[2014] JMSC Civ 1

IN THE SUPREME COURT OF JUDICATURE

CLAIM NO. 2009HCV06486

BETWEEN	**NEIL LEWIS**	**CLAIMANT**
AND	**ASTLEY BAKER**	**DEFENDANT**

Christine Hudson, instructed by K. Churchill Neita and Co. for the Claimant

Stacia Pinnock-Wright, of counsel, for the Defendant

NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – OVERTAKING OF VEHICLE – TURNING INTO PATH OF ONCOMING VEHICLE – DENIAL OF ALLEGATION – NEED TO PUT FORWARD REASONS FOR DENIAL – FAILURE TO PUT OWN VERSION OF ALLEGATION WHICH HAS BEEN DENIED

Heard **February 14, 2013 and January 17, 2014**

Anderson, K., J.

[1] This claim pertains to a vehicular accident involving two persons in particular, namely: Neil Lewis (hereafter referred to as 'the claimant') and Astley Baker (hereinafter referred to as 'the defendant'). The claimant and the defendant are hereinafter collectively referred to as, 'the respective parties'. The motor vehicle accident which occurred between the respective parties, occurred on June 16, 2005, at the time of either between 1 p.m. and 2 p.m. (according to the defendant's version of events), or at or about 2:45 p.m. (according to the claimant's version of events). The said accident occurred, according to the respective parties, at the intersection between Orange Street and Rosedale Avenue, in downtown Kingston and the respective parties were, at the time of the accident (hereinafter referred to as 'the material time'), driving cars owned by them respectively, these being, a Toyota Starlet (the claimant's vehicle) and a Toyota Camry (the defendant's vehicle).

[2] Only two witnesses testified at trial, these being the respective parties. This court does not need to and will not refer to the evidence as given by either of the respective parties to this court, in any great detail, but it should be noted that this court has carefully considered all evidence as given in respect of this claim, whether of an oral or a documentary nature.

[3] Arising out of the occurrence of that vehicular accident, the claimant has claimed against the defendant for compensation ('damages'), interest and costs, as it is his allegation that the said accident was caused solely by the defendant's negligence and that, as a result of the said accident's occurrence, he suffered injury to his person and loss/damage to his motor vehicle and incurred expense. In response to the claimant's claim against him, which incidentally, was filed in 2009, the defendant only filed a defence, in which he has alleged that the said accident was either wholly caused, or alternatively, contributed to by the negligence of the claimant. Thus, the defendant has not only raised the defence of contributory negligence, as he is permitted to do, by virtue of the provisions of **Section 3(1) of the Law Reform (Contributory Negligence) Act**, but in addition, the partial defence of contributory negligence has been set out in the defence, as an alternative defence, in that, the defendant has, in the first instance, contended that the said accident was wholly caused by the claimant's negligence. This is a complete defence. This is, just as is contributory negligence, a special defence, in that it goes beyond a denial of the essence of the claimant's claim against him and constitutes a positive averment against the claimant, albeit that the said averment has been made as part and parcel of his defence. This therefore means that, insofar as the defendant is concerned, the burden of proof of negligence or contributory negligence, on the part of the claimant, is a burden which rests exclusively on the defendant. See in that regard: **Murphy on Evidence,** 11th ed. [2009], at paragraph 4.5.2.2 (page 82). The same would, of course, apply in respect of the claimant's defence to counterclaim, in which the claimant has alleged that the relevant accident was caused solely by the defendant's negligence. The standard of proof in those respects, is proof on a balance of probabilities.

[4] In addition to the defence as filed by the defendant, as is understandable to this court, the defendant has counterclaimed against the claimant, seeking to recover damages, interest and costs, as a consequence of the damage to his motor vehicle which was caused due to the accident and thus, the money which he allegedly has spent in order to repair such damages, as well as compensation for loss of use of his vehicle for seven days and also, the cost of the fees allegedly charged by the motor vehicle assessor and paid by the defendant, in order for his vehicle's damage to be assessed, no doubt, for the purposes of these court proceedings. In response to the said counterclaim, the claimant has filed a reply and defence to counterclaim, the essence of which constitutes a repetition of the particulars of the claimant's claim and thus, alleges therein, that the said accident was caused wholly by the claimant's negligence. There rests on the defendant, in respect of his counterclaim, a burden to lead sufficient evidence capable of enabling his counterclaim to be proven to the requisite standard of balance of probabilities. If he has failed to meet that burden, for whatever reason, then he would have also failed to have proven his counterclaim. The converse of this is also true. The same would apply as between the claimant's claim and the defendant's defence to same. This court has, for the purposes of awarding judgment on the claim and counterclaim, at all times, carefully borne in mind, the respective burdens of proof, as also, the standard of proof.

[5] What then is it that has been alleged by the respective parties, as to the precise circumstances which led to the said accident having occurred? The claimant was, by permission of this court, allowed to rely on an amended claim form and particulars of claim and it is thus, that, which this court will make reference to, for the purpose of outlining the claimant's claim.

[6] The claimant has alleged that on or about June 16, 2005, he was driving a Toyota Starlet motor vehicle licensed number 6409 EH, along Orange Street, in the parish of Kingston and upon reaching the intersection of Orange Street and Rosedale Avenue, the driver of the vehicle which was then being driven in front of the claimant's vehicle, indicated his intention to pull his vehicle over to the extreme left of the roadway and then stopped his vehicle. After having passed the said motor vehicle, which was

then stationary, the defendant so negligently drove, managed or controlled his vehicle – this being a Toyota Camry licensed number 6758 BZ, insofar as he then, without warning, turned or attempted to make a right turn from Orange Street to Rosedale Avenue. This in turn, caused the defendant's vehicle to move across the path of the claimant's vehicle, whereupon, the claimant then took evasive action and turned his vehicle to the right and thereafter, to avoid colliding with utility poles, turn to the left, as a result of which, the respective parties' motor vehicles collided, as a consequence of which the claimant has suffered both personal injury and loss, in addition to having suffered loss and incurred expense, arising from the consequential damage to his motor vehicle. As such, the claimant has sought, by means of this claim, to recover general damages, special damages, interest and costs.

[7] The claimant has averred that the said motor vehicle accident was exclusively caused, as a consequence of the defendant's negligence. The essence of the particulars of negligence as alleged by the claimant, can easily be summarized as being that: That defendant failed to give any warning, or adequate and timely warning to the claimant, of his intention to, at the relevant movement in time, turn his vehicle to the right and thus, across the path of the vehicle which was then owned and being driven by the claimant. Having then driven his vehicle across the path of the claimant's vehicle, when it was unsafe and dangerous to have done so, the defendant then failed to stop, slow down, swerve, or in any other way, so to manage or control his motor vehicle, in order to have avoided the collision.

[8] In the defendant's filed defence he has contended that the said motor vehicle accident was either solely caused, or alternatively, contributed to, by the claimant's negligence. It is helpful for present purposes, to set out with precision, the particulars of the claimant's negligence as alleged by the defendant. They are as follows:

(a) Driving at too fast a rate of speed in all the circumstances;

(b) Overtaking a line of traffic on an unbroken white line;

(c) Failing to keep any or any proper look out and as a result colliding into motor vehicle registered 6758 BZ which was in the process of making a right turn and had almost completed doing so;

(d) Overtaking at a time when it was manifestly unsafe so to do;

(e) Causing and/or permitting the said collision;

(f) Failing to stop, slow down, swerve or other to manage or manoeuvre the said motor vehicle (the claimant's vehicle) so as to avoid the said collision.

[9] The defendant has, in his defence and counterclaim, specifically denied there having been any negligence on his part, which caused the said motor vehicle accident. In order to properly safeguard himself legally though, to the extent that it may be proper and possible for him to do so, he has alleged, in the alternative, that it was, at the very least, the claimant's negligence which, at least to some extent, contributed to the occurrence of the relevant accident. Contributory negligence has thus been specifically averred in the defendant's statement of case, as the law requires and as such, this court will give due consideration to that averment, to the extent as required by this court, so to do. If, of course, this court takes the view, after having considered the respective parties' statements of case and the evidence led by the parties in support thereof, that said accident was either wholly caused by the claimant's, or by the defendant's negligence, then this court will not go on to address its mind to any issue of contributory negligence.

[10] The essence of the defendant's contention is that on June 16, 2005, he was driving his motor vehicle registered number 6758 BZ along Orange Street, when, on reaching Rosedale Avenue, he put on his vehicle's right indicator and began turning his vehicle to the right. At the same time, the claimant had negligently caused his vehicle to overtake a line of traffic on Orange Street, this even though there was then an unbroken white line in the middle of the roadway on Orange Street leading up to its intersection with Rosedale Avenue. As a consequence, the claimant, through his negligence, either wholly caused, or in the alternative, contributed to the collision which then occurred between the respective parties' motor vehicles.

[11] Whilst the claimant in a civil trial wherein negligence is the cause of action/claim, has the burden of proving that claim on a balance of probabilities, in a situation wherein the defendant, in response to that claim, alleges contributory negligence on the claimant's part, it is he (that defendant), who has the burden of proving contributory negligence, on a balance of probabilities. Thus, as was succinctly stated by Ld. Wright,

in – **Caswell v Powell Duffryn Associated Collieries Ltd.** – [1940] A.C. 152, at p. 172 – '*If the defendant's negligence or breach of duty is established as causing the damage, the onus is on the defendant's to establish that the claimant's contributory negligence was a substantial or material co-operating cause.*'

[12] It should be carefully noted that what must be proven by the relevant defendant, in order for the defence of contributory negligence to be established to the requisite standard, is that the claimant's carelessness, contributed to the damage and/or loss which was caused to him, also as a consequence of the negligence of the defendant. Furthermore, whilst the dicta as quoted in the last paragraph of these reasons for judgment, that being from Ld. Wright in the **Caswell case** *(op. cit.),* is certainly correct insofar as the burden of proof of contributory negligence is concerned, I, for my part do not hold the view, as was also expressed by Ld. Wright in said dicta, that if the defendant's carelessness was not such as can properly be considered either as being a substantial or material co-operating cause of the damage suffered by the claimant, then contributory negligence cannot be established. I disagree with that dicta, to that extent but only to that extent, based on the very wording of **Section 3(1) of the Law Reform (Contributory Negligence) Act (Ja.)**, which reads as follows:

> *'Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damages...'*

As can be recognized from the immediately above – quoted wording of that applicable legislation, the fault of the person who suffered the damage, need not be significant or material, in order for the court to reduce the damages awarded, 'to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.'

[13] It is the context of Ld. Wright's above – quoted dicta from the **Caswell case** *(op. cit.)* that must be considered and understood, in order for one to better be able to

understand why that aspect of Ld. Wright's dicta as above – quoted, no longer is applicable, as a matter of law. The published judgment in the **Caswell case** *(op. cit.),* was recorded in 1940 and thus, was delivered, prior to the enactment into law, in England, of the **Law Reform (Contributory Negligence) Act (Eng.)** [1945]. Thus, the effect of the defence of contributory negligence, prior to 1945 in England and pursuant to the common law, was that if it were proven by the defendant to have existed in respect of the plaintiff, then judgment would be entered on, 'the suit' (the equivalent of that which is now known as, 'the claim'), in favour of the defendant. See: **Butterfield v Forrester** – [1809] 11 East. 60.

[14] As stated in the text – **Charlesworth and Percy on Negligence**, 11th ed., 2006] –

> *'...historically therefore there had to be a judgment, either for the claimant or for the defendant, and there was no provision for apportioning the loss between them. When one of the parties alone was negligent, judgment had to be given for that party against the other. On the other hand, when both were negligent, the defendant could only be made liable if his negligence was the cause – what has variously been described as the 'real cause', 'effective cause', 'direct cause', substantial cause', 'decisive cause', 'proximate cause', and 'immediate cause' of the accident. As Ld. Summer said in* ***British Columbia Electric Ry. v Loach*** *[1916] 1 A.C. 719, at 728: 'the inquiry is an investigation into responsibility.' Liability was a question of fact and the question was: 'whose negligence was the real or substantial cause of the accident?' See:* ***Swadling v Cooper*** *– [1913] A.C. 1, where the direction of Humphries J., 'whose negligence was it that substantially cause the injury?'* was approved.

[15] The reason why the test for contributory negligence used to be one wherein substantial cause for the accident or loss had to be considered by the court, is because, English courts had, over the years, attempted to mitigate the harshness of contributory negligence on the part of a plaintiff, as entirety disentitling that plaintiff from succeeding on a claim for damages for negligence and one such means of harshness mitigation, was to limit the defence of contributory negligence, such that it could not succeed in disproving a claim for damages for negligence, unless it were to be proven by the

defendant, on a balance of probabilities, that such contributory negligence, on the part of the plaintiff, was a substantial cause of the plaintiff's loss. That common law principle however, no longer remains extant, in view of the simple and clear wording of Jamaica's **Law Reform (Contributory Negligence) Act**, **Section 3(1),** which is *ipassima verba* as the English statute of the same name and **Section 1(1)** of that English statute.

[16] Insofar as 'contributory negligence' is concerned, it is important to note that the 'negligence' aspect of 'contributory negligence' is not at all to be equated with 'negligence' as constituting the basis for a claim, since 'contributory negligence', can only be relied on as a defence. Thus, whilst the existence of a duty of care is essential to a cause of action for negligence; for contributory negligence, it is quite unnecessary that the plaintiff should owe a duty to the defendant. All that is required is that which may generally be described as carelessness, considered, generally, in an objective context, in view of the prevailing circumstances at the material time and that such carelessness on the claimant's part, contributed to some extent, in causing him (the claimant), 'damage' (loss). What must be considered by a court therefore, in order for that court to properly determine whether a claimant was contributorily negligent in respect of the loss which he suffered, is whether a reasonable man, faced with those then prevailing circumstances, would have acted as the claimant then did. It is only in the exceptional cases of a claimant who is a child, or a claimant who suffers from an infirmity or disability, that the court will be obliged to consider an allegation made by a defendant in respect of any such claimant that the issue of contributory negligence must then be considered by a court from a more subjective viewpoint, considering the special circumstances of the claimant, in other words, youth, infirmity, or disability, rather than from, as is the general rule, a purely objective viewpoint. Thus, putting aside such exceptional cases, as was very cogently stated by Denning, L.J. in: **Jones v Livox Quarries Ltd.** – [1992] 2 Q.B. 608, at 615, a *'person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.'*

[17] It should be carefully noted, that where the defendant's negligence has created a dilemma for the claimant, the defendant cannot escape full liability if the claimant, in the agony of the moment, tries to save himself by choosing a course of conduct which proves to be the wrong one, provided the plaintiff acted in a reasonable apprehension of danger and the method by which he tried to avoid it, was a reasonable one. Provided that those two conditions are satisfied, these being that the claimant acted in a reasonable apprehension of danger and the method by which he tried to avoid the danger with which he was confronted at the material time, was a reasonable one, then the claimant would not be contributorily negligent, as regards his loss and/or injury suffered. See: **Jones v Boyce** – [1816] 1 Stark 493 and **Sayers v Harlow U.D.C.** – [1958] 1 W.L.R. 623. This is equally true, as regards a defendant, in a situation wherein, there is contributory negligence on the claimant's part, which has forced the dilemma upon the defendant, instead of upon the claimant. See: **Swadling v Cooper** *(op. cit.)*, esp. at p. 9 and **Mclean v Bell** – [1932] 147 L.T. 262, esp. at p. 263.

[18] The degree of want of care which will constitute contributory negligence, varies with the circumstances. Where however, all that the claimant is threatened with, is mere personal inconvenience of a relatively trifle kind/nature, the said claimant is not entitled to run a considerable risk in order to get rid of it. See: **Adams v L. and Y. Ry.** – [1869] 4 C.P. 739; and **Sayers v Harlow U.D.C.** *(op. cit.)*.

[19] This court has concluded as being matters of fact, insofar as this case is concerned, the following, as set out, seriatim below:-

(i) That the section of Orange Street on which the claimant and the defendant had been driving, immediately prior to the occurrence of the relevant accident, heading towards the intersection between that street and Rosedale Avenue, had on it, an unbroken white line. The claimant did not act carefully or as a reasonably prudent driver would, in having overtaken other vehicles, where, when and how he so did.

(ii) That the defendant was, just prior to the occurrence of the accident, seeking to turn right, so as to then head onto Rosedale Avenue. It was after he was far advanced in the making of that right turn to get onto Rosedale Avenue, that the defendant then realized that the claimant's vehicle had overtaken other vehicles and was then heading directly towards his vehicle. The defendant did not act carefully, when seeking to make that right turn, as he did not do enough, or perhaps anything at all,

at least to whatever extent it would have been reasonably possible for him to have done so to ensure, as he ought to have done, that it was then safe for him to have made the right turn which he did.

(iii) That at the material time, based upon the prevailing circumstances, the claimant's vehicle was speeding. This would be, because of the prevailing circumstances, carelessness on his part, which contributed to his loss and/or damage and also, which was a partial cause of the accident's occurrence.

(iv) That ultimately therefore, the losses suffered by the claimant and the defendant respectively, could have, at least, been lessened, if not, avoided altogether, were it not for the respective parties' carelessness.

[20] This court views the issue of negligence in the present case, from the point of view of what a reasonably prudent driver would have done, in the given circumstances which prevailed in respect of the claimant and the defendant respectively, on the relevant occasion. This court has made no determination of fact, as to whose vehicle it was, that first hit into the other's vehicle. That matter of fact is, if of any relevance whatsoever, only relevant in a wholly academic context. In considering whether or not a party has acted negligently, this court must apply its mind to the realities of everyday life when one is driving a vehicle in Jamaica and perhaps even more particularly in the instant case, when one is driving as a reasonably prudent driver would and should, along Kingston's typically, constantly busy with vehicular traffic, main roads – of which, Orange Street is one such – as this court has taken judicial notice of.

[21] There is no doubt, in this court's view that the claimant's negligence was, as a matter of both law and fact, the primary cause of the relevant motor vehicle accident. The claimant should not have been overtaking at all, whilst travelling on a road with an unbroken white line in the middle thereof. Worse yet, in circumstances wherein, he (the claimant), was then driving his vehicle along that road and the way ahead of him was at the material time, impeded somewhat, the claimant should not have been driving at a fast speed. The claimant should have, instead, been driving his vehicle at a slow speed and remained entirely within his lane and behind any other vehicle that was ahead of his vehicle and which was positioned within his correct vehicle lane, such that he could safely pass that vehicle without crossing over onto the other lane. That was the

situation that existed in respect of the claimant's vehicle, which was overtaking and the defendant's vehicle which had begun to turn right and was therefore, surely, at least at the stage, as well as, in all likelihood, even before then, positioned in the defendant's correct vehicle lane, such that it could not safely have been passed, even if the defendant had not then begun to make the right turn. The claimant's carelessness in that regard, undoubtedly, significantly contributed to his loss and/or damage and the defendant has proven this, well beyond a balance of probabilities.

[22] There is equally though, no doubt in this court's mind, that the defendant must share some of the legal responsibility, arising from that which this court has determined, was his carelessness which contributed to the accident's occurrence and thus, in turn, contributed to the loss and/or damage which both the claimant and the defendant suffered as a consequence of the accident's occurrence.

[23] This court has determined that the defendant was contributorily negligent in having caused the loss and/or damage which he suffered, because a careful driver, before having made the right turn on a main road, as and when he did, without having first did his best to ensure that he could have safely made that turn clearly, the defendant did not do that, when he made the fateful right turn with his vehicle, arising out of which, the relevant accident occurred. The defendant thus, having driven his vehicle into or across the path of the claimant's vehicle, at a time when it was unsafe to do so, then failed to manage his motor vehicle, so as to have avoided the collision.

[24] As such, this court has concluded that the defendant was, in law, contributorily negligent insofar as the occurrence of the relevant vehicle accident is concerned. The claimant has discharged the burden cast upon him, to prove contributory negligence, on the part of the defendant with respect to the claimant's loss and/or damage. The claimant has proven that it is more probable than not, that the defendant was, as such, contributorily negligent.

[25] This court has noted that in the claimant's reply and defence to counterclaim, the claimant essentially repeated his allegations of negligence, as had been made against the defendant in his particulars of claim and further specifically averred, in paragraph 6

thereof, that *'...if the defendant suffered any loss and damage as particularized same was caused wholly by the negligence of the defendant.'*

[26] An allegation of contributory negligence must be set out in a party's statement of case, if it is to be relied upon as a defence. See: **Rule 10.7 of the Civil Procedure Rules (CPR)** as regards the need to set out sufficient particulars in one's defence and see also, **Fookes v Slaytor** – [1979] 1 ALL ER 137, which court judgment, from England's Court of Appeal, makes it eminently clear, that a defence of contributory negligence must be averred in one's defence, if it is to be relied upon.

[27] The nature of the law of contributory negligence is such that it can never be relied upon as a complete defence. In other words, it is a partial defence only. It enables the trial court, to quantify the damages sum to be awarded to a claimant, such that said quantum of damages will be reduced by the extent as determined by that court, as being the extent to which the claimant was legally responsible for his own loss and/or damage. Thus, if for instance, the trial court were to determine as a matter of fact, that the claimant is responsible to the extent of 20% for his own loss and/or damage, then, in such circumstance, once contributory negligence has been specifically alleged in the defendant's defence, that court would then be legally obliged to reduce the damages awarded to be made in the claimant's favour, by that same 20%. There is no such concept in our law as 100%, or in other words complete 'contributory negligence'. 'Contributory negligence' is a specialized legal term and should only be utilized by attorneys and/or litigants, in accordance with the specialized meaning which Parliament has chosen to give to that term, that being the meaning which courts in both Jamaica and England have applied, time and time again. See: **Pitts v Hunt and another** – [1990] 3 ALL E.R. 344 as to there being no defence of complete or 100% contributory negligence.

[28] In the present case, the claimant's defence to counterclaim does not even so much as remotely imply, much less suggest, that the claimant is even accepting that there exists any alternative to his defence to counterclaim, which is that the defendant's negligence was entirely responsible for the relevant accident, as well as any loss and/or damage which may have been suffered by the claimant. In other words, unlike as

would more typically have been done, the claimant, in response to the defendant's counterclaim, did not set it out in his statement of case, that he is prepared to accept, at most, some of the legal responsibility for the loss and/or damage cause to the defendant as a consequence of the relevant accident's occurrence. In other words, he made no averment that the defendant's negligence contributed to the defendant's loss and/or damage. To the contrary, he averred that the defendant's negligence was the sole cause of his loss and/or damage. In other words, he has not accepted that that defendant's loss and/or damage was, at the very least, partially contributed to by the defendant's carelessness.

[29] As was succinctly stated in **Pitts v Hunt and another** *(op. cit.),* at p. 357, by Beldam, L.C. in reference to **Section 1 of the Law Reform (Contributory Negligence) Act** – [1945] of
England, which is worded precisely the same as **Section 3(1)** of Jamaica's equivalent statute –

> *'... it seems to me that the wording of* ***Section 1 of the Law Reform (Contributory Negligence) Act*** *– [1945] is incapable of a similar interpretation. Section 1 begins with the premise that the person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons. Thus before the section comes into operation, the court must be satisfied that there is fault on the part of both parties which has caused damage. It is then expressly provided that the claim shall not be defeated by reason of the fault of the person suffering the damage. To hold that he is himself entirely responsible for the damage effectively defeats his claim. It is then provided that the damages recoverable in respect thereof.... shall be reduced. It therefore presupposes that the person suffering the damage will recover some damage (sic.). Finally reduction is to be to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage. To hold that the claimant is 100% responsible is not to hold, that he shared in responsibility for the damage.'*

[30] This court is nonetheless, of the view that since, in respect of the claimant's claim for damages for negligence, this court is not entitled to, but should apportion the loss and/or damage, to the extent that this court deems the respective parties' carelessness

as having contributed to their loss and/or damage, then it must follow, that since, in the defendant's defence and counterclaim, the defendant had put forward that it was either the claimant's exclusive negligence which was responsible for the loss and/or damage which he, the claimant, suffered, or alternatively that the claimant, by his negligence, contributed to his loss and/or damage, it is now open to this court and indeed, this court should apportion the defendant's loss and/or damage, just as the same is to be apportioned, in respect of the claimant's claim. The legal position in that respect, would undoubtedly have had to have been different, if, in the defendant's defence and counterclaim he had not raised any allegation of the claimant's negligence having contributed to the loss and/or damage which the claimant suffered. In such a circumstance, the legal principle as set out in **Fookes v Slaytor** *(op. cit.),* in terms of the general rule that one is required to plead a defence of contributory negligence, if one wishes to rely on it, would undoubtedly have been applicable. This is though a general rule and thus, will not be applicable in all cases. On that point, see: **East Coast Berbice Village District Council v Hussain** – [1982] 31 W.I.R 250. The rule is inapplicable in the particular circumstances of this particular case.

[31] In the circumstances, this court will apportion damages for the respective losses suffered by the respective parties to this claim and counterclaim, in the proportion of the claimant being 80% responsible for his loss and/or damage and the defendant as being 20% responsible for his loss and/or damage.

[32] This court is of the view that in respect of the claimant's claim for damages, the sum which would have been awarded to him, had the court not determined him as having been contributorily negligent, is $2,395,931.71, as general damages, for pain and suffering and loss of amenities and the further sum of $56,000.00 as special damages. This court relies primarily, on the authority of the award of as was made by this court in the case: **Andrew Ebanks and Jephter McClymont** – Khan's volume 6, at pp. 76-79, in which case, the claimant's injuries, pain and suffering and loss of amenities were recorded and accepted by the trial, court as having occurred due to the defendant's negligence, were as follows: Loss of consciousness; closed fracture of

shaft of femur; open comminuted fracture of both tibia and fibula; abrasions to face; superficial laceration to right knee and temporary loss of consciousness.

[33] The claimant in the **Ebanks case**, was treated at the Black River Hospital and then transferred to the Mandeville Hospital, where he received further treatment. A pin was placed through his ankle that caused him to scream in pain. His leg was placed in a position, so that the bones could grow toward each other. To promote this growth of new bone, his right lower limb was held in a fixed position. He was placed on skeletal traction for 140 days and kept under close neuro - observation. During the 140 days he had debridement and placement of an external fixator on the right leg and suffered pin site infection which was treated with antibiotic. His leg was dressed daily. He developed a fungal rash. Consistent X-rays done over period, did not show any evidence of healing and a diagnosis of non-union was made. He was then sent to the Kingston Public Hospital for further operative management. There he underwent an operation, during which, a metal bar was placed on his thigh. There was no medical report indicating permanent disability or impairment, but there was unchallenged evidence that the claimant had stiffness of the knee and a shortened right leg. He also had difficulty straightening or bending the leg. The claimant told the court that he was embarrassed by his facial scars, as when he went for a job, the impression was left that he was a 'bad man' (criminal). He could no longer play basketball or football, as he used to, since he no longer had balance. He was also, no longer able to fish, or lift anything, or stand in his father's canoe.

[34] In the **Ebanks case**, this court made an award to the claimant, of $1,300,000.00 as general damages for pain and suffering and loss of amenities. That award was made in March, 2007, when the Consumer Price Index (CPI) was 102.5. The latest CPI is from November, 2013 and is: 209.9. Updated therefore, the said award in the **Ebanks case**, would now be: $2,662,146.34.

[35] This court has accepted the claimant's evidence as to the specific nature, as also the extent of his pain and suffering, to the extent that such was set out in paragraph 10-30 of the claimant's witness statement and thus forms part and parcel of his evidence-

in-chief. The evidence of the claimant's injuries, this court has accepted as being that which has been set out in a medical report prepared by one Dr. Carlton Chambers, who had attended to, diagnosed and treated the claimant, at the Kingston Public Hospital. Although that report is very pithy and thus, not as helpful as it could have been, nonetheless, this court has discerned that the claimant suffered three fractures and that those fractures were, it seems, to the claimant's right hip and right leg. The medical report itself does not make this clear, but the medical report cannot be considered in isolation. It must instead, be considered along with the evidence, of the nature of the claimant's pain and suffering as was provided to this court, by the claimant himself and which this court has accepted as being truthful.

[36] This court has also noted that in both the **Ebanks case** and the present case, there was no evidence of any long term disability whether of the whole person, or partial. In the present case though, the claimant did not suffer any loss of consciousness. In the **Ebanks case**, the claimant suffered loss of consciousness. Also in the **Ebanks case**, there was extensive evidence of loss of amenities, whereas, in the present case, whilst it can be and loss been implied by this court, that the claimant will suffer and have suffered from loss of one amenity or another there is though, no specific evidence of loss of amenities. The burden was on the claimant to prove loss of amenities. Whilst loss of amenities can, in certain circumstances, be inferred, nonetheless, the quantum of damages that can be properly be awarded in such a case, will be far lower than in a case wherein there exists extensive evidence, found by the trial court as having been duly proven, of loss of amenities.

[37] In the circumstances therefore, this court has discounted the updated award in the **Ebanks case**, somewhat, so as to make an award in this case in terms of general damages for pain and suffering and loss of amenities, which is best suited to the particular circumstances of this particular case. This court has concluded that a 10% discount in that respect, would be appropriate.

[38] Applying that methodology, the award which would have been made to the claimant in respect of his claim, for general damages, if it were not that there must be a further discount of 80% of same, for the purpose of taking into account his contributory

negligence, is $2,395,931.71. Following on that 80% discount of $2,395,931.71 though, the award to be made to the claimant, as general damages for pain and suffering and loss of amenities, in respect of his claim, will be: $479,186.34.

[39] Insofar as the claimant's claim for special damages is concerned, this court accepts as proven to the required standard of a balance of probabilities, the claimant's claim for (i) Transportation costs - $4,000.00. (ii) Loss in value of motor vehicle - $52,000.00. Aggregated these sums total: $56,000.00. The claimant is also claiming though, for loss for earnings, as according to his evidence, due to the accident, he had to stop from working, for two months. He has also given evidence that prior to the accident, he was working for the National Water Commission as a plumber and was earning $22,000.00 per month. He gave no evidence to this court, as to whether he was paid by the National Water Commission while he was away from work. The claimant has however, in his particulars of claim, made no claim whatsoever, for loss of any earnings while he was away from work. What the claimant has done instead, is claimed for loss of earnings 'of $5,000.00 from salary of $22,000.00 per month from June 16, 2006 to August 30, 2006.' In that regard, the claimant has particularized his claim for loss of earnings, as being for the sum of $20,000.00

[40] This is an interesting particularization, since June 16, 2006, would have been one year post – accident and thus, it is difficult to understand on what basis there could have been loss of earnings of $5,000.00 per month for the period of two months and two weeks, which is the period of time between June 16, 2006 and August 30, 2006, bearing in mind that the claimant has not, in his particulars of claim averred anything which could lead one to believe that he likely experienced any peculiar difficulties as regards his carrying out in work tasks during that short period of time, which, as it so happens, is one year post – accident.

[41] Furthermore, this particularization is interesting because, if the loss was $5,000.00 per month for a period of two months and two weeks, then the sum claimed for, could not properly be: $20,000.00. Instead, the sum claimed for, should have been:

$12,500.00. It is however, the sum of $20,000.00 which the claimant has claimed for, in this regard.

[42] What then, was the claimant's evidence as to his loss or earnings? Firstly, he provided no documentary proof of his alleged loss of earnings. Bearing in mind that he worked with a fairly large and significant statutory corporation, owned and operated by the Government of Jamaica he should have been able to have provided to this court, documentary proof of his alleged loss of earnings. Secondly, he testified in his examination-in-chief, as is set out in paragraph 32 of his witness statement, that:

> *'At the time of the accident I was a plumber for the National Water Commission. At that time my workload was very heavy and I had to fix and maintain pipes, lay water lines and lift heavy pipes. I didn't stop from work for long and about two months after the accident I went back to work. I couldn't lift anything heavy and I was unable to fulfil (sic) my duties. While I was paid, my salary was reduced. Before the accident, I earned $22,000.00 per month but when I returned to work I was paid $16,000.00 per month.'*

[43] Thus, if the claimant's own evidence is accepted, he was back to work within two months of the relevant accident and therefore was earning $6,000.00 (as distinct from $5,000.00 alleged in the particulars of claim), less that he was earning before the accident. In his evidence-in-chief, he gave no evidence that he had ever, since the accident, regained the pay which he had been earning prior to the accident. In addition, he certified his witness statement as being true, over seven years after the accident, this insofar as same was so certified, on December 10, 2012. One must wonder therefore, as this court certainly does – Why is it that the claimant has made no mention in his witness statement that he suffered loss of earnings of $6,000.00 per month, for two months and two weeks, commencing as of June 16, 2006? The claimant has not proven the allegation in that regard, as was set out in his particulars of claim. If that allegation as particularized, was erroneously so particularized, then the claimant's counsel, who is very experienced in matters of this nature, should have recognized same and sought this court's permission, to amend accordingly. As it was, no such permission was ever sought and the allegation has not been proven. In any event, in the particular circumstances of this particular case, the claimant should have been able

and should therefore be expected by this court, to have if he could, proven his loss of earnings by means of salary slips evidencing same, for the relevant time period. Having not so done, this court is satisfied that he has entirely failed to prove his claim for loss of earnings. Accordingly, the sum which would have been awarded by this court, to the claimant, in respect of his claim, as special damages, would have been: $56,000.00.

[44] This court will make no award of damages in the claimant's favour, arising from his claim, as particularized, for 'cost to extra help - $2,000.00 per week from June 16, 2005 to November, 2005 - $40,000.00'. No such award will be, over properly could have been made because, although the claimant has given evidence that he needed and had extra help, which was provided to him by one of this relatives, while he was recuperating at home, nonetheless, the claimant has provided to this court, no evidence whatsoever, that he had actually paid that person any money arising from the provision by that person to him, of such help. That evidence, which is the minimum required for that purpose, has not at all been forthcoming from anyone, during trial of this claim. In the circumstances, this court can and will make no such award.

[45] This court also, will make no award of special damages for the assessment of the claimant's motor vehicle, after the relevant accident. That assessment was carried out to determine the extent of the financial loss caused to the claimant, due to the diminished value of the claimant's vehicle and such assessment was carried out, undoubtedly, for the purposes of pursuit of this claim. Accordingly, that cost of assessment is recoverable, if it can be recovered at all, as constituting costs of the claim, rather than as special damages the term 'special damages' relates to specific financial and ascertainable – loss to a party, arising out of the legal wrong committed in relation to that party. That term is not meant to cover a situation wherein a party incurs specific and ascertainable financial loss, for the purpose of pursuit of a claim in court. The claimant's claim for cost of assessment of motor vehicle, falls squarely within the latter category. This reasoning will, of course, equally apply to the defendant's claim for special damages for cost of assessment of motor vehicle and thus, that claim will also not be accepted by this court for the purpose of an award of special damages.

[46] In the circumstances, the discounted award to the claimant, for special damages in respect of his claim, will be the equivalent of 20% of $56,000.00, which is: $11,200.00.

[47] As regard the defendant's counterclaim, he is only seeking, by means thereof to recover special damages. In that respect, he is seeking to recover as the cost of repairs - $54,680.00 and as assessor's fees - $5,400.00 and for loss of use – seven days at $1,600.00 per day - $11,200.00. The defendant gave evidence as to his having incurred all of these expenses and none of his evidence in that regard, was challenged. In addition, for the cost of repairs, the defendant has produced into evidence as an exhibit, a damage assessment report from Auto Assessors Associates Ltd., specifying the quantum of his loss as amounting to $54,680.00 and also, has produced into evidence as an exhibit a receipt for the assessor's fees, in the sum of $5,400.00. This court concludes that the defendant's claim for loss of use of his vehicle for seven days, at $1,200.00 per day is reasonable, and thus, will award to the defendant, by virtue of his contributory negligence, the sum of 80% of the total of his claim for special damages, except for the portion thereof which relates to his motor vehicle assessment. The total of the defendant's claim for special damages is $65,880.00 and therefore, the defendant will be awarded, in respect of his counterclaim, the sum of $52,704.00. This court will award to the respective parties, interest on the judgment awards of damages, at an equal rate of 6% the judgment awards of damages, at an equal rate of 6% for both general and special damages. The Court of Appeal expressly approved of such interest rate, for both an award of general, as well as special damages in: **Vandyard Dacres and Carla Dacres v Taria Reid** – SCCA No. 103/00.

[48] As such, this court makes the following judgment orders:

(i) Judgment on the claimant's claim, is awarded in favour of the claimant and the claimant is awarded, with respect to his claim, the sum of $479,186.34 as general damages, at an interest rate of 6% with effect from June 16, 2005 and the further sum of $11,200.00, as special damages at an interest rate of 6% with effect from December 10, 2009.

(ii) Judgment on the defendant's counterclaim is awarded in favour of the defendant and the defendant is awarded, with respect to his counterclaim,

the sum of $52,704.00, as special damages, at an interest rate of 6% with effect from December 10, 2009.

(iii) As regards the claim and counterclaim, each party shall bear his own costs.

(iv) The claimant shall file and serve this order.

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Hon. K. Anderson, J.