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[2014] JMSC Civ. 120

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008HCV00324

BETWEEN	CLEON PORTER	CLAIMANT
AND	ORVILLE DRUMMOND	1ST DEFENDANT/ 1ST ANCILLARY CLAIMANT
AND	RICHARD DRUMMOND	2ND DEFENDANT/ 2ND ANCILLARY CLAIMANT
AND	KEVIN TAYLOR	1ST ANCILLARY DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND ANCILLARY DEFENDANT

CONSOLIDATED WITH

CLAIM NO.2008 HCV 00333

BETWEEN	LEO RODGERS	CLAIMANT
AND	ORVILLE DRUMMOND	1ST DEFENDANT/ 1ST ANCILLARY CLAIMANT
AND	RICHARD DRUMMOND	2ND DEFENDANT/ 2ND ANCILLARY CLAIMANT

AND KEVIN TAYLOR **1ST ANCILLARY DEFENDANT**

AND THE ATTORNEY GENERAL OF JAMAICA **2ND ANCILLARY DEFENDANT**

Mrs. Allia Leith-Palmer instructed by Kinghorn and Kinghorn for the claimant.
Mr. Seyon T. Hanson instructed by Messrs Seyon T. Hanson & Co. for the 1st defendant/1st ancillary claimant and for the 2nd defendant/ 2nd ancillary claimant.
Ms. Cheryl-Lee Bolton instructed by the Director of State Proceedings for the 2nd ancillary defendant.

Heard: February 10, 11, 12 and 14 and July 31 2014.

Negligence – Motor vehicle collision – Turning across lane for on-coming vehicles – liabilities of parties – whether there is contributory negligence - apportionment.

P.A. Williams, J.

[1] The relative quiet of the afternoon of Sunday the 1st day of April 2007 was shattered along the Constant Spring main road by the sounds of the impact between a Nissan Frontier motor truck (pick up) registration no. 6561EQ and a Toyota Hiace motor truck (mini bus) registration no. 30-3074 which was being operated as a police service vehicle.
The drivers of the Nissan Frontier and the passengers in the Toyota Hiace were injured. The vehicles were damaged extensively – the Nissan Frontier ended up overturned and resting on its top.

[2] The actions that have arisen out of that collision involve a claim, ancillary claim and counter claim. It will therefore perhaps be best to identify and refer to the parties by their names. The driver and passengers of the Toyota Hiace motor truck were all serving members of the Jamaica Constabulary Force. The driver

was Kevin Taylor the 1st ancillary defendant; sitting beside him in the front passenger seat was Leo Rodgers, a claimant, and sitting behind the driver was Cleon Porter the other claimant. The driver of the Nissan Frontier was Orville Drummond, the 1st defendant/ 1st ancillary claimant and the owner of this vehicle was his brother Richard Drummond, the 2nd defendant/ 2nd ancillary claimant.

[3] Mr. Rodgers and Mr. Porter initiated these proceedings against Richard and Orville Drummond seeking to recover damages for personal injuries allegedly suffered by them. The Drummonds thereafter filed an ancillary claim against Mr. Taylor and the Attorney General, the 2nd ancillary defendant, seeking to recover for Mr. Richard Drummond damages for the loss of his vehicle and for Mr. Orville Drummond damages for personal injuries he allegedly suffered. The Attorney General has counter claimed against the Drummonds for damages relative to the cost of repairs to the Toyota Hiace.

The Claims

[4] The claims of Mr. Porter and Mr. Rodgers are largely identical. They assert that on the day in question, they were lawfully travelling in motor vehicle registration number 30-3074 along Constant Spring main road in the parish of St. Andrew when Mr. Orville Drummond so negligently drove and/or operated and/ or managed motor vehicle registration number 6165 ER, the property of Mr. Richard Drummond, along the said road that he caused and/ or permitted the said motor vehicle to come violently into collision with the vehicle in which they were travelling.

[5] They allege negligence against the Drummonds in similar terms as follows:

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

(ii) Colliding with motor vehicle registration number 303074.

(iii) Failing to see motor vehicle registration number 303074 within sufficient time or at all.

(iv) Failing to apply his brakes within sufficient time or at all.

(v) Driving at or into motor vehicle number 303074.

(vi) Failing to stop, slow down, swerve or otherwise conduct the operation of the said motor vehicle so as to avoid the said collision.

[6] These claim forms having been filed on January 23rd 2008, by October 21, 2008 an ancillary claim was filed on behalf of the Drummonds. They allege therein that the accident was caused by the failure of Mr. Taylor to stop at a red light located at the intersection of Dunrobin Avenue and Constant Spring Road. They seek to recover damages for their respective injuries and loss and further they seek indemnity from liability in relation to the claims brought by Mr. Porter and Mr. Rodgers. They therefore ask the Court to determine the following matters not only between the claimants and themselves but also as between them and Mr. Taylor and the Attorney General.

(i) Whether Mr. Taylor's negligence caused the accident.

(ii) Whether they ought to be indemnified in relation to all or any damages caused in relation to the said accident.

[7] They allege negligence against the 1st ancillary defendant/ Mr. Taylor in the following terms.

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

(b) Failing to decrease speed at the sign of an amber light being displayed on the traffic sign;

(c) Failing, refusing and/ or neglecting to stop at the sight of a red light being displayed on the traffic sign;

(d) Failing, refusing and/ or neglecting to turn on any warning sirens to indicate the approach of an emergency vehicle;

(e) Failing, refusing and/ or ancillary claimant's indicator in time or at all and taking the necessary action to slow down and avoid the collision;

(f) Colliding with the vehicle being driven by the 1st ancillary Claimant [Orville Drummond].

[8] The Attorney General in defending this ancillary claim brought against it, allege that it was Drummond who was negligent and counter claim for the cost of repairs to the Toyota Hiace.

The Defences

[9] The Drummonds have proffered defences that are largely similar. They deny the assertion that they are and were at all material times the driver and owner of the motor vehicle registration number 6165 ER respectively. The response by Mr. Orville Drummond is that at all material times he was driving the motor vehicle but with the actual registration number being 6561 EQ Mr. Richard Drummond acknowledge that he was the owner and that the registration number was indeed 6561 EQ. The error that runs throughout the claims brought by Mr. Rodgers and Mr. Porter failing to properly identify the vehicle involved in the collision was therefore not fatal to the determination of this matter.

[10] Mr. Orville Drummond states that he was operating and managing the motor vehicle which he was driving in a careful manner having regard to the other road users and to the road condition and was in the process of turning off Constant Spring Road into the Shell Gas Station located at the intersection of Constant Spring Road and Dunrobin Avenue when the motor vehicle registration number 303074 which was travelling down Constant Spring Road illegally came through on the red light and collided with his vehicle causing it to overturn and being written off and him sustaining serious injuries to his neck and spine.

[11] He further states that he was driving at a moderate speed as he was in the process of turning off the main road into the Shell Gas Station and in the circumstances could not have been speeding. The collision, he claims was caused by and/or contributed to by the negligent and careless manner in which the motor vehicle registration number 303074 was being driven by Mr. Taylor

who broke the red light at high speed and who had not engaged the use of the siren and/ or any warning devise to indicate that there was an emergency.

[12] He further asserts that both Mr. Porter and Mr. Rodgers were negligent and/ or contributory negligent in relation to the injuries they sustained in so far as they were not wearing a seatbelt, which if properly worn, would have restrained them in the said vehicle.

[13] The Attorney General filed an amended defence to the ancillary claim asserting that Mr. Taylor was driving the Toyota Hiace service vehicle at a moderate speed along the left lane of Constant Spring Road heading towards Half Way Tree, when upon approaching the Shell Gas Station (across from the Merl Grove High School) Mr. Orville Drummond suddenly recklessly and without warning turned the Nissan Frontier into the path of the said service vehicle thereby causing the collision.

[14] Further, it is asserted that Mr. Orville Drummond did not switch on his indicator to signal his intention to turn right, did not position himself in the traffic to indicate his intention to turn right into the Shell Service Station and turned recklessly and carelessly without due regard for other road users. He also failed to exercise due care and attention and failed to ensure that the road was clear before he turned into the gas station and due to his negligence both vehicles collided.

[15] The allegations of negligence on the part of Mr. Orville Drummond made by the Attorney General states:-

(i) Driving at an excessive and/or improper speed;

(ii) Driving without due care and attention;

(iii) Failing to maintain control or sufficient control over motor vehicle registration number 6561EQ.

(iv) Driving into Toyota Hiace motor vehicle registration 30-3074;

(v) Failing to see motor vehicle registration 30-3074 in sufficient time or at

all;

(vi) Failing to keep a proper look out;

(vii) Failing to apply his brakes in sufficient time or at all;

(viii) Suddenly and without warning turning into the path of motor vehicle registration 30-3074;

(ix) Failing to position himself in traffic to signal intention to turn right into Shell Gas Station;

(x) Attempting to turn into the Shell Gas Station in a careless and reckless manner; and

(xi) Failing to swerve, stop, slow down and otherwise manage motor vehicle registered 6561 EQ, in such a manner so as to avoid a collision with motor vehicle registered 30 3074.

The location of the collision

[16] The parties are not disputing where, in terms of general location, the collision took place. It is also largely agreed that it was a bright and sunny afternoon at approximately 3:30 pm when the collision occurred. There is therefore, no challenge to the fact that the road surface in the area where the accident occurred was dry and asphalted.

[17] The Attorney General prior to trial sought and obtained permission for Sergeant Franklin McLaren's Expert Report on the collision to be relied on. The Sergeant was called as a witness and attested to being a certified and trained Accident Investigator and Reconstruction officer working at the Jamaica Constabulary Force Traffic Headquarters since 1999. There was no challenge to his description of the road layout given in his report and this will be relied on in seeking to come to an understanding of the area where the collision occurred.

[18] He stated that it occurred on Constant Spring Road in front of the entrance to the Shell Service Station at about 40 meters south of Gore Terrace in the parish of

Saint Andrew. As he saw it, this section of the road is made of asphalt with no significant grade or super-
elevation and was in a state of good repairs. He described the location as follows:-

> *"As one approach from north or the direction of Constant Spring, Dunrobin Avenue meets Constant Spring Road at a right angle. The road formed a "T" junction. This junction is to the Western end of Constant Spring Road and is controlled mechanically with stop lights. It is approximately 50 meters north of the collision locus."*

[19] He went on in his description as follows:-

> *"The normal layout of Constant Spring Road is that of a single carriage way that facilitates the simultaneous movement of single lane traffic in opposite directions. However, at the collision site, the road is widened to accommodate double lane traffic in both directions. One central solid line divides the roadway and separates the northbound traffic from the southbound traffic. Short broken white lines divide the southbound section, so that two motorists can travel abreast into their respective lanes. A similar situation obtains for motorists who travel in a northerly direction. In addition, for northbound traffic, an extra filter lane facilitates motorists who are turning left onto Dunrobin Avenue".*

[20] Another significant observation which he made is that approaching the collision site after leaving the stop light, the roadway curves slightly to the left. He further noted that an elevated concrete sidewalk on each side of the roadway run parallel to the main thoroughfare. He gave the measurements at the point he determined to be the collision site. The overall width was 52ft 10 inches. The northbound section's total width is 30ft 10 inches and when divided each lane is 10ft and 8 inches with the filter lane measuring 9ft 6 inches wide. The southbound section's total width is 22 feet and when taken separately each lane

measured 11 feet wide. As one faces north, the left sidewalk measured a width of 4ft 6 inches and the right sidewalk measured 10ft.

The reason the collision occurred

From the perspective of the occupants of the Toyota Hiace.

[21] Mr. Taylor explained that he was a force driver and the holder of a general drivers licence. On that fateful afternoon he was transporting his colleagues from their assignment to Harmon Barracks. He explained that he was driving at a moderate speed all along the journey down from the Manor Park area. His passengers Mr. Porter and Mr. Rodgers agree that the vehicle was being driven at moderate speed. Mr. Porter puts it at 40 to 60 kmph. Mr. Rodgers would not estimate the speed and was content to describe it as not going fast.

[22] The three gentlemen are also agreed that when approaching the traffic lights which controlled the flow of traffic at the "T" junction of Constant Spring Road, with Dunrobin Avenue, they were not in conversation. Mr. Taylor, most importantly said he was not in any way distracted. Mr. Taylor and Mr. Porter maintained that the lights facing them were on green – in other words they had the "go – ahead". Mr. Taylor insisted that from the stop light prior to this one, he had been able to observe that all the traffic lights were on green. As he puts it when pressed under cross-examination, within ten (10) feet of passing through the Shortwood Road/ Constant Spring Road intersection he was able to see the Dunrobin Avenue\ Constant Spring Road stop-light and they showed green and remained that way until he got to them and passed through. He estimated the lights were sixty (60) to seventy (70) feet apart and it had taken him 2 minutes to get from one to the other driving at 50kmph.

[23] Mr. Rodgers however had a different recollection of the passage through the intersection. He is unable to say what colour the lights were because he did not look at them. He said the Toyota Hiace however was brought to a complete stop. He had no explanation as to why this was done but he said the vehicle stopped,

European Court of Justice gave consideration to this principle within the context of public policy in relation to the enforcement of a foreign judgment, in answer to questions raised by the Italian appellate court in Milan. In that case, the appellant's defence was struck out for disobedience of an order for discovery and judgment was entered against him. It was held that "the State in which the enforcement is sought may refuse to recognize a judgment delivered in another Member State if the judgment was delivered in manifest breach of the fundamental right to a fair trial".

[91] Speaking to the concept of fairness within the context of the rules of natural justice, in ***Regina v Secretary of State for the Home Department ex parte Doody*** [1993] 3 All ER 91LR 154 at 169, Lord Mustill said, among other things:

> "...(2) the standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demand is dependent on the context of the decision and this is to be taken into account in all its aspects...."

[92] Mr Braham's submission that the decision of the foreign court undermined DYC's right to be heard must be looked at against the developments in that court. DYC filed a defence to the verified complaint. It participated in the action by defending the claim and although it attempted to have the claim dismissed for want of jurisdiction and the lack of a cause of action, jurisdiction was vigorously contested in the foreign court. DYC took several important steps in participating in the proceedings. It is without doubt that DYC had an opportunity to answer the claim and could have

[96] It is a well-established rule that the court will not make an inquiry into the merits of the case where the judgment of the foreign court is final and conclusive save and except where fraud is raised, and as shown by the modern approach, the merits are open to challenge only where the allegations of fraud are new. Where a foreign judgment is impeached by a party against whom the judgment is given, the burden of proof rests on that party who challenges the judgment.

[97] In raising the issue of fraud, it has not been shown that there is any new evidence which has been discovered which, with due diligence could not have been raised in the foreign court. The evidence put forward by DYC as showing fraud consisted of mainly matters which were before the foreign court and other matters of which DYC was fully aware at the material time which could have been placed before the foreign court. DYC has not demonstrated that the allegations of fraud raised could not have been, with reasonable diligence, placed before the foreign court. There are no circumstances arising in this case, which would have required Anderson J to have held an inquiry into the allegations of fraud, as contended for by DYC. It is obvious that DYC seeks to re-litigate the action.

Conclusion

[98] In my judgment, the court in Miami had jurisdiction over DYC. The issues of fraud complained of related to matters which were before the court or which could have been raised before the court. Perla is entitled to have its judgment registered and enforced, Anderson J was correct in so finding.

the driver changed gear and then moved off again still at a moderate speed. Both the other men in the vehicle failed to speak of any such maneuver; indeed they said the vehicle did not accelerate or decelerate during the approach to or passage through the intersection. Mr. Taylor said he did not stop the vehicle at any time coming down that road.

[24] Another point of departure between the occupants of the Toyota Hiace was as to what happened immediately before the collision. They are all agreed that the Nissan Frontier turned across their lane suddenly. It was so sudden they said, the driver of their vehicle had no time to swerve to avoid the collision. Mr. Rodgers however said he felt the vehicle make a sudden drop in the speed which suggested to him that the driver had applied his brakes. The other passenger, Mr. Porter said there was no sudden movement – there was no time for it. The driver, Mr. Taylor, said he did not apply the brakes, he did not gear down, he did change his direction of travel in anyway; there was no time.

[25] Mr. Porter estimated that when he first saw the Nissan Frontier it was very close about five feet away, cutting across their path heading in the direction of the gas station. Mr. Rodgers in his witness statement/examination-in-chief said that when he saw the Nissan Frontier it was indeed very close; he estimated it as no more than four (4) feet. Under cross examination he changed his estimate and said it was in fact more than four (4) feet away when he first saw. Mr. Taylor maintained that when he first saw that yellow vehicle it turned suddenly into his path and was so close he had no opportunity to brake or swing away.

[26] The occupants of the Toyota Hiace are further in unison however, in their position after coming through the intersection; they were in the extreme left lane, the lane closer to the Shell Service Station. They are also largely agreed that not much traffic was on the road at that time whether going to or coming from the opposite direction. Mr. Taylor also said that going through the lights; he did not encounter any traffic exiting on Constant Spring Road.

[27] The other significant matter the men were questioned about was the distance between the intersection and the point of collision. Mr. Rodgers estimated it was thirty (30) feet, Mr. Taylor estimated it to be twenty (20) feet. As the driver, Mr. Taylor estimated it took him a mere four (4) to five (5) seconds from the intersection to the area the collision occurred. He underscored that it was all very sudden.

[28] None of the men said they saw the Nissan Frontier indicate its intention to turn right. Indeed Mr. Taylor said when he first saw the vehicle it had already turned and was at the entrance of the Shell Gas Station. Mr. Porter said he did not remember seeing any indication. Mr. Rodger eventually under cross-examination said he had seen the Frontier approaching, he observed it for two (2) to four (4) seconds and saw when it made that sudden turn into their path. He did not see it come to a stop or make any indication of its intention to stop. He did not observe the front of the vehicle actually across the left lane and start to enter the service centre.

[29] Mr. Taylor denied suggestions that he had been driving recklessly at a fast rate and that he had failed to decrease his speed on approach when the lights had turned to amber and then to red. There was, he insisted no change from the colour green, he had no need to and certainly did not refuse to stop. He disagreed also with the suggestion that had he been looking in the direction of oncoming traffic he would have seen the Nissan and would have been able to brake or swerve thereby avoiding any collision. He did not agree that the front section of the Frontier had in fact passed totally and already come off the roadway and was positioned in the gas station.

[30] It is useful to note that the three occupants of the Toyota Hiace admitted that they were not wearing seat belts. They explained that as police officers travelling in a police service vehicle they were exempted from having to do so while on

duty. Indeed, Mr. Rodgers was unaware of whether the vehicle was fitted with seatbelts. Mr. Taylor acknowledged that the front passenger seats did in fact have seatbelts. In any event, Mr. Rodgers also explained that it was not correct to say they could have chosen to use the seatbelts and he did not agree that he would have been restrained if he had chosen to use them.

From the perspective of the driver of the Nissan Frontier

[31] Mr. Orville Drummond explained that he was actually visiting Jamaica at the time and had attended Champs and World Cup Cricket. He had migrated some eight (8) years earlier but had been familiar with driving in Jamaica for some (7) years prior to that. He admitted most of this driving had taken place in the rural area where he had lived. He had however been staying at premises off Dunrobin Avenue and was familiar with the area during this visit to Jamaica.

[32] The Nissan Frontier was indeed the property of his brother. He had borrowed it to travel into Kingston to attend the activities he wished and to do his personal business. He first drove it the Friday before the Sunday when the collision occurred. It was a left hand drive-vehicle with a V6 engine which he acknowledges meant it had a powerful engine.

[33] Mr. Orville Drummond explained that he was proceeding from the Half Way Tree direction first travelling in the left lane heading in the Constant Spring direction. The landmark on the left hand side of the road which became a point of reference was the location of the CVM television station offices. It was after passing this location that Mr. Orville Drummond decided to change lanes and then proceeded for a short distance into the right lane nearest to the middle of the road.

[34] Mr. Orville Drummond in accepting that he did turn across the lanes for oncoming traffic explained that he did so to get to the service station to purchase gas. He admitted knowing that there were two (2) entrances to that gas station. He was

aware of one that had been closer to CVM location but he was more familiar with the 2nd entrance closer to the "T" junction with the traffic lights.

[35] Under cross-examination he was asked specifically if he would accept that he did not decide to turn into the gas station until after he had passed CVM to which he responded "no". However shortly after when it was suggested to him that the reason he did not take the entrance closest to CVM was because he had made the decision to enter the gas station after he had passed that first entrance he agreed with this suggestion. Eventually he explained that he knew he needed to purchase gas and had been keeping a look out at the different prices it was being sold for. When he noticed that the price being advertised at that Shell Gas Station was the cheapest, he decided to stop and purchase it there. He was insistent, in any event that it was not a last minute decision he had made to turn into the gas station but a calculated one.

[36] He indicated that there were vehicles in front of him heading in the same direction he was – it was not bumper to bumper or heavy traffic but he described it as moderate. He said he was 10 to 15 meters away from the traffic light at the "T junction" when he saw a car coming down Constant Spring Road coming through the intersection when the lights were showing amber. He saw no other vehicle approaching at that time. He saw the lights change to red which meant that the traffic going northerly and southerly, up and down, Constant Spring Road would have to come to a stop. Only traffic coming from Dunrobin Avenue and turning right on to Constant Spring Road was expected at the point. He saw no traffic at this time.

[37] He explained how he had come to a stop, put on his indicator to show his intention to turn right, then had proceeded to go across the two lanes on the opposite side and then saw the Toyota Hiace approaching at what he thought was a high speed he estimated to be 60 to 70 mph. He said when he saw it; the Toyota Hiace was 10 to 15 meters away. Within a second of seeing the Hiace the

collision took place. He said he did not apply his brakes; he neither slowed down nor accelerated but maintained his speed. He remembered holding the steering wheel a lot tighter. The Nissan Frontier was struck with so much force that it flipped over and landed on its top.

[38] Under cross-examination; Mr. Orville Drummond was not reluctant in accepting that to turn across the two lanes required care and caution. He insisted that when he saw the first car it had just crossed the intersection with part still in it. He saw no other vehicle immediately behind it; he had looked in that direction for more than one second but less than five seconds and seen nothing. The car had actually passed him as he stopped waiting to cross into the gas station. He definitely had not seen the Toyota Hiace neither before nor while he was positioning himself to make the turn. He admitted to being able to see only a little beyond the intersection as the road was a little curved beyond that point. He had taken his eyes from that direction to look into the gas station for a second or two to ensure the pathway was clear. He felt it was prudent to look in every direction where he would expect danger including in front of him. He looked to his right along the sidewalk area to see if there was any pedestrian or bicycle passing there. He said he would have delayed turning for at least three (3) seconds.

[39] After looking right he glanced left again. He said at some point he did see traffic coming down on the opposite side of the intersection moving towards the traffic lights. He, in moving to cross, would not have been going more than 5 to 10 mph. It was a short distance so he acknowledged he knew he had to move carefully but as fast as possible. He described the Nissan Frontier as having already crossed the white line of the right lane, going towards Half Way Tree, was facing the gas station and was in the lane closest to the gas station with the back tyres in the lane he had just left. At the speed he was going it should have taken him 4 to 5 seconds to cross but it was within 2 seconds of making the turn that he got hit.

[40] In his witness statement/evidence in chief he had said that at the time of indicating to make the turn he had observed that the traffic light had turned red. Under cross-examination he agreed that those lights controlled the flow of traffic not only travelling up and down Constant Spring road but also that coming from Dunrobin Avenue. Hence he acknowledged that he would not have been able to see the lights controlling the flow from Dunrobin Avenue. He was not able to say with certainty that it had been showing green. He however, expected that once the light on the Constant Spring Road end was showing red, the ones for Dunrobin Avenue would have turned green in seconds; if they were functioning correctly.

[41] Thus Mr. Orville Drummond explained how given his experience he expected that the lights for Dunrobin Avenue would have changed to green permitting vehicles to make the turn unto Constant Spring Road. He was certain he would have made it across and into the gas station safely without any traffic coming around from Dunrobin Avenue to interfere with his passage. He estimated that cars coming from Dunrobin Avenue would have had the same time to get into the lane going to Half Way Tree as he would to get into the gas station. He felt there was "no way a person taking the corner would beat him into the entrance of the gas station". He however conceded that cars coming around from Dunrobin Avenue would have the right of way but he did not expect any coming very fast from that direction.

[42] To re-enforce the correctness of his feeling that he could have safely crossed without interfering with traffic from Dunrobin Avenue, Mr. Orville Drummond explained that as a teacher of Mathematics and Physics he was making a calculated move. There was less distance he would have had to traverse and he calculated that the person coming from Dunrobin Avenue would have had to have moved off more than four (4) seconds before him for there to have been a possible problem between them.

[43] However, he was forced to agree that based on timing, somebody wanting to turn into the entrance closest to Dunrobin Avenue would have had a shorter break in which to do so than if they had chosen to do so at the other entrance closest to CVM, to get into the gas station. He acknowledged it was good to have more time to make the maneuver. If traffic was coming the CVM entrance may well have been the safer of the two entrances but he maintained that if there was no traffic neither entrance could be considered safer.

[44] Mr. Orville Drummond while agreeing that he had in effect turned across the path of the Toyota Hiace vehicle; he disagreed that it had not been safe to turn as his vehicle was already proceeding towards the gas station. He disagreed that he was the cause of the accident or that he drove into the path of the Toyota Hiace as he had failed to see it within sufficient time before making the turn. He also denied seeing the Hiace but calculating that he could have beaten it to get across so he did not decide to accelerate by driving very fast above 50 kmph. He did not fail to look out, did not turn recklessly, carelessly or negligently and did not fail to maintain sufficient control over his vehicle. He was insistent that he did, in fact, stop before turning and did use his indicator clearly demonstrating his intention to turn.

From the perspective of the member of the Accident Investigation and Reconstruction Unit.

[45] Sgt. Franklyn McLaren received a telephone call whilst on duty at the Police Headquarters at about 4:20 pm on the afternoon of April 1, 2007 which caused him to visit the scene of the collision, in his then capacity as a certified accident investigation and reconstruction officer. He made his observations of the road layout, the vehicles involved in the collision and marks found at the scene. He took photographs of his observations. He analyzed the information and came to his conclusion as to how the collision may have taken place based on his reconstruction. His report was admitted as an expert report on behalf of case presented for Kevin Taylor and the Attorney General.

[46] He noted that the yellow Nissan Frontier motor truck with registration plates 6561 EQ was overturned and resting on its top with the front facing the Shell Station and the rear towards the roadway. It was on the right sidewalk directly in front of the Shell Service Station as one faced the northern direction or Constant Spring. This he said was its post impact position. This vehicle he observed to have extensive damage that concentrated to its left side as follows: front and rear doors, left front fender, bonnet, front wind screen, right rear rim, top, right headlamp and left B-pillar.

[47] He saw the white and blue Toyota Hiace mini bus with registration plates 30 3074 in what he described as a contrasting post-impact position as that of the Nissan Frontier motor truck. It was broadside across the left lane as one faced the direction of Constant Spring. It had extensive damage that was concentrated to its front panel, left front door, left A-pillar windscreen and left front head lamp with both left and right indicators broken and detached from the vehicle.

[48] He saw gouge marks (digging) on the road surface, concentrated in the left lane as one faced Half Way Tree. The size of the gouge marks was 8 inches long and measured 4 ft and 6 inches into the road from the left sidewalk. Further, he saw two sets of skid marks (created by sliding tyres) on the road surface. These marks were also concentrated in the left lane as one faces Half Way Tree direction. He also noted that there was debris consisting of broken windscreen from the Toyota Hiace and also door glass from both vehicles and left running board from the Nissan Frontier. These were found in the left lane and on the left sidewalk as one faced Half Way Tree.

[49] Sgt. McLaren was satisfied from his inspection of the damage to the vehicles that they collided at a 90 degree angle with the impact occurring at a time when the Toyota was heading south and the Nissan Frontier was heading east. This 90 degree angle of impact with the Nissan motor truck broadside across its path

meant that the Toyota Hiace offered the Nissan Frontier no opportunity to absorb and resist the force as would a head-on collision. This therefore meant that at impact the Toyota Hiace motor truck pushed the Nissan Frontier sideways (causing the wheels to create the tyre marks) and sustained force eventually overturning it.

[50] In concluding Sgt. McLaren stated that based on the lack of pre-impact skid marks from either of the vehicles, none of the drivers reacted to their respective hazards. He formed the view that a reaction would be evident in the behavior of the vehicles if their respective drivers had the time and attempted to avoid the collision by firm and sustained braking. Another significant opinion from Sgt. McLaren is that the Toyota Hiace had the greater post impact movement which is an index to say that it was travelling at a greater pre-impact speed than the Nissan Frontier.

[51] Under cross-examination by Mr. Hanson Sgt. McLaren explained that the pre-impact position of the Nissan Frontier would be the same as the post-impact in terms of direction except, of course that pre-impact it would have been on its wheels. Further, he opined that the impact would not have pushed this vehicle on the roadway but rather it would have been pushed further in towards the gas station. He was pressed on whether it was possible that a section of the Nissan Frontier had actually cleared the left lane prior to impact. This he found to be possible but not probable. He however felt it safe to say the front would have passed the vehicle that collided with it. He was reluctant to give any estimate of the rate of speed the Toyota Hiace would have been travelling at; only that it was travelling faster.

[52] Under cross-examination by Mrs. Leith-Palmer, he was also reluctant to give any estimate of the speed the Nissan Frontier was moving at.

The submissions on the issue of liability for the collision

For Leo Rodgers and Cleon Porter

[53] Mrs. Lieth Palmer structured her submissions by firstly setting out what she considered to be the admitted undisputed or unchallenged facts, then discussed the applicable law and concluded by addressing the evidence in the context of the law and the facts.

[54] It is however with her discussion of the law she considered applicable that I will commence my recounting of her submission. She urged firstly that the starting point was the appreciation of two legal principle, the first of which she found to have been discussed in the case of **Boss v Litton (1832) 5 C & P 407**

> *"All persons, paralytic as well as others, have a right to walk on the road and are entitled to the exercise of reasonable care on the part of persons driving carriages upon it"*

From this principle she submitted that the claimants, Mr. Rodgers and Mr. Porter, start out from a position of having a right to travelling in motor vehicle registration number 30 3074 and were entitled to the exercise of reasonable care on the part of Mr. Orville Drummond as he drove along the road.

[55] The second applicable principle she pointed to is that which is set out in section 32 of the Road Traffic Act.

32 (i) If any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road he shall be guilty of an offence.

By this principle she submitted, every motorist when driving or the road is obliged to drive, with due care and attention and/or reasonable consideration for other persons using the road.

[56] She also highlighted another section of the Road Traffic Act she found to be of importance to the circumstances of this matter.

Section 51 (1) states inter alia:-

the driver of a motor vehicle shall observe the following rules – a motor vehicle...

(a)...

(b)...

(c)...

(d) Shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;

(2) 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 by 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.

[57] Finally in this area, Mrs. Leith-Palmer referred to the case of **Simpson v Peat 1952 2 QB 24** and cited what was found to be held from the case in Bingham and Berrymans' Motor Claims Cases, paragraphs 9.55 at page 356 to 357.

> *"A driver might not be using due care and attention although his lack of care maybe due to something which could be described as an error of judgment. If he is driving without due care and attention it is immaterial what caused him to do so. The question was whether he was exercising that degree of care and attention which a reasonable and prudent driver would exercise in the circumstances. The question was one of fact and not of law. On the facts the defendant was cutting across the line of traffic coming from the opposite direction. It was for him to take care that he could execute the manoeuver in safety"*

[58] In applying the law to the evidence, it was Mrs. Leith-Palmer's opinion that on the evidence presented, Mr. Orville Drummond is to be held solely responsible for the occurrence of the accident and even on his own evidence he ought to be held liable. She therefore in analyzing his evidence and argued that only one of two explanations can be accepted as to why the accident occurred, namely :-

(i) Mr. Orville Drummond failed to see the Hiace, who had the right of passage travelling along Constant Spring Road in the left lane towards Half Way Tree in time or at all when he turned across its path;

(ii) Mr. Orville Drummond saw the Hiace who had the right of passage travelling along Constant Spring Road in the left lane towards Half Way Tree and made an attempt to beat the Hiace and complete his right turn into the gas station and failed.

In her opinion, it matters not which of the two scenarios is correct as Mr. Orville Drummond would be liable on either account.

[59] She argued further that he has not brought one scintilla of evidence to confirm that the stop light, he contends was disobeyed by Mr. Taylor, was in fact on red when Mr. Taylor came through it and collided with his vehicle. She cast doubt on his ability to see the traffic light so that he could now say with any certainty what colour it was showing. She noted that Mr. Orville Drummond had said he had not seen the Toyota Hiace at the traffic light or in the intersection when he looked to his left before making his turn.

[60] Further she posited that on his own evidence it can be said that he had made a last minute decision to turn into the Shell Gas Station as he had been checking gas prices along the way and he saw that the prices at Shell were more reasonable only after he had passed the first entrance to the station closer to CVM television station .Next she went on to challenge Mr. Orville Drummond's estimation of the time it took him to execute the manoeuver. She noted he maintained he was travelling at a maximum speed of 10mph whilst making the turn knowing he had to move as fast as possible yet he had expressed the opinion that the time between his beginning to turn and the collision was 3 seconds.

[61] Referring to paragraph 9.24 of Bingham and Berrymans' Motor Claim Cases 11th edition which states that a vehicle travelling at 10mph will cover 14.66 feet in 1

second, Mrs. Leith-Palmer calculated that since the total width of the southbound section measured 22 feet (according to the expert opinion of Sergeant McLaren); Mr. Orville Drummond should have completed his turn safely at the speed he said he was travelling at. He was however, she noted positioned directly in the path of the Hiace, with his rear tyre still in his right lane and the front door and cab section in the left lane closest to the gas station.

[62] She asserted that the case for Mr. Porter and Mr. Rodgers was a simple one. She accepted that Mr. Rodgers said the Hiace had come to a stop before moving off through the green light but said this is of little significance as the accident occurred 50 meters away from the intersection and traffic light at the time when theToyota Hiace had the right of way.

[63] She urged the court to accept the version of Mr. Kevin Taylor as to what he did as the driver of the Toyota Hiace. He proceeded through the green light and it was the Nissan Frontier that turned into the path of the Toyota Hiace so suddenly he had no time to react. She urged the court to find as incredulous the suggestion that Mr. Taylor would have seen the Nissan Frontier in the process of turning and maintained his speed over a distance of 50 meters from the traffic lights and never applied his brakes or changed lanes or swerved to avoid the collision.

[64] She argued that the occupants of the Toyota Hiace ought not to be found contributing negligence for failing to wearing seat belts as the law states that they are not required to wear it. Section 43 (b) (2) (d) of the Road Traffic Act provides that:-

"a person riding in a vehicle while it is being used for fire brigade or police are exempted from wearing seat belts."

She opined that taking into consideration this exemption under the Road Traffic Act and the policy and practice of members of the JCF it; was reasonable for the claimants to have made the decision not to wear a seat belt even where

one was provided. In any event, the Hiace was not fitted with seat belts in the rear so Mr. Porter could not have worn one.

[65] Mrs. Leith-Palmer submitted that where Mr. Rodgers was concerned, there is no expert evidence offered to prove that had he been wearing the seat belt his injuries would have been any less serious. She noted that the cases of **Froom etal. v Butcher (1975) 3 ALL ER 520** and **Hitchens v Berkshire County Council 21 June unreported CA** – Bingham and Berrymans' Motor Claims Cases 11th edition at paragraph 4. 45 were being relied on by Mr. Hanson in arguing that her clients be held to have been contributory negligent in their failure to wear seat belt. She however countered this position in arguing that the cases are distinguished since there is no evidence here that the injuries would have been less severe.

[66] In concluding on the matter of liability, Mrs. Leith Palmer submitted that the version presented by Mr. Rodgers and Mr. Porter accords with the physical evidence and is more probable in all the circumstances.

For Mr. Orville Drummond and Mr. Richard Drummond.

[67] Mr. Hanson on behalf of the Drummonds identified 3 issues he says are to be determined by the court:-

(i) Whether Mr. Orville Drummond or Mr. Kevin Taylor were Negligent and /or contributory negligent in relation to the cause of the accident.

(ii) Whether Mr. Rodgers and Mr. Porter were contributory negligent in so far as they were not wearing seat belts at the time of the accident.

(iii) Whether Mr. Richard Drummond as the owner is vicariously liable for the acts of Mr Orville Drummond the driver

[68] Mr. Hanson reviewed what he found to be relevant bits of evidence and submitted that in assessing the evidence of both drivers that of Mr. Orville Drummond is more creditable and establishes that he performed a number of precautionary steps ensuring it was safe to turn before proceeding to do so. In contrast he said the evidence of Mr. Taylor showed that he had no appreciation for other users of the roadway and their presence on same as he saw no cars and never looked in the direction of the oncoming traffic despite having a clear view from the intersection to the bridge near to CVM. Thus Mr. Hanson said Mr. Taylor failed to see the bright yellow Nissan Frontier driven by Mr. Orville Drummond and he would not have seen it because he did not look in that direction nor did he see the indicator of the Nissan Frontier.

[69] Mr. Hanson went on to describe the evidence of the passengers in the Toyota Hiace as being inconsistent and highly contradictory. He highlighted the discrepancies between them and submitted that based on the varying accounts given by the three occupants of the Toyota Hiace, their entire evidence should be approached with extreme caution.

[70] Mr. Hanson submitted that based on what he termed as the multiplicity of claims, ancillary claims and counter claims involved in the present matter and the evidence which was presented; the court could make the following finding or a combination thereof notwithstanding the total defence raised by his clients:

(a) 1st and 2nd Ancillary Defendants liable to claimants and indemnity applied in favour of defendants.

(b) 1st and 2nd Defendants liable to claimants and 2nd Ancillary Defendants on the counter claim.

(c) Claimants contributory negligent and damages reduced based on allotment of negligence.

(d) 1st Defendant and Ancillary Defendants both Contributory negligent in relation to cause of collision and liability to claimants to be apportioned based on each parties' contributory negligence.

[71] Mr. Hanson stressed that Mr. Orville Drummond denies being negligent and lays the blame for the accident on Mr. Kevin Taylor. It is submitted that the actions of Mr. Taylor were to be viewed as negligent insofar as he failed to brake or swerve or avoid the collision with the Nissan Frontier. It is Mr. Hanson's opinion that in the circumstances Mr. Orville Drummond claims an indemnity for the damages and injuries sustained by the passengers in the Toyota Hiace from its driver and the Attorney General. Further he argued that Mr. Orville Drummond was to be compensated for his injuries, loss and damage.

[72] On the other hand, Mr. Hanson urged the court to explore contributory negligence as between Mr. Orville Drummond and Mr. Taylor especially based on the report of Constable Franklyn McLaren(as he then was). From this report, Mr. Hanson submitted, the negligence is to be shared. He cited from the text Bingham and Berrymans' Motor Claims cases 11th edition at para. 4.33

> *"In order to establish the defence of contributory negligence ,the defendant must prove first that the plaintiff failed to take "ordinary care for himself" or, in other words such care as a reasonable man would take for his own safety, and, second, that his failure to take care was a contributory cause of the accident."*
> *Per Du Parcq in* ***Lewis v Deyne (1939)1KB 540***

[73] Mr. Hanson found that the expert's version of how the collision took place was consistent with that of Mr. Orville Drummonds account. "It is safe to say neither driver saw the other within sufficient time to avoid the accident" was how he

described it. He went on to urge that the greater duty was on Mr. Taylor, who was engaged in the maneuver viewed by Mr. Hanson as being the more dangerous.

[74] The local decision of **Christine McNally v Kenneth Mahabier et al [2012] JMSC Civ. 26** was relied on and Mr. Hanson opined that the case "establishes that it is not automatic that the vehicle coming straight will be negligent as the facts of the case have to be examined to determine same". In the case Mr. Justice Campbell found contributory negligence in a collision similar to the matter before the court and apportioned blame on a 60:40 basis.

[75] Mr. Hanson also argued that the issue of contributory negligence arises as between the passengers in the Toyota Hiace and its driver. It is submitted that the failure of a passenger to wear a seat belt has long been judicially recognized as being an act of contributory negligence.

The case of **Froom and others v Butcher** [supra] was relied on in support of this submission where it was held that

> *"... in determining whether the plaintiff had been guilty of contributory negligence, the question was not what was the cause of the accident, but what was the cause of the damage; that since the plaintiff's injuries except for the broken finger had been caused by his failure to wear a seat belt he had been guilty of contributory negligence and, the judge's assessment having been accepted by the parties, the overall reduction in damages would be 20%."*

[76] It was therefore Mr. Hanson's opinion that based on the injuries sustained, if the passengers had been restrained by seatbelts, those injuries would have been considerably less severe, and as such they ought to bear some amount of blame for the injuries ,regardless of where liability for the accident lies. He found further

support for this approach to analyzing this area in the unreported case of **Hitchens v Berkshire County Council** (supra)

[77] Whilst acknowledging that the statute seemingly exempts police officers from criminal liability for the failure to wear the seatbelt; Mr. Hanson argued that those provisions ought to be viewed with care since the matter before the court would require a different standard it being a matter of civil liability that is to be determined.

[78] Turning to the issue concerning Mr. Richard Drummond the undisputed owner of the Nissan Frontier, Mr. Hanson submitted that if it is proven that Mr. Orville Drummond was not driving the vehicle as the servant and/or agent of his brother, then the latter ought to be absolved of any liability. He again referred to the text Binghams and Berrymans' Motor Claim Cases at paragraph 6.81where the case of **Hewitt and Bonvin (1940) 1 KB 188** is noted and he cited the words of du Parcq L J

> *"An owner of a vehicle does not incur liability for damages caused by it merely by being the owner. It must be established that the driver of the vehicle was driving it as the servant or agent of the owner."*

[79] He noted that" the principle has been applied in other cases even in circumstances where it is accepted as prima facie evidence that the driver was the servant and/or agent of the owner which evidence is rebuttable by actually facts"

Ref: **Bernard v Sully (1931) 47 TLR 557** and **Rambarran v Gurrucharran (1970) 1 ALL ER 749.**

For Mr. Kevin Taylor and the Attorney General for Jamaica.

[80] Miss Cheryl-Lee Bolton submitted that responsibility for the accident lay with

Mr. Orville Drummond who had failed to take proper or reasonable care thus resulting in the collision. She grounded her submission in the law as stated in Charlesworth and Percy on Negligence where the author is quoted as saying that the duty imposed on the driver of a motor vehicle is to take proper or reasonable care not to cause damage to other road users or to the property of others. This duty is fulfilled where the driver keeps a proper lookout, observes traffic rules and signals and avoids driving at an excessive speed.

[81] It is her submission that Mr. Orville Drummond going in the opposite lane in order to execute a turn could have reasonably foreseen that drivers in the opposite lane who had the right of way were likely to be affected by him turning into the said lane. She noted the provision of Regulation 3 of the Island Traffic Authority Road Code of 1987 which provides that motorists are to keep as near to the left as practicable unless they are about to overtake or turn right.
Additionally, she noted Regulation 37 which provides that on roads marked with white lines motorists are to keep within lane markings and are not to drive their vehicles in two lanes at the same time by riding the white line.

[82] She found it necessary to note the observations of the authors of Charlesworth and Percy on Negligence in relation to the procedure motorists who are turning right are advised to follow. The mirror is to be used to note the position of vehicles behind, a right turn signal is to be given then a position just left of the middle of the road or in a space marked for right turning traffic is to be assumed. Room must be left for vehicles to pass on the left and even before finally executing the turn drivers should again check their mirrors and blind spot to ensure they are not being overtaken. Further it is noted that the driver should give the proper signal before he changes direction and all signals should be given clearly and in good time to give an indication to the other users of the highway. Failure to do any of these is evidence of negligence.

[83] Miss Bolton opined that from the evidence of the occupants of the Toyota Hiace it is clear that the driver of the Nissan Frontier failed to give proper signal whether by indicator or positioning in the road that he was about to turn. It is her opinion that if he had done so Mr. Taylor would "at the very least, have had the opportunity or chance to slow down and avoid the accident as he would have been pre-alerted to the intention" of the driver of the Nissan Frontier.

[84] It was her conclusion that the more plausible account of how the accident occurred which ought to be preferred is that Mr. Taylor had not been given any signals of Mr. Orville Drummonds intent to turn and so had proceeded. She disputed the possibility of Mr. Taylor breaking the red traffic light by arguing that if he had done so the collision would have been in the intersection or nearby and not 50 meters away from the lights.

[85] Miss Bolton ultimately urged that if the Court was minded to find that both drivers were responsible, liability should be proportioned as 90/10 with Mr. Orville Drummond being 90% liable and Mr. Taylor being 10% liable as he was travelling in his correct lane, had the right of way and had very little time to react to the collision.

Analysis and findings as regards liability

[86] The general definition of negligence as provided in the early case of **Blyth v Birmingham Water Works Co. 836 Exch 781** is the usual starting place for appreciating the law applicable for matters such as this:-

> *"Negligence is the omission to do something which a reasonable man guided upon these considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do"*

[87] Another useful pronouncement which can provide guidance in matters such as this is to be found in the Privy Council decision of **Nance v British Columbia Electric Railway Co. Ltd. [1951] 2 ALL ER 448** where Viscount Simon at page 450 said :-

> *"Generally speaking when two parties are so moving in relation to one another so as to involve risk of collision each owes to the other a duty to move with due care and this is true whether they are both in control of vehicles, or both proceeding o foot, or whether one is on foot and the other controlling a moving vehicle."*

[88] The submissions made by counsel outlining the general principles to be borne in mind when approaching matters such as this are of course appreciated and found to be of great assistance. The common law duty of the motorist to exercise care while operating their motor vehicle on a road and to take all reasonable steps to avoid an accident is adequately addressed in the submissions. The S statutory duty also noted could well bear repetition before further embarking on any other relevant law. The Road Traffic Act at section 51 sets out the rules of the road and significant to this matter is 51 (d) and 51 (2).

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

(a) .....

(b) .....

(c) .....

(d) Shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic.

(2) 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 by any driver of any

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.

[89] The issue of contributory negligence is strongly urged in this matter on two levels. A succinct pronouncement as to the definition of this defence is that of Viscount Birkhead in **Admiralty Commissioners v S.S. Volute [1922] 1 AC 129**.

> *"The test is whether the claimant in the ordinary plain sense of this business .... contributed to the accident."*

[90] A somewhat more full exposition of the issue is found in **Nance v British Columbia Electric Railway Co. Ltd.** [supra] by Viscount Simon at page 450

> *"But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed by want of care to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury he cannot call upon the other party to compensate him in full.*

[91] All users of the roads, therefore, have a responsibility to look out for other users of the road and this must be coupled with the responsibility they have to take such care to avoid the possibility of harm to themselves. Thus it can be

appreciated why the passenger in the motor vehicle is to wear a seatbelt in his own interest.

[92] In **Froom and others v Butcher** [supra] Lord Denning MR at page 524 had this to say:-

> *"Negligence depends on a breach of duty whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He 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 hurt himself:* ***see Jones v Livox Quarries Ltd. [1952] QB 608."***

[93] Further on the matter of wearing seatbelt he had this to say at page 525:-

> *"In these seatbelt cases the injured plaintiff is in no way to blame for the accident itself. Sometimes he is an innocent passenger sitting beside a negligent driver who goes off the road. At other times he is an innocent driver of one car which is run into by the bad driving of another car which pulls out on its wrong side of the road. It may well be asked: why should the injured plaintiff have his damage reduced......*
> *The question is not what was the cause of the accident. It is rather what was the cause of the damage."*

[94] In the instant case of course, the Jamaican legislation provides for the certain persons to be exempt from wearing a seatbelt in certain circumstances. This is to be seen as exonerating them from criminal liability and the penalties that flow

there from. This situation was also recognized by Lord Denning MR in **Froom v Butcher** (supra) where he put it thus at page 525:-

> *"Seeing it is compulsory to fit seat belts, parliament must have thought it sensible to wear them. But it did not make it compulsory for everyone to wear a seat belt. Everyone is free to wear it, or not, as he pleases. Free in the sense that everyone is free to run his head against a brick wall, if he pleases. He can do it if he likes without being punished by the law. But it is not a sensible thing to do. If he does it, it is his own fault; and he has only himself to thank for the consequences."*

[95] It is to be recognized that at the time of this discussion in **Froom v Butcher**, the wearing of a seatbelt was not compulsory in England but there was provisions in the highway code that one should "fit seatbelts in your car and make sure they are always used" Our legislation requires that every person on any road who drives or rides in a motor vehicle or in the front seat of certain vehicle shall wear a seatbelt. As already noted the passengers in the Toyota Hiace falls in one of the categories of persons who is exempt from liability for failure to comply with the provision.

[96] The question therefore now becomes whether because the passenger would be exempt from criminal liability, they should not be concerned for their own safety and bear some responsibility in matters concerning civil liability. It would seem that the position makes it even more necessary for proof that the damage sustained would have been less if the seatbelt had been used. The principle as stated in **Patience v Andrews [1983] RTR 447** as per Croom- Johnson J. is instructive.

> *"Where a plaintiff who was not wearing a seatbelt suffered injuries the court had to examine the injuries*

actually suffered, assess compensation and then make a deduction depending on the extent to which these injuries had been caused or contributed to by the failure to wear the seatbelt."

Against this general discussion and appreciation of the applicable law, I will now move to access the evidence.

[97] Mr. Orville Drummond, in seeking to get to the Shell Service Station, embarked on a maneuver which meant he was leaving his correct side of the road to cross the path of possible oncoming traffic – a maneuver which was inherently risky and therefore required much more care in its execution. This however does not release any driver in the oncoming traffic from exercising care and keeping proper lookout in that he is not exonerated from his duty of care. Both drivers were to be expected to observe ordinary care or exercise reasonable skill towards other users whom he could reasonably foresee as likely to be affected.

[98] Both drivers were anxious to maintain that it was the other who had made the unexpected movement. For the driver of the Toyota Hiace it was the sudden and unexpected turning of the Nissan Frontier across its path within seconds of first being observed that caused the collision. For the driver of the Nissan Frontier it was the unexpected running of the red light at an excessive speed that caused the Toyota Hiace to collide into him before he had time to complete his turning into the gas station. The driver of the Nissan Frontier maintains further that he was well on his was to clearing the side of the road that he had crossed before the collision occurred.

[99] Of significance to me in determining where liability lies, is the point at which the Nissan Frontier was struck. From the evidence of those involved and taking due consideration of the expert, the point of impact on the Frontier was more to the

side. Certainly if it was as close and as sudden as Mr. Taylor and his passengers have invited the court to accept, impact could reasonably be expected to be more to the front of the Nissan Frontier. I am further buttressed in this view of the collision, by the evidence of the expert that at the time of impact the Toyota Hiace pushed the Nissan Frontier sideways and eventually caused it to turn over.

[100] Further the conclusion of the accident reconstruction expert that none of the drivers reacted to their respective hazards is supportive of my basic assessment that neither driver saw the other in sufficient time and given the description of the layout of the area the collision occurred; both have failed to give a credible explanation of why they failed to do so. The photographs which were exhibited as a part of the report of the expert seems to suggest that both drivers would have had a clear view for some distance, prior to the collision taking place, in either direction. From this view, it is to my mind somewhat incredible to seek to suggest either vehicle would have suddenly appeared.

[101] Mr. Orville Drummond is asking the court to believe that he saw no vehicle at the intersection when he started the turn but that the lights controlling the intersection were on red. In the cross – examination of Mr. Orville Drummond it became increasingly clear that he did not see what colour those lights in fact were. He assumed it must have been red. If he had been truly observant, given the layout of the roadway he ought to have seen the Toyota Hiace approaching. He however, estimated that he could have completed the turn before the Toyota Hiace got to him – an estimation that was clearly wrong, hence the collision.

[102] Also from cross-examination, it became apparent that the decision of Mr. Orville Drummond to turn into that gas station must have been somewhat sudden. He said he needed gas and had been observing the prices exhibited for gas at the stations along his route and when he saw the cost at this station, he made the decision to turn. This was after he had passed an entrance to the station some distance further from the intersection. This entrance to would have been a safer

distance away and thus would have afforded him more time to get into the station without the risk of impeding oncoming traffic. I am also cognizant of the presence of unbroken white line at the point where Mr. Orville Drummond had chosen to enter the gas station. I am not satisfied that he was aware of its presence and its significance. He ought not to have chosen to cross it unless it was eminently clear and safe to do so. The fact that the collision took place is proof enough that it was not. He appeared to have taken what he thought was a well calculated risk but it turned out to be poorly executed.

[103] The passengers in the Toyota Hiace particularized the negligence of Mr. Orville Drummond to include driving at too fast a rate of speed in all the circumstances. The evidence however, suggest otherwise, he did not move fast enough having committed to crossing their path to get to the gas station. He seemed not to have seen the vehicle in which they were travelling within sufficient time and thereby failed to conduct the operation of his vehicle so as to avoid the collision.

[104] The findings of the reconstruction expert also indicates that the operation of the Toyota Hiace is also to be considered. There was no indication the driver had engaged his brakes or had swerved or tried to avoid the collision. Indeed it was also found that the Toyota Hiace must have been going at a greater pre-impact speed than the Nissan Frontier. This does not to my mind lead to the inevitable conclusion that it was going at an excessive speed. Mr. Orville Drummond saw it at a time when it was too close to him to avoid the collision. He cannot therefore, to my mind, give any credible evidence in those circumstances of the speed the Toyota Hiace may have been travelling prior to arriving at the intersection or even going through it.

[105] Mr. Orville Drummond in turning from his correct side of the road to venture across the path of the oncoming traffic owed a duty of care to any potential oncoming motorist to avoid the risk of a collision. He ought to have seen the oncoming vehicle and would have appreciated that it was unsafe for him to

attempt to cross from his correct side of the road. His failure to see the oncoming Toyota Hiace has not been convincingly explained leaving the presumption that he did not pay sufficient attention. If he did in fact see it he miscalculated his chances of getting out of its way and thus avoiding the collision.

[106] The question now to be considered is whether the driver of the Toyota Hiace contributed to the accident. The case of **Christine McNally v Kenneth Mahabier et al** [supra] does demonstrate circumstances where the vehicle on its correct side of the road can be found contributory negligent in a collision with another that had turned across it path. However, it is noted that in that case both drivers were found to have not been exercising the requisite care and caution as the judge there found that the car in its correct lane had been overtaking carelessly.

[107] In the instant case it is the allegations of Mr. Orville Drummond that the collision was caused and/or contributed to by the negligence and carless manner in which the Toyota Hiace was being driven by Mr. Taylor who he said broke the red light at high speed and had not engaged the use of the siren and/or any other warning device to indicate that there was an emergency. As already argued, the evidence offered by Mr. Orville Drummond in support of this allegation is not found to be sufficiently credible. If he had seen the Toyota Hiace coming at that excessive speed, having broken the stop light which was approximately 50 meters north of where the collision occurred, he ought not to have ventured from his correct side of the road into the path of this speeding vehicle. If at the time he saw the red light he is to be believed that he saw no vehicle approaching the lights, I am hard pressed to believe that a vehicle could have come so swiftly to those lights travelled through them and covered that distance of 50 meters and collided in the side of the Nissan Frontier.

[108] On the totality of the evidence, I am satisfied that Mr. Taylor did nothing to avoid hitting the vehicle that had come across his path. He may well not have seen it in sufficient time to take evasive action but the question to be resolved is whether

this failure can be viewed as him having contributed to the collision such that he must bear some blame for it. I am not so satisfied that his failure to avoid the Nissan Frontier in the circumstances it had come across the road means that Mr. Taylor contributed to the collision. It was Mr. Orville Drummond who had crossed the lanes for traffic coming from the opposite direction who was required to take t necessary care so that he could have executed and completed the maneuver safely.

[109] The passengers in the Toyota Hiace suffered injury while not wearing seatbelts because they fell within that category of persons who is exempted from criminal liability in choosing to do so. It must be viewed that by so doing, they accepted whatever risk that may arise for their personal safety. The need is now to consider whether the nature of the injuries support an assertion that the injuries would have been less severe if the men had been restrained.

[110] Mr. Leo Rodgers was taken to and treated at the Emergency Department, University Hospital of the West Indies within three to four hours after the accident. He was observed as having a 1.5cm laceration to his forehead, mild tenderness to the right side of his chest and bruises to both legs. He explained that his feet had been trapped in the front of the bus for a while after the accident and he had to force them free . He further explained that his head had hit the windshield and his chest had hit on the dashboard.

[111] Under cross – examination Mr. Hanson suggested to Mr. Rodgers that he had been careless and reckless to his own safety by making the conscious choice not to wear his seatbelt. Mr. Rodgers was insistent that this was not the case and explained that as a police officer he was exempt from wearing the seatbelt as it would be difficult to react quickly in the event of an emergency. He further would not agree with the suggestion that the seatbelt would have restrained him in the event of a collision. There was no suggestion and indeed no evidence that the

injuries to Mr. Rodgers would in fact have been less severe if he had chosen to wear the seatbelts.

[112] Mr. Cleon Porter also visited the emergency department, University Hospital of the West Indies, within three hours after the accident. He had tenderness to the back of his neck and a small abrasion was noted over the left clavicle. He also had superficial bruises over the left medial thigh and outer leg. He explained that his chest had hit into the steel bar that was on the seat in front of him. His head had been thrown forward and then his entire body had followed and he fell to the ground with his foot positioned to the door of the Hiace bus. He too under cross-examination was questioned about the usage of seatbelts but he said the vehicle had not been fitted with any. Hence he denied the suggestion that it did in fact have seatbelts which he had chosen not to wear .

[113] Mr. Hanson had submitted that based on the injuries they sustained, had these men been restrained by seatbelts their injuries would have been considerably less severe and they ought to bear some amount of blame. It is true that in some cases it can be clear from the evidence of how the collision occurred that if persons were restrained by seatbelts, they would have been speared some injury. However, I do not find this is the obvious and logical conclusion that must be drawn from the evidence that emerged in this case. The court cannot speculate, without more, on what might have been the injuries if seatbelts had been used. Hence I find no basis for holding that the claimants were contributory negligent.

[114] Having concluded that Mr. Orville Drummond is liable for the collision and the injuries flowing there from, the question must now be whether Mr. Richard Drummond as owner ought to be held jointly liable. The submission by Mr. Hanson that as owner he does not automatically incur liability is well made and he has rightly referred to authorities that demonstrated the application of the principles involved. This then would be an appropriate defence available to Mr.

Richard Drummond in that his brother he is maintaining had borrowed the vehicle to use for his own purpose and not as servant or agent.

[11] The problem however, is that Mr. Richard Drummond had failed to raise this denial of agency in his defence. He did not comply with provisions of the Civil Procedure Rules 2002, namely :-

10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.

(2) .....

(3) In the defence the defendant must say

(a) Which (if any) of the allegations in the claim from or particulars of claim are admitted.

(b) Which (if any) are denied and

(c) Which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

(4) Where the defendant denies any of the allegations in the claim form or particulars of claim-

(a) the defendant must state the reasons for doing so

(b) if the defendant intends to prove a different version of events from that given by the claimant,

the defendant's own version must be set out in the defence.

[116] Having failed to comply with those provisions; the 2nd defendant, Mr. Richard Drummond is subjected to CPR 10. 7 which provide:-

> The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have seen set out there, unless the court gives permission.

[117] The defence of Mr. Richard Drummond is largely a duplication of that of Mr. Orville Drummond. The only allegation in the particulars of claim which was denied was the assertion that he was the owner of a motor vehicle registration no. 6165 ER. He corrected this by stating that "at all material times he was the owner of a 2002 Nissan Frontier motor vehicle registration No. 6561EQ which was being driven and operated by the 1st defendant".

It is also significant that he joined his brother in the ancillary claim. As the 2nd ancillary claimant once again asserting that he was at all material times the owner of the Nissan Frontier. He joined in asserting that it was the negligence of Mr. Kevin Taylor that caused the accident. He also claimed damages for the destruction and loss of the use of the vehicle. In is only in his witness statement that it is stated that he loaned the vehicle to his brother to do his personal business.

[118] Given the failure of Mr. Richard Drummond to adequately raise the issue of agency in his defence, he cannot now rely on it and is bound by the defence as filed. He relied on merely asserting that his brother was not the cause of the accident. He has not, to my mind successfully defended the presumption and assertion that as owner of the vehicle he too is liable for the accident as at the time his brother can be deemed to have been driving as his servant or agent with full consent and permission.

Assessment of damages

[119] Re: Leo Rodgers

The injuries seen shortly after the accident on Mr. Rodgers have been noted above. At that time his forehead wound was cleaned and sutured. He had radiographs done on his cervical spine, chest and legs which were normal. The doctor at that time opined that he should suffer no permanent sequelae as a result of these injuries. He was seen by another doctor on the 4th of April where it

is reported he complained of "having headache pain in his neck, difficulty swallowing, chest pain and difficulty in breathing as well as pain in his leg." He was wearing a cervical (neck) collar and his forehead was heavily bandaged.

[120] When examined the doctor made the following findings:

(1) Six (6) cm laceration to central forehead extending to frontal scalp.
(2) The neck was stiff and tender to manipulation. The range of motion of the neck was markedly restricted only about ten degrees of flexion and extension was possible.
(3) Tenderness on palpation of the anterior chest, especially on the right side.
(4) Abrasion and swelling to the anterior surfaces of both legs.

[121] The diagnosis made was that he had suffered multiple injuries inclusive of a whiplash injury to the neck and head injuries. There was a discrepancy noted between the lengths of the injury to the forehead as observed on the day of the accident and as noted some 3 days later. However, when Mr. Rodgers pointed out the scar which now remains as a result of the injury, it did not appear to be consistent with the 6 cm injury the 2nd doctor had recorded seeing.

[122] Mr. Rodgers visited a third doctor on the 13th of April 2007, about 13 days after the collision. He was still complaining of chest pain and pain in the neck. The diagnosis then was a blunt trauma to the chest and neck and he was treated appropriately with analgesics and muscle relaxants. The doctor opined that the injuries he received were unlikely to be permanent and not serious, with full recovery anticipated in ten (10) to twelve (12) weeks.

[123] For his special damages Mr. Rodgers exhibited receipts from the various doctors he visited and the pharmacies he attended to purchase the recommended and prescribed medication. Thus he has specifically proven his medical expenses in the amount of $30, 236.30

[124] In her submission on his behalf Mrs. Leith- Palmer included an amount of $1000.00 for the police report. This amount was not pleaded in his particulars of special damage neither was any proof offered for it so that his claim could have been amended if necessary. In any event I would not be minded to make an award for this item.

[125] To assist in determining the appropriate award for general damages; two authorities were offered **Marion Llandell v Judah Campbell Claim no. 2006HCV01324** and **Claston Campbell v Omar Lawrence and others Claim No. 2002HCV0135.**

[126] In the former, the claimant suffered what was described as lower back strain and muscle spasms of the lower back and pain to the neck, she suffered pain for a period of three (3) weeks. The award made at the time was $950,000.00 for general damages for pain and suffering and loss of amenities. The CPI at the time of the award was 150.4; the CPI at the time of this trial was 211.1 which means the amount updated would be $1,333,410.90.

[127] In the latter, the claimant had suffered from pains in his neck, back and chest injury and was impaired for some 6 weeks. An award of $650,000.00 was made for general damages for pain and suffering and loss of amenities. The CPI at the time of the award was 64.4 which with the CPI at time of trial the is updated to $2,130,667.70.

[128] It became the argument of Mrs. Leith- Palmer that Mr. Rodgers had injuries which were more serious than Llandell and less than that of Campbell and therefore urged an award of $1,500,000.00.

[129] It is true that Mr. Rodgers claim to have been feeling pain up to the time of his witness statement in June 2013. He also claimed that he was feeling some

amount of discomfort from the injury up to that time. In his particulars of claim he asserted he had severe whiplash injury. This assertion has not been borne out in the findings of the three (3) doctors who saw him. The 2nd doctor did diagnose whiplash injury to the neck but the doctor he saw after that while speaking about blunt trauma to the chest and neck did not specifically mentioned whiplash injury. This doctor saw Mr. Rodgers last on May 11, 2009 at which time due to the continued complaint about discomfort around the neck, he was advised orthopedic consultation. This was never apparently done.

[130] Mr. Hanson submitted that in relation to both Mr. Rodgers and Mr. Porter the following authorities should be used as guide:

(i) **Peter Marshall v Carlton Cole et al. Khan Vol. 6 page 109**

(ii) **Lascelles Allen v Ameco Caribbean Inc. etal Claim no HCV3883**

He did not give the details of the injuries suffered by either claimant in the two cases but merely noted the awards made. For Peter Marshall, the award in October 2006 was $350,000.00 and when updated using the CPI at the time of this trial 211.1 and that of October 2006 of 99.83 the sum is updated to $740,108.18. The Lascelles Allen award was $600,000.00 in January 2011and when updated using the CPI of 167.8 for that time and the 211.1 at the time of trial , the sum is updated to $754,827.17.

[131] Mr. Hanson concluded that neither of the claimants in the instant case has suffered any permanent partial disability and their injuries are best described as minor and have been satisfactorily resolved.

[132] The cases relied on by Mr. Hanson does offer some guidance as in the Peter Marshall case the claimant had suffered (1) moderate whiplash (2) sprain swollen and tender wrist and left hand (3) moderate lower back pain and spasm. It is noted that his whiplash injury was described as moderate. In the instant case, the medical evidence has fallen short of putting a description of the level of the

whiplash injury the claimant allegedly suffered.

[133] In the Lascelles Allen case, the plaintiff suffered injuries to his side, neck and back. He was diagnosed with whiplash injury and was expected to have complete resolution of the injury. It was noted by the judge doing the assessment that within four (4) months of the accident he seemed to have recovered fully.

[134] In all the circumstances, I am satisfied that an appropriate award for the injuries sustained by Mr. Leo Rodgers and the pain suffered arising there from is $1,000,000.00.

Re: Cleon Porter

[135] As already noted, the injuries seen on Mr. Porter shortly after the accident were limited to the back of his neck, over the left clavicle with superficial bruises over the left medial thigh and outer leg. He had radiographs done of his chest, left clavicle and neck which were all normal. He was advised to purchase a soft collar and was sent home with medication for his pain. It was opined that he should suffer no permanent sequelae as a result of these injuries.

[136] Some four days after the collision Mr. Porter was seen by another doctor whose examination found him to be having moderate pain medial aspect left thigh and mild pain in his right shoulder. Examination of his neck revealed moderate tenderness of both left and right side of his neck. He was encouraged to continue his medications and was asked to rest at home for 10 days.

[137] At the time of the making of witness statement in June 2013 he claimed to be still experiencing some amount of discomfort from these injuries. He said when he sat for over five (5) minutes his lower back became numb. Further if he stood upwards for over a long period his entire back upwards to his neck became stiff and painful.

[138] In his witness statement also Mr. Porter details sums he claimed he expended on his medical expenses. In his particulars of claim, he pleaded medical expenses to be $10,000.00 and continuing. He also claimed transportation expenses. Only one (1) receipt was offered in proof of his claim. He asserted in his witness statement that he did not have receipts in support of these figures but he remembers paying for them. This of course is far from sufficient for a claim to special damages. The only amount specifically proven by a receipt tendered is $2000.00 as the fee paid for the report from the University Hospital of the West Indies.

[139] Two authorities were offered by Mrs. Leith-Palmer as useful guides for determining the appropriate amount to be awarded to Mr. Porter for his pain and suffering. In the case of **Trevor Benjamin v Henry Ford et al claim No. 2005HCV02876** the plaintiff sustained spasms of the neck, soft tissue injuries to his chest tenderness to his back muscles and abrasion to his left foot. He was awarded $700,000.00. The award when updated using the CPI at the time of the award of 156.6 and the CPI at the time of trial 211.1 amounts to $943,614.30

[140] The second authority was **Ronald Bowen v Mark Wallace and Industrial Chemicals claim No. 2010HCV01073**. The plaintiff there sustained muscular ligament damage to the left shoulder and muscle spasm of the neck. The award at the time delivered in February 2011 was $975,000.00. The CPI then was 152.6 and when updated with CPI at the time of trial of 211.1 the amount increases to $1, 348,771.29 . Mrs. Leith-Palmer opined that since the claimant in the instant case was not as seriously injured as Mr. Bowen and in view of the distinctions, the reasonable sum to be awarded was $1, 200,000.00.

[141] I bear in mind the opinion of Mr. Hanson regarding Mr. Porter's injuries as already noted. I agree that these injuries could best be described as minor. On the evidence presented I am satisfied that an appropriate award for general damages is $950,000.00.

Re: The counter claim by the Attorney General for Jamaica

[142] The Toyota Hiace being driven by Mr. Taylor had to be repaired and a bill was exhibited from Ken Clarke Trading Co. Ltd. detailing the work done and the cost of parts purchased to replace the damaged parts. The total amount expended was $481,440.00. Miss Bolton submitted that the ancillary defendant is entitled to recover the amount expended to repair the vehicle. In the circumstances I am satisfied that the amount has been specifically proved and should be awarded.

Conclusion

[143] Although there are inconsistencies and discrepancies in the cases presented by Mr. Rogers and Mr. Porter, I find that on the totality of the evidence including that of Mr. Taylor; it was the attempt by Mr. Orville Drummond to get to the gas station to purchase gas that caused the collision. I am satisfied on a balance of probabilities, that it was he who failed to exercise the requisite care of a prudent driver and ought not to have attempted the maneuver. Although Mr. Taylor failed to take any evasive action I am satisfied that the movement across his path was too sudden and unexpected for him to have done so. In any event his failure to do so cannot be viewed as contributing to the collision such that he can be held to share any blame.

[144] There is therefore judgment for the claimant on 2008HCV00333, Mr. Leo Rodgers in the following sums:-

Special Damages in the amount of $30,236.30 with interest at 3% from April 1, 2007 to July 31, 2014.

General Damages in the amount of $1,000,000.00 with interest at 3% from the 17th July 2008 to July 31, 2014.

[145] Judgment entered for the claimant on 2008HCV00324 , Mr. Cleon Porter in the following sums:

Special Damages in the amount of $2000.00 with interest at 3% from April 1, 2007 to July 31, 2014.

General Damages in the amount of $950,000.00 with interest at 3% from the 17th of July 2008 to July 31, 2014.

[146] Judgment for the 1st and 2nd ancillary defendants on the ancillary claim in the amount as follows:

Special damages in the amount of $481,440.00 with interest at 3% from 1st of April 2007 to July 31, 2014.

Cost to the successful parties to be taxed, if not agreed.