will be awarded to the defendant in the event that he is successful in proving his claim, this of course though, subject to this court's conclusions also, as to the issue of contributory negligence.

[22] The defendant has also claimed for loss of use of his vehicle for 45 days at $2,000.00 a day. The defendant though, has provided no evidence to this court whatsoever, in support of this particular aspect of his claim for special damages. Whilst this court can understand his claim for loss of use, he has given no evidence whatsoever as to why his loss of use of his vehicle was for 45 days, or as to why he is claiming $2,000.00 per day, for said loss of use. The defendant ought to have specifically proven said loss. He has not done so. His failure to do so, means that he has failed to specifically prove a loss which he has specifically alleged. He had a duty to prove same. He also had a duty to prove that he had adequately mitigated his loss in that specific respect and in that respect also, he has not done so. It is reasonable to expect that he would have done so. See: **Selvanayagam v University of the West Indies** [1983] 34 WIR 267.

[23] The issue of contributory negligence is a live one in this matter. It is so, because, in response to the claimant's claim for damages for negligence, the defendant has specifically averred that the accident was either wholly caused, or substantially contributed to, by the negligence of Monique Williams. Accordingly, in assessing any sum that may be awarded to either the claimant or the defendant as damages, this court may adjust same, dependent on this court's conclusions as to contributory negligence.

[24] The claimant gave evidence and by means of his evidence, certain documents referred to earlier herein, were identified, as they had, by then, already been admitted into evidence, by consent. Paragraph 3 of his witness statement was deemed as inadmissible evidence and thus, was not accepted as evidence. Apart from the

identification of those documents and thus, his having given evidence of the financial value of the damage to his vehicle, his evidence was not significant.

[25] Mr. Myrie gave evidence for the claimant. In his evidence-in-chief, as per his witness statement, he testified that during the night of January 1, 2010, he was on night duty at a 'development' which was then being constructed at 24 Liguanea Avenue, Kingston 6, in the parish of St. Andrew, that being a site which is located at the intersection of Liguanea Avenue and Paddington Terrace. His work duty that night, was to keep watch. In other words, he was a watchman for the site. On that site at that time, there was a building that had several levels – a basement, ground floor, first floor and an attic. He was standing on the first floor and looking easterly, towards Paddington Terrace and Liguanea Avenue. According to him, he had a clear view of the intersection of Paddington Terrace and Liguanea Avenue, because, even though there is a building which is situated directly across from the building which he was looking out from, that building is lower than the one that he was looking out from.

[26] While giving further evidence during cross-examination, Mr. Myrie testified that the construction site on which he had been working that night had a wall around it, but that said wall only blocked some of his view of Paddington Terrace, and that it did not in terms of its height, pass the first floor. He was unable though, when asked by cross-examining counsel to do so, state what his estimate of the height of that wall is. While testifying during re-examination, Mr. Myrie testified that the part of Paddington Terrace which that wall blocked his view of, was the side to go to King's House Road.

[27] As part of his evidence-in-chief, Mr. Myrie testified that after the accident had occurred and the driver of the car had exited his dark coloured vehicle, that driver appeared to be, 'under his liquor'. Although he was challenged on that bit of evidence during cross-examination, he refused to resile from it. Furthermore, when I, as trial judge, had enquired of him as to why he had stated that the driver of the dark coloured vehicle appeared to be under his liquor, Mr. Myrie's response to that query, was that when he came out of his vehicle, he appeared to be unsteady, 'like any drunk

somebody' and a portion of his shirt was out and a portion was in. According to him – '*I can tell he was drinking. When I went over the station, I could also smell it on him.'*

[28] Of course though, it is important to note two (2) things, about that evidence of Mr. Myrie, that at the station, he smelled liquor on the male person who had been driving one of the vehicles that had been involved in the accident. The first of those two (2) important points, is that, as the witness (Mr. Myrie) himself accepted, upon further questioning by defence counsel, he had not mentioned that, in his witness statement. Secondly and equally significantly, there is evidence that a blood alcohol test was carried out in respect of Mr. Depass, after the accident, but was negative. Indeed, no one was, from the police report, it seems, either criminally charged as a consequence of the accident and furthermore, the police accident report does not even so much as imply that either of the vehicle drivers involved in the accident had a blood alcohol test result which showed a higher blood alcohol level, than that which is permitted by law. In the circumstances, this court does not at all accept that at the time of the accident, the male driver – Mr. Depass, was intoxicated.

[29] Mr. Myrie's evidence was that it was the dark coloured car which had collided into the white coloured SUV, which he described as a white, 'Toyota Jeep.' He said that the driver of that vehicle had reached the four way stop at the intersection of Paddington Terrace and Liguanea Avenue and when that vehicle reached there, the vehicle 'appeared to stop' and 'look up and down Paddington Terrace before proceeding across in the direction of Hope Road.' That was what he said, during his evidence-in-chief. Under cross-examination though, he significantly changed that bit of evidence, by insisting that said vehicle did not merely appear to stop at that intersection, but, actually did stop at that intersection, where, as the parties have agreed, there exists a stop sign, when entering onto Liguanea Avenue, from Paddington Terrace. If he saw the driver of that vehicle look up and down the road, before moving onto Liguanea Avenue, it would have required him to be paying very careful attention to both that driver and the vehicle which was being driven by her, at that time.

[30] If that is indeed so, it is this court's considered opinion that Mr. Myrie could not have, at that same time, been paying close attention to the defendant's vehicle, which he described as the dark coloured car, coming from the opposite side of Paddington Terrace. According to him though, as part of his evidence-in-chief, before the driver of the white Toyota Jeep could have crossed the intersection, he, 'heard a vehicle coming at full speed.' When he looked further across the road, he saw a dark coloured vehicle coming from the opposite side of Paddington Terrace, from where he was standing. '*The vehicle sailed straight across the intersection and hit into the front left side of the white Toyota Jeep…*' (paragraph 11)

[31] This court does accept that the witness – Mr. Myrie, certainly was present in close vicinity to and witnessed the aftermath of the accident. This court also accepts that Mr. Myrie witnessed some aspects of the driving of the respective vehicles, immediately prior to the occurrence of the accident. This court though, does not accept that the dark coloured vehicle sailed across the intersection.

[32] This court does not accept that bit of evidence, because, this court does not believe that Mr. Myrie actually saw what the dark coloured vehicle did, at the time when it reached the intersection. He could not have seen that, if he was watching so closely, at that same time, what the vehicle at the opposite end of the intersection, was then doing.

[33] This court also does not accept Mr. Myrie's evidence that the driver of the dark coloured vehicle, appeared, after the accident, when he was seen by Mr. Myrie, to have been 'under his liquor,' or that he smelled liquor in Mr. Depass' breath in the aftermath of the accident, while he and the respective vehicle drivers were at the police station.

[34] This court accepts that the colour of the claimant's vehicle was, at the time of the accident, white and that it is a Toyota Hilux Surf motor vehicle, whereas the defendant's vehicle at that time, was a blue coloured Audi Sedan car.

[35] This court is now left to consider the evidence of Ms. Williams and Mr. Depass and it is this court's careful consideration thereof, and its examination of the applicable law, which will ultimately determine the outcome of this case. We will, in that respect next go on to analyze their evidence, particularly in respect of the factual issues that are in dispute between the parties.

Factual issues that are not disputed

[36] On the evidence in this case, the parties are in agreement as to the following:-

(a) The accident occurred at the intersection of Paddington Terrace and Liguanea Avenue, Kingston 6, in the parish of St. Andrew.

(b) The accident occurred at sometime between 4:00 a.m. and 4:25 a.m. on January 1, 2010 and the lighting that was available for use by the vehicle drivers at that time, were their respective vehicle lights which were then on and the street lights – which were then lit.

(c) That intersection is a four-way intersection with stop signs on all sides.

(d) Monique Williams was, at the material time, driving a Toyota Hilux SUV, which was owned by the claimant and which was higher and bigger than the Audi Sedan car, which was then being driven by the defendant.

(e) When the accident occurred, Monique Williams was driving along Liguanea Avenue heading in the direction of Sovereign Plaza/Hope Road.

(f) When the accident occurred, the defendant was driving on Paddington Terrace heading in the direction of East King's House Road.

(g) After the accident and as a consequence thereof, the defendant's vehicle stopped on Liguanea Avenue, with it being in a slanted position with its front facing the right side walk, as one faces Hope Road.

(h) After the accident and as a consequence thereof, the claimant's vehicle stopped on Paddington Terrace, facing in the direction of East King's House Road.

(i) After the accident, only the claimant's vehicle was functionally able to have been driven away from the accident scene and it was driven from there, to the Matilda's Corner Police Station, whereafter, it was removed from there, by a wrecker truck.

(j) The claimant's vehicle was badly damaged at the front left side of the fender/bumper which was pushed to the right – as a result of which, the

driver's door was unable to close or open properly. Parts from the claimant's vehicle had fallen off. The console between the driver and passenger seat inside of the claimant's car, was damaged and unable to close and there was a dent above the back left wheel. There was also damage caused by the accident, to the right front side of the fender/bumper of the claimant's vehicle. Most of the damage to the claimant's vehicle, was to the left front side thereof.

(k) The damage to the defendant's vehicle, as a consequence of the accident was primarily caused to the right front side thereof, but there was also damage caused to the right back fender/bumper. The bonnet and right front fender/bumper were damaged. The windscreen glass was cracked and the vehicle's radiator had leaked out all of the fluid. The defendant's vehicle was thus, badly damaged as a consequence of the accident.

(l) The defendant suffered personal injury as a consequence of the accident, in particular, musculoskeletal spam of the neck and attendant pain.

(m) The crash occurred on Liguanea Avenue.

(n) Both vehicles involved in the accident had their headlights on, at the time of the accident.

[37] With the respective vehicle drivers and parties to this claim being in agreement on so many of the factual aspects of this claim, one is almost left to wonder what important issues, if any, are the parties and respective vehicle drivers, disputing. As the evidence evolved at trial though, there are a few important factual issues in dispute. They are as follows:

Disputed factual issues

(a) Whether the defendant stopped at the stop sign which is at the intersection of Paddington Terrace with Liguanea Avenue, before driving his vehicle through that intersection.

(b) Whether Monique Williams had stopped the claimant's vehicle at the stop sign, at the intersection of Liguanea Avenue with Paddington Terrace, prior to having driven that vehicle through the intersection.

(c) Whether it was the claimant's vehicle, or the defendant's vehicle that reached, first in time, from amongst those two vehicles, at the intersection.

(d) Which vehicle collided into which other vehicle.

(e) Whether the defendant may have been intoxicated at the time of the accident.

(f) Whether Monique Williams carried out a proper lookout while at the intersection.

(g) Whether the defendant carried out a proper lookout while at the intersection.

Issue (e)

[38] This court will address issue (e) above, first. It has already been stated that this court accepts the defendant's evidence that he was tested by the police, after the accident, for the purpose of determining his blood alcohol level and that said test was negative for blood alcohol over the prescribed limit. As such, this court has not accepted Mr. Myrie's evidence that when he came out of his vehicle after the accident, the defendant appeared to have been, 'under his liquor,' nor does this court accept Mr. Myrie's evidence that while he was at the police station along with Ms. Williams and the defendant – this having been not long after the accident occurred, he smelled alcohol on the defendant's breath.

[39] This court does accept that the defendant was likely walking in an unsteady manner, in terms of his walking gait, when he exited his vehicle immediately after the accident had occurred and indeed, that was the evidence of Ms. Williams, who testified in relation to the defendant, after the accident had occurred, that – 'he was walking a little off balanced and I believed him to have been drunk.' (paragraph 15).

[40] To this court's mind though, that the defendant's walking gait was unsteady, in the immediate aftermath of the accident, is explicable, based upon the injury which this court accepts that the defendant suffered as a consequence of the accident.

[41] The defendant's evidence, as given in-chief, was that as a consequence of the accident, he had hit his head on the panel between the windshield and his window. His forehead was swollen and his head started to hurt right after the accident. This was related by the defendant in paragraph 9 of his witness statement.

[42] When considered in that context, it comes as absolutely no surprise to this court, that immediately after the accident, the defendant would have been walking in an unsteady manner. After all, by that injury to his head, which was caused by the accident, this court is of the considered view, that the defendant's balance, in terms of his walking gait, would likely have thereby been detrimentally affected. This court thus, definitely does not draw the inference from the defendant's unsteady gait in the immediate aftermath of the accident, that he (the defendant) was then intoxicated. Breathalyzer tests were conducted on both drivers, after the accident and the respective evidence as regards each of same, was that the results were fine. This court accepts that evidence. If it were not true, then the police accident report should reflect same and in any event, the defendant would likely have been criminally charged, arising from same. This court has concluded that none of that happened, or was done, because, as the defendant has testified, the breathalyzer test which was conducted on him after the accident yielded a result which 'was fine.'

Issues (a) & (b), (f) & (g)

[43] For convenience, issues (a) & (b), (f) & (g), will be addressed in this judgment, conjunctively. Mr. Myrie, in his evidence, stated that the defendant's vehicle had 'sailed across the intersection.' This court understood that quoted term to mean that Mr. Myrie's testimony was that the defendant's vehicle did not stop at the intersection. This court had earlier, rejected that aspect of his evidence and provided reasons therefor. Same will not be recounted. As regards though, his evidence that he saw the claimant stop her vehicle at the intersection and look left and right, this court will now go on to consider whether it accepts that evidence, as also, the defendant's evidence, that he had stopped his vehicle at the intersection. The defendant gave that evidence to this court, during his examination-in-chief, as per paragraph 3 of his witness statement. For her part, Ms. Williams also gave evidence that she had stopped at the intersection, after she had approached same, in the vehicle which she was then driving, with caution. According to her, after having stopped, she then looked left and right, but there was no vehicle immediately at the intersection, although she then saw the lights of an approaching vehicle and it was then that she moved off, 'and began proceeding.' It was

after that, according to her, that the vehicle crash occurred. See in that regard, paragraph 7, 8 and 9 of Ms. Williams' witness statement.

[44] From the demonstration given by Ms. Williams in court, using two (2) toy cars, while she was being cross-examined by defence counsel, it is important to note the position in which the respective vehicles that were involved in the accident, were, in relation to each other, moments before the collision/accident occurred. The claimant's vehicle was on Liguanea Avenue heading in the direction of Sovereign Plaza, Hope Road. The defendant's vehicle was heading towards East King's House Road, while being driven along Paddington Terrace, headed towards the intersection with Liguanea Avenue.

[45] Accordingly, approaching the intersection, the claimant's vehicle was positioned to the right hand side of the defendant's vehicle, at an angle of between 45 and 90 degrees, away from that vehicle. That could be the only explanation as to why the primary impact to the claimant's vehicle was to its front left side, while the primary impact to the defendant's vehicle, was to its front right side. In any event, this court has accepted the evidence of Ms. Williams as to how both vehicles were positioned in relation to each other, as they approached the intersection and also, her evidence as to how they were positioned in relation to each other, when the collision/accident occurred. At the time when the collision/accident occurred, the defendant's vehicle was still positioned to the left of the claimant's vehicle and from the way in which Ms. Williams had demonstrated, using the toy cars, in court, the vehicles were more or less positioned at a 90 degree angle, one to another, when the impact occurred.

[46] It is this court's factual conclusion, that if the defendant's vehicle had sailed across the intersection, as Mr. Myrie suggested in his evidence, then, bearing in mind that the claimant's vehicle is bigger than his vehicle – since the defendant's vehicle is a car, whereas the claimant's vehicle is a SUV, the damage to the claimant's vehicle would have been far more widespread, across the vehicle's front, than it actually was.

[47] This would have especially been so, if as Ms. Williams testified, she had, very shortly prior to the accident/collision, brought the vehicle which she was then driving, to a complete stop, looked left and right and then moved off, shortly after which she felt the impact to the front left hand side of that vehicle and very shortly thereafter, a further impact to that vehicle's left rear. That evidence, if true, would signify that at the time when the accident/collision occurred, the claimant's vehicle could not have been proceeding at a fast pace. To the contrary, it would then have been proceeding slowly. Indeed, that was what Mr. Myrie testified as having been the situation, when the collision/accident occurred. Thus, when he was being cross-examined, the suggestion was put to Mr. Myrie, that 'the jeep was not travelling slowly when the collision happened.' In answer to that suggestion, Mr. Myrie responded, - '*it was travelling slowly.' Furthermore, when the suggestion was immediately thereafter made to Mr. Myrie, by defence counsel, that – 'the jeep had not just moved off from Liguanea Avenue when the accident happened,' Mr. Myrie's answer was – 'The jeep had just moving off*.'

[48] In the circumstances, it is this court's conclusion that if in fact the defendant's vehicle had 'sailed through the intersection' and hit into the claimant's vehicle, which was then just moving off from, or had then just moved off from the intersection, then, bearing in mind that the claimant's vehicle is a larger vehicle than the defendant's vehicle, the damage to the defendant's vehicle would have been more extensive, particularly to the front thereof.

[49] In his claim, the claimant has sought to rely on six (6) particulars of negligence, being:

(i) Driving too fast;

(ii) Failing to stop at the stop sign;

(iii) Failing to keep any proper look out;

(iv) Driving without any or sufficient consideration for other users of the road;

(v) Failing to apply his brakes in time or at all or to steer or control his vehicle so as to avoid colliding with the claimant's vehicle;

(vi) Failing to accord precedence to the claimant's motor vehicle which was proceeding through the said intersection before any part of the defendant's motor car had come through the intersection.

[50] It is for the claimant to prove the negligence which he has specifically alleged, in relation to the defendant. Accordingly, it is for him, if he can, to prove at last one, perhaps some, or at best, all of the particulars of the defendant's negligence, which he has alleged. One of those particulars, is that the defendant failed to stop at the stop sign. The evidence given by Mr. Myrie in that particular respect, has, for the reasons earlier specified, been rejected by this court, as this court views such evidence as given in that particular respect, as being untruthful.

[51] It will be recalled, that the claimant did not witness the collision/accident. The only other witness apart from Mr. Myrie, who testified on behalf of the claimant and on her own behalf, since she is also a defendant to the defendant's claim against herself and the claimant, is: Monique Williams.

[52] Since the burden of proof rests on the claimant to prove his claim, just as it, in turn, rests on the defendant to prove his claim and each claim, if it is to be duly proven, must be proven, on a balance of probabilities, a burden rested on the claimant, if he could meet it, to prove that the defendant failed to stop at the stop sign. If therefore, Ms. Williams' evidence didn't prove same to the requisite standard, then that would mean that the claimant would have failed to prove that the defendant failed to stop at the stop sign.

[53] Unfortunately for the claimant, Ms Williams' evidence fell woefully short of proving same. In fact, to the contrary, her evidence assisted the defendant in proving one of his particulars of negligence, which is that Ms. Williams failed to stop at the stop sign at the intersection.

[54] While giving testimony during cross-examination, Ms. Williams disclosed some very important things. She disclosed that at the time when the collision/accident occurred, she was travelling alone in her vehicle and coming from a New Year's Eve party. She had drank alcoholic drinks while at that party earlier in the night. She had not been to bed up until 4:25 a.m. that morning – which is the time when the collision/accident occurred. At that time, she was living at 2A Washington Boulevard. She did not see what hit 'her' (the vehicle which she was then driving is what this court understood her as having meant, when she referred to what hit 'her'). She had only seen a flash of light before the vehicle which she was then driving, was hit. The alcohol drinks which she had imbibed earlier that night, was, as she herself termed it, 'maybe two (2) or three (3) appleton and coke' (rum and coke – in other words) and 'those weren't full glasses and after that, I had water.'

[55] While that evidence as referred to in the foregoing paragraph hereof, was by no means, the totality of Ms. Williams' evidence as provided to the court during cross-examination, that evidence is perhaps, most significant, in two particular respects. Firstly, it is significant because it has clearly disclosed that at the material time, Ms. Williams did not see the defendant's vehicle while it was at the intersection. She did not even see that vehicle as it was crossing that intersection, until the collision/accident occurred. Accordingly, her evidence has been wholly unable to satisfy this court, on a balance of probabilities, that the defendant failed to stop at the stop sign.

[56] Additionally, her evidence has patently disclosed that she never stopped and looked left and then right as she had testified. To this court's mind, it patently so discloses, because it is inconceivable to this court, that if she had stopped, then looked left and right, as she has given evidence that she did, that she would not have then seen, both the defendant's vehicle approaching the intersection, as well as that vehicle not having stopped at that intersection. All that she saw was a flash of light and then she heard the impact with her vehicle. Not even a batmobile could have moved as quickly as the defendant's vehicle would have had to have been moving that night, if, up until when the claimant's vehicle had stopped and Ms. Williams had looked left and

right, she had not then seen that vehicle and yet, after having moved off from the intersection really slowly, she just saw a flash of light and then the defendant's vehicle impacted, as she has claimed, into the vehicle which she was then driving. Whilst it is true that the defendant's vehicle would have been coming towards the claimant's vehicle, from the left side of the claimant's vehicle, surely, Ms. Williams would and should have seen the defendant's vehicle, if she had indeed stopped, as she ought to have and if, also as she ought to have, she had then carefully looked to her left and to her right. According to her evidence, there were streetlights that were working, at the intersection when the collision/accident occurred. According to evidence which is undisputed also, the defendant's vehicle had on its lights at that time. To this court's mind, not even a batmobile could have moved as quickly, both to and into that intersection, as Ms. Williams has sought to have this court believe, that the defendant's vehicle so moved. In the circumstances, it is this court's considered conclusion, that not only did Ms. Williams not stop the claimant's vehicle at that intersection, immediately prior to the occurrence of the collision/accident, but also, she (Ms. Williams) failed to keep a proper lookout for other vehicular traffic, when the vehicle which she had then been driving, had reached the intersection. In other words, the defendant has proven, in respect of the claimant and his agent – Ms. Williams, that, at the material time, she failed to keep a proper lookout and also, that she failed to stop at the stop sign on Liguanea Avenue, at the intersection with Paddington Terrace. These are two (2) of the particulars of negligence alleged by the defendant, in his claim against the claimant and Ms. Williams. There is another particular of negligence, which the defendant has proven as against the claimant and Monique Williams and it is that she drove without any, or any proper care and attention, for other users of the roadway.

[57] This court's factual conclusions in those particular respects, do not, by any means, oblige this court to conclude that the defendant either kept a proper lookout, or that he drove with any, or sufficient consideration for other users of the road. In fact, just as was the case with the evidence of Ms. Williams, it was the evidence of the defendant, that was the most helpful in enabling this court to draw the conclusion that the defendant failed to keep a proper lookout and that he had driven without any or

sufficient consideration for other users of the road. Before addressing same though, this court will address its mind to a few other important factual issues.

[58] The defendant gave evidence during cross-examination, that he had been at a party, earlier that 'night' and while there, at about 1:30 a.m. he had been drinking alcoholic beverages, in particular two (2) or three (3) 'Guiness' that night. According to the defendant is it not at all correct to state, as was suggested to him, by the claimant's counsel, that, 'Ms. Williams' vehicle' was already proceeding through the intersection, at the time when his vehicle arrived at that intersection. His evidence also, was that he saw Ms. Williams' car coming towards the intersection. The defendant denied a suggestion that he had been speeding at the time when the accident occurred and in reference to the damage that had been caused by the collision/accident, he stated that, *'the damage occurred because of a failure to stop at the intersection*.' When the suggestion was made to him, that it was as a result of the speeding, why Ms. Williams' vehicle ended up, 'off course,' the defendant's response was that, 'Ms. Williams 'vehicle did not end up 'off course.' According to him, 'she drove her car and parked it.' It was immediately thereafter, put to him, that Ms. Williams did not drive her car and park it, but rather, it was the force of the collision which had resulted in her vehicle ending upon Paddington Terrace, where it stopped. The defendant denied that suggestion. This latter – mentioned bit of evidence of the defendant as was related by him, during cross-examination is consistent with what the defendant stated in his evidence-in-chief, as per the first sentence of paragraph 4 of the defendant's witness statement.

[59] The defendant in fact, gave no evidence, as to precisely where the claimant's vehicle was located and how it was positioned on the road, in the immediate aftermath of the accident and prior to, as the defendant has alleged, occurred, Ms. Williams having turned right, onto Paddington Terrace and parked on the right hand side of Paddington Terrace. It is regrettable that he did not provide that evidence to this court.

[60] For completeness' sake on this point though, it is worthwhile noting that Ms. Williams had, at all times throughout the trial both maintained and stated it as her

evidence, that she had 'lost control of the vehicle, as a result of the impact', 'which forced' her vehicle into an almost ninety (90) degree turn heading down Paddington Terrace in the direction of East Kings House Road and the other vehicle remained in the intersection with the front of that car slightly angled and facing mainly towards East Kings House Road where my vehicle had stopped.' (paragraph 10 of Ms. Williams' witness statement)

[61] The defendant had, for his part, stated that where his vehicle had stopped, as a consequence of the collision/accident, was on Liguanea Avenue, with his car in a slant position, with its front facing the right sidewalk as one faces Hope Road direction. The defendant was not challenged by the claimant on that particular aspect of his evidence and it is evidence which is in accord with that same aspect of Ms. Williams' evidence. This court accepts said evidence of Ms. Williams and the defendant, as being both truthful and accurate.

[62] This court though, does not accept the evidence of Ms. Williams that the consequence of the collision/accident, was that it forced her vehicle onto the left hand side of Paddington Terrace. This court instead, accepts the defendant's evidence on this particular point of fact, which was, that after the collision/accident had occurred, Monique Williams drove her vehicle over to the left hand side of Paddington Terrace and parked it there and in fact, as he had gone on to state, during cross-examination that she had driven her car and parked it on the sidewalk.

[63] This court has not accepted Ms. Williams' evidence on that particular point of fact, because, if indeed, the defendant's vehicle had collided with the claimant's vehicle and pushed it that far to its right, the damage caused to the defendant's vehicle would inevitably, have had to have been far more significant in extent and location on the defendant's vehicle, than it actually was. This must be so, bearing in mind the weight and overall size if the claimant's vehicle, when compared with that of the defendant. The claimant's vehicle was an SUV, whereas, the defendant's vehicle was a mid-sized car.

[64] On the issue of the claimant and the defendant having both been drinking alcoholic beverages during the early morning hours of January 1, 2010, or in typical Jamaican parlance, 'during that night,' just as was this court's finding in respect of the defendant, it is equally this court's finding, in respect of Monique Williams, that she too, was neither intoxicated, nor driving impaired due to alcohol consumption, as at the time of the collision/accident. Her breathalyzer test result was also fine and in any event, she was never charged with any criminal offence such as driving with blood alcohol above the prescribed limit, arising from the collision/accident. In any event, just as for the defendant, if it had been the case that Ms. Williams had been alcohol impaired at the material time, the police report should have so reflected. It does not so reflect.

[65] It was the evidence which the defendant gave while testifying in response to the questions which I had asked of him, which has led this court to conclude that the defendant did not keep a proper lookout and that he did not drive with any or sufficient consideration for other users of the road and that this was the partial cause of the collision/accident. It is helpful, for those reading these reasons for judgment, to relate that interchange between this judge and the defendant. It was as follows:

Judge: *'What to your mind, was your duty, when you arrived at the intersection that night?*

A. *My duty was to look to see whether it was safe to proceed through that intersection.*

Judge: *And if you, therefore, see that there's another vehicle coming, approaching that intersection, how do you help to ensure that it is safe for you to proceed through that intersection?*

A. *If the other vehicle is approaching the intersection and I form the view that the vehicle is going to stop at the intersection, I believe that it is safe to proceed through the intersection, having arrived at the stop sign before the other party.*

Judge: *What caused you to form the view that the other vehicle – Ms. Williams' vehicle was going to stop at the intersection?*

A. *I use that intersection daily. Generally and speaking, if you are at the intersection and another vehicle is approaching the intersection, even if you don't know the speed, you are able to tell if the other vehicle is going to come to a stop. Able to tell may be a little strong. You can't really tell. At the time, I formed this view that the other vehicle was going to come to a stop.'*

[66] It ought to be readily recognized that the defendant did not in fact actually answer the trial judge's last question. He did not say what had caused him to form the view that the other vehicle, which was then being driven by Ms. Williams, was going to stop at the intersection. As it turned out, he maintained that he had formed that view. This court accepts that he did form that view. What this court does not believe though, is that the defendant had any rational basis for having formed that view. This court believes that he formed that view because he was of the view that since it was he who had first arrived at the intersection, the other vehicle would give way to his vehicle and thus, stop at the intersection. That was a flawed judgment and also, a careless judgment on the defendant's part, when considered in the context of a motor vehicle driver and the legal obligations of such a driver.

[67] That there was such a judgmental flaw from a vehicle driver's standpoint, was highlighted even further, by the defendant's answer to the single question which was posed to him by his defendant counsel, following on the trial judge's questions having earlier been asked. That question and answer, were as follows:

Defence counsel: On that night in question, was there anything about it that would have alarmed you, that he was not going to stop at the intersection?

A. No.

[68] What the defendant's answers to the questions posed to him by the trial judge, as well as by his own counsel, has revealed – as set out above, is that the defendant knew that he had an obligation, at that particular intersection, to look to see whether it was safe to proceed through the intersection. The defendant is correct in that assertion.

[69] This court would only refine same, from a legal standpoint, to conclude that the defendant had a duty to exercise reasonable care in determining whether it was safe to proceed through the intersection and in that respect, he was required to not only stop at that intersection, but also, look and listen carefully, while there, before making the decision as to whether it was safe to proceed into the intersection and then so proceeding.

[70] It is clear to this court, that the defendant was of the view that once his vehicle had been the first to arrive at the intersection, the vehicle which arrived at the intersection after his, would have stopped. That is why he could not proffer any reason as to why he believed that the claimant's vehicle would have stopped at the intersection. He could not proffer any reason, because he realized that he had no good and credible reason that he could properly have proferred to the trial court. Clearly, he would have known, at least during the time of the trial – which was held more than three (3) and a half (3½) years after the collision/accident had occurred, that, merely because one's vehicle has first reached that particular intersection, is not by any means, a good reason for believing that an oncoming vehicle to that intersection, would stop at the same. Accordingly, when the trial judge asked him the question as to why he believed that the claimant's vehicle would have stopped at that intersection, he was unable to provide an actual answer to that question. Instead, he maintained, in answer to that particular question, that he had formed the view that the claimant's vehicle would have stopped at the intersection. Of course, as things actually turned out, on the relevant occasion, according to the defendant's evidence and as this court has concluded, the claimant's vehicle did not stop at that intersection.

[71] From this court's understanding of the applicable law as regards the duty of a vehicle driver, which will be addressed in detail, further on in these reasons for judgment, it was the combined negligence of Monique Williams, in having, while driving the claimant's vehicle, failed to stop at the intersection and having failed to keep a proper lookout and having failed to have sufficient regard for other road users, along with the negligence of the defendant, in having failed to keep a proper lookout and

having failed to have sufficient regard for other road users, which resulted in the collision/accident.

[72] In the circumstances, this court has found it unnecessary to determine whose vehicle it was that first arrived at the intersection, or whose vehicle crashed into whose. Suffice it to state though, that from the law as referred to further on, it will readily be recognized that even if a party's vehicle had first arrived at the intersection and thus, that vehicle would thereby have had right of way, this does not mean that the driver of that vehicle, which then would have had right of way, no longer had any duty of care, in respect of other road users.

[73] Even drivers of vehicles which have right of way, have a continuous duty of care and as such, have to be mindful and take due measures to protect against vehicle collisions/accidents being caused, due to their actions as drivers, combined with the actions of other drivers, cyclists, motorcyclists or pedestrians, who may be careless in their conduct on the road.

[74] Furthermore, even if one vehicle crashes into another, that in and of itself, does not raise a presumption that the driver of the vehicle that crashed into another, was negligent in having so done. It could simply have been, that the accident was inevitable based upon the carelessness of the driver of the vehicle, whose vehicle was crashed into, by another. Also, it could have been that even though one vehicle crashed into the other, it was the combined negligence in either equal or varying degrees, which resulted in that vehicle crash having occurred. The latter is exactly what happened as between the vehicle which was being driven by Ms. Williams and that which was being driven by the defendant on January 1, 2010.

The Applicable Law

[75] This court adopts the dicta of Ld. Wright in **Lochgelly Iron and Coal Co. v McMullan** [1934] AC 1, at 25, where he opined – *'in strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it*

properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owing.'

[76] As such, this court must first consider whether the drivers of the respective vehicles involved in the collision/accident, on the day when that collision/accident occurred, owed a duty of care to one another. This court is satisfied that Ms. Williams and Mr. Depass respectively owed a duty of care to each other, not to injure each other, or to cause property damage and/or consequential financial loss as a consequence of the carelessness of either of them, as a vehicle driver.

[77] Was that duty breached? In answering that question, it is useful to note the words of Baron Alderson in the case of **Blyth v Birmingham Waterworks** [1856] 11 Ex. 781 at 784 – '*Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a reasonable and prudent man would not do.'*

[78] It is important to recognize also, that whilst a motorist always has a duty to drive with reasonable care, what is reasonable, must always depend on the particular context of circumstances with which a driver is faced, at any given moment in time. A flexible test as to what constitutes the exercise of reasonable care, is essential. One always has to measure the risk against the measures necessary to eliminate that risk. See: **Latimer v A.E.C. Ltd.** [1953] AC 643. Thus, decisions in individual cases, as to what amounts to reasonable or unreasonable conduct are regarded as useful guides, but no more than that. See: **Qualcast (Wolverhampton) Ltd. v Haynes** [1959] AC 743.

[79] It is based on that understanding of the law as set out above, that this court will, in these reasons, next go on to set out the law as regards how the duty of care owed by a vehicle driver to other road users, ought, in general, to be exercised. This will be particularly apposite in light of the defendant's evidence, that there was nothing, 'about it' that had alarmed him that, 'it' was not going to stop at the intersection – this in

reference, as, this court understood it, to the claimant's vehicle, as it was, according to the defendant, while he had already stopped his vehicle at the intersection, then approaching the intersection.

[80] It is this court's understanding of the law, that a reasonable and prudent driver, is not to wait until he sees something alarming occurring on the roadway, to take steps as then would be appropriate to prevent, as far as it may then be possible to do so, loss and/or damage and/or injury to anyone occurring, as a consequence of that which then alarmed him, for actually occurring.

[81] A reasonable and prudent driver is required to anticipate what other road users may do at any moment in time. One is not, as a vehicle driver, expected to take precautions against a wholly unlikely risk, or against an occurrence that could not possibly have been reasonably anticipated. Thus, in **L.P.T.B. v Upson** [1949] 1 All ER 60 (H.L.), Ld. Uthwatt stated:

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

Also, in **Berrill v R.H.E.** [1952] 2 Lloyd's Rep. 490, at 492, per Slade J:

> *'You are not bound to foresee every extremity of folly which occurs on the road. Equally, you are certainly not entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. You are bound to anticipate any act which is reasonably foreseeable, that is to say, anything which the experience of road users teaches them that people do, albeit negligently.'*

[82] It is, I think, well known in Jamaica, that in general, persons do not obey the rules of the road. I state, 'persons' because, to my mind, that applies to vehicle drivers, cyclists, motorcyclists and pedestrians – or in other words, all and sundry who use our

nation's roadways from time to time. Accordingly, to my mind, a reasonable and prudent vehicle driver, in Jamaica, ought to bear this in mind, while driving a vehicle, anywhere in Jamaica, at any time. Other countries may very well, have vehicle drivers and other road users who, by and large, comply with road rules. In any event, every factual situation confronting a driver at any given movement in time, requires that a driver act in relation to same, as any reasonable and prudent driver would.

[83] A reasonable and prudent driver in Jamaica is not, *ipso facto*, entitled to assume that a vehicle driver will stop at a stop sign. Everything depends on the circumstances. It is not as though, in respect of the relevant collision/accident, the defendant gave any evidence that he had seen the claimant's vehicle slowing down while heading towards the stop sign. To the contrary, it is this court's considered opinion on the facts of this case, that at the material time, the defendant not only wrongly anticipated what the driver of the claimant's vehicle would have done with the vehicle which she was then driving, when it reached to the stop sign at the junction, but also, he wrongly assumed that said vehicle would stop there, without then having had any rational or prudent basis for having so assumed.

[84] In the circumstances, the defendant failed to have sufficient regard for other road users and he failed to keep a proper lookout. Those two things on his part, constituted his breach of duty to the claimant, by virtue of which, loss and damage to the claimant has been caused. For that, the defendant must and will be held liable.

[85] Also, Ms. Monique Williams failed to keep a proper lookout and failed to have sufficient regard for other road users and in addition, failed to stop at a stop sign. Those three (3) things on her part, constituted her breach of duty to the defendant, as a consequence of which, he has suffered loss and damage. For that, it is both Ms. Williams and the claimant – as her 'principal' – she being his agent in driving his vehicle that early morning of January 1, 2010, who must and will be held liable.

[86] **Section 95(3) of the Road Traffic Act** provides that any failure on the part of any person to observe any provision of the Road Code may be relied on by any party in civil or criminal proceedings as tending to establish or negative any liability which is in question, in those proceedings. **Section 95(1) of the same Act**, provides that the Island Traffic Authority shall prepare a **Road Code**, comprising such directions as appear to the authority to be proper, for the guidance of persons using roads.

[87] In addition, **section 97(1) (a) of the Road Traffic Act**, provides that the driver of every vehicle shall obey all red lights and stop signs. It is in fact a criminal offence, if a driver fails to do so. Also, in the **Road Code** as revised, in **paragraph 55**, it is specifically provided that drivers should approach all road junctions with caution and should proceed, 'only when it is safe to do so.' In addition, at road junctions, the same paragraph of the **Road Code**, provides that vehicle drivers should bring their vehicles to, 'a complete stop at all stop signs.' Furthermore, it is provided in paragraph 2 of the **Road Code**, that all road users are required to, 'be careful and cautious at all times to all road users.'

[88] **Section 51(2) of the Motor Vehicles and Road Traffic Act** sets out important provisions which it is this court's considered opinion, that both vehicle drivers in the case now at hand, failed to properly take note of and duly apply to their driving while approaching and at the intersection and while driving into the intersection. That provision reads as follows:

> *'Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident and the breach of a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle, from the duty imposed, on him by this subsection.'*

To this court's mind, both drivers breached the duty imposed on them by **section 51(2)**, by each having failed to take such action as was necessary to avoid an accident. The particulars of negligence which this court has determined as having been proven against each of them, also proves that.

Conclusion as to Extent of Liability of each Driver

[89] In the circumstances, this court has concluded that the defendant is 40% contributorily negligent, in having caused the collision/accident and the claimant's consequential financial loss, whereas, Ms. Williams is correspondingly, in relation to the injuries and loss of the defendant, 60% contributorily negligent with respect to same.

Assessment of Damages

[90] The claimant is entitled to recover only special damages, in respect of his claim. The claimant will, to the extent of 40% of thereof, recover for the motor vehicle loss adjuster's fee ($5200.00) and for the police report ($1000.00) and for reasons already given herein, shall recover the sum of $424,348.33, for the repair of his vehicle. In total therefore, the claimant will be awarded 40% of the aggregate sum of $430,548.00, as special damages with interest at the rate of 3% from the date of service of his claim form, which was: February 18, 2011, to date of judgment. The claimant will actually be awarded $172,219.20 with interest at the rate specified and for the time specified.

[91] The defendant is entitled to recover, general and special damages, to the extent of 60% thereof. On general damages, this court has not relied on two (2) of the cases submitted by the defence counsel, since those cases related to a diagnosed whiplash injury. The defendant was in this case, diagnosed on January 2, 2010, as suffering from musculoskeletal spasms which was causing him pain. This court heard no evidence from anyone that would convince this court that musculoskeletal spasms and whiplash injury are different names for the same type of injury. As such, this court has relied on the **Claim No. 2007 HCV 04197, between Marcia Jackson and Judith Mahoney and Noel McCormack**. In that claim, judgment was delivered by Mr. Justice Glen Brown, on February 4, 2010. The claimant in that case was injured in a vehicular accident. She had no fractures, based on X-rays of her head, neck and shoulders, which were taken. On examination by her treating physician though, she was diagnosed as having severe spasms in her neck and upper back. She was then experiencing pain in her head, neck and back. She was awarded $600,000.00, as general damages. On February 4, 2010, the Consumer Price Index (CPI) was 155.9,

whereas now, the CPI is 230. Marcia Jackson though, was treated with a soft cervical collar and analgesics. In the case at hand, the defendant took pain medication, but was not treated with a cervical collar. Accordingly, this court would use as its starting figure for assessing general damages for the defendant, as $480,000.00 (80% of $600,000.00). When updated, the sum which will be awarded to the defendant, as general damages, will be 60% of $708,146.25 ($480,000.00 updated). The defendant will therefore be awarded the sum of $424,887.75 as general damages, with interest at the rate of 3% from January 1, 2010 to date of judgment.

[92] As regards special damages, the defendant is entitled to recover for 60% of the cost of the damage assessment report which was prepared in relation to the damage which had been caused to his vehicle. This is so, even if it was the insurance company that his vehicle was insured with, which actually paid that sum. See: **Parry v Cleaver** [1970] AC 1. The defendant's evidence was that he paid $2,000.00 for the X-ray which he took. Even if that sum was repaid to him in full, by his insurance company – albeit that there is no evidence that this was what occurred, in any event, even had there been such evidence, the defendant would be entitled to be awarded 60% of same. In all likelihood, the actual cost of the X-ray report without insurance, would have been more than $2,000.00, yet the defendant is only seeking to recover the sum which he actually paid for same. He is entitled to recover 60% of same.

[93] The damage assessment report cost, as per the invoice which was entered into evidence as an agreed document, was $9458.80. Accordingly, the defendant is entitled to recover 60% of $11,458.50, plus 60% of the value of the loss of his car – 60% of $1,150,000.00. In total therefore, the defendant will be awarded as special damages, the sum of $696,875.13, with interest at the rate of 3% from date of service of his counterclaim and ancillary claim, on the claimant – that having been, April 20, 2011, to date of judgment.

Judgment Orders

(i) The claimant is awarded special damages in the sum - $172,219.20 with interest at the rate of 3% from February 18, 2011, (date of service of claim) to date of judgment.

(ii) The defendant is awarded general damages in the sum - $424,887.75 with interest at the rate of 3% from January 1, 2010 to date of judgment.

(iii) The defendant is awarded special damages in the sum of $696,875.13, with interest at the rate of 3% from April 20, 2011 (date of service of counterclaim/ancillary claim) to date of judgment.

(iv) Each party shall bear their own costs.

(v) The defendant/ancillary claimant shall file and serve this order.

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Hon. K. Anderson, J.