



[2024] JMSC Civ. 36

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2015 HCV 04663**

<b>BETWEEN</b>	<b>ALECIA WALTERS AIKMAN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>RICHARD HIBBERT</b>	<b>DEFENDANT</b>

**IN OPEN COURT**

**Ms Linda Wright and Mr. Henroy Samuels instructed by Linda Wright and Associates for the Claimant.**

**Ms Suzette Burton Campbell instructed by Burton Campbell and associates for the Defendant.**

**HEARD: 12<sup>th</sup>, 13<sup>th</sup> of February and 15<sup>th</sup> of March 2024**

**Motor vehicle Accident - Negligence - Breach of Duty of Care.**

**THOMAS A, J**

## **INTRODUCTION**

### **THE CLAIM**

[1] The Claimant Ms. Alecia Walters- Aikman is claiming against the Defendant Mr. Richard Hibbert damages for injuries that she alleges that she suffered from a motor vehicle accident on the 29<sup>th</sup> of January 2015 around 11:50 pm. The accident occurred on the premises of the Cotterell Texaco Service station, located at 27 Half Way Tree Road where she was employed as a pump attendant. In her

Particulars of Claim, she alleges that, on the date of the 29<sup>th</sup> of January 2015 around 11:50 pm she was walking from the gas pump to the Star Mart on the compound of the service station when the Defendant negligently reversed his Honda Civic motor car so that it collided with her. As a result, she suffered injuries, loss, damages, and incurred expenses.

### **Particulars of Negligence**

[2] The Claimant particularized the negligence of the Defendant as follows;

- (i) The Defendant was negligent for failing to provide:
  - a) warning of his intention to reverse.
  - b) warning of his approach
- (ii) failure to show sufficient regard for the Claimant.
- (iii) Failing to take sufficient precautions to ensure the area behind was clear before reversing the motorcar.
  
- (iv) Failing to see the Claimant in time to avoid the collision or to stop, slow down, swerve, steer, or otherwise manoeuvre to avoid colliding with her.
  
- (v) Failing to heed or act upon the presence, path, position of the Claimant and her safety by reversing his vehicle when it was not safe.

### **The Defence**

[3] The Defendant denies the particulars of negligence outlined by the Claimant. In his Defence he admits that there was a collision between his motor vehicle and the Claimant. He however avers that he was in the process of reversing his motorcar, after ensuring that it was safe to do so, when the Claimant, who was standing on the right of his car on a raised platform, stepped backwards into the path of his moving motor vehicle, without looking to see the vehicle approaching. He further avers that the accident occurred as a result of the negligence of the Claimant.

## **Liability**

### **The Claimant's Case**

- [4] The evidence in chief of the Claimant as it relates to liability is as follows; On the 29<sup>th</sup> of January 2015, at about 11:50pm, during the course of her employment at Cotterell Service Station, located at 27 Half Way Tree Road in the parish of St Andrew she was involved in an accident that occurred on the compound.
- [5] She says that; she was working the night shift and was serving a customer at the gas pump. The gas station has three islands or raised concrete platform. There are pumps to the end of each island numbered 1 to 12. There is a flat paved concrete area after each island. Pump number 5 is located on the right end of the middle island when one faces the Star Mart, Pump number 1 and 3 face the Star Mart and are closest to it.
- [6] She further says that; There is a narrow asphalted area directly in front of the Star Mart that is used for parking. She took pictures of the Lay out of the Star Mart (These were admitted into evidence as exhibit 5A to C). The customer she was serving at pump number 5, had a charge account so she walked off towards the Star Mart to process the payment. She stepped down off the island that has pump numbers 1 and 3 onto the flat concrete paved area.
- [7] She states that; She was at the edge of the island and about to step onto the asphalted area in front of the Star Mart where motorists parked, when the said customer called out to her. She stopped and turned around. The customer ordered a phone card. While communicating with the customer she felt an impact to the lower right side of her back. She glanced quickly and realized that a motor car had reversed from in front the Star Mart and hit her in her back. She used her hand to knock against the trunk several times. Then the driver stopped reversing. After he stopped, she asked him if he did not look before he started reversing. He told her he never saw her. He then asked if she was all right, after which he drove off.

**[8]** She also says that, before turning to face the customer she had seen the said Honda Civic Motor Car parked before the Star Mart on the asphalted area. It was not in motion. The reverse lights were not on, and she did not hear the engine.

### **The Injuries**

**[9]** In this case, in light of the varying contentions of the parties as it relates to what part of the Claimant's body came into contact with the Defendant's motor vehicle, the evidence as it relates to the nature of her injuries and also the medical examination become relevant to the determination of liability. Therefore, I will highlight the injuries as alleged by the Claimant and later, the relevant aspects of the medical evidence that touch and concern liability.

**[10]** The Claimant states that; the pain in her back, started and continued to get worse, so on January 30, 2015, she visited her general practitioner Dr. Carroll Chester Jones of Alma Jones Medical Centre located at 119 Hagley Park Road, Kingston 11. She told him about the pain she was feeling in the right side of her back. He examined her, prescribed painkillers and also recommended that she did a right hip and lumbar spine x-ray.

**[11]** She also states that on the same day of her visit to Doctor Jones, she did the right hip lumbar spine x-ray at Ultra Medical Services located at 119 Hagley Park Road on the same compound where she saw Dr. Jones. She further says that she used the painkillers that were prescribed by Dr. Jones, but they were not helping her. The pain and discomfort in her back got worse so she went back to Doctor Jones on February 4, 2015. He gave her a referral to do Physiotherapy.

**[12]** She says that she did two sessions of physiotherapy that were helpful, but she was still feeling pain. She went back to Dr. Jones on February 14 and explained what she was experiencing. He advised that she continue physiotherapy. She completed eleven sessions of physiotherapy. She returned to Dr. Jones on July 30, 2015 after completing her physiotherapy sessions. She told him that she was

still feeling some discomfort in her back when doing long shifts at work and have to stand for long hours. Once she got rest, however, she did not feel any pain.

- [13] On cross examination the Claimant states that; She was working at the service station from 2009. As part of her job, it was necessary for her to move from the pump to the Star Mart area regularly. She got instructions when she was being trained as a pump attendant about safety and how to be aware of her surroundings. Before the accident she was familiar with the layout of the station.
- [14] She admits that where the motor vehicles were parked in front of the Star Mart, the only way for them to leave was to reverse. She also accepts that, depending on where there are going, some vehicles must reverse to the left and some to the right. She agrees that in order to reverse, motor vehicles would have to be driven on the asphalted concrete.
- [15] She also states that; at the time of the accident, it was not busy, and no music was playing at the time. When she was walking towards the Star Mart, before the accident, her face was towards the Star Mart. At that time about three (3) to four (4) motor vehicles were parked in front of the Star Mart. She did see the Defendant's motor car parked in front of the Star Mart before the accident.
- [16] She says that the Defendant's car was parked between two cars. The person who called out to her whose card she was going to run was at pump number 6. On the other side of the island was pump number 5. She admits saying earlier the customer was at pump number 5. When she was asked to clarify whether the customer was at pump number 5 or pump number 6, she said pump number 5.
- [17] Ms. Walters-Aikman agrees that when the customer called out to her, she turned around to the customer and that her back was now to the Star Mart and the parked cars. She however insists that she was standing on the asphalted area at the time of the impact. She denies that she had placed herself in a dangerous position. She agrees that with her back turned she would not have been able to see the moving vehicle.

- [18]** She indicated that she was approximately thirty-five feet from the customer with whom she was speaking. She says that the island separated her from the customer and that she could hear the customer from that distance. She further indicates that she was standing talking to the customer for about 5 minutes before she felt the hit. She says she turned and looked at the licensed plate as she was trained to look at the license plates. When she turned around, she did not see any reverse light. She saw that the car has a spoiler.
- [19]** Ms. Walters-Aikman also states that, after she felt the impact, and turned around and saw the brake light. She is not sure if the lights were on the spoiler as she was not paying much attention to the lights but to the license plate. After she felt the impact, she says she used her hand to tap the trunk of the car. When she felt the impact in her back, she tapped the car once, but it kept reversing. She tapped it again and it was still reversing. She also says that it was only after she hit the car the third time it stopped reversing. It was reversing and pushing her.
- [20]** The Claimant agrees that she did not say in her evidence in chief that the car was reversing and pushing her while reversing. She states that she used the word impact which means the same. She says the reason that she did not move out of the way of the vehicle after the impact was because everything happened so fast. She asserts that when she turned around, she was still not feeling the impact. She further says that when she tapped the car she turned around and when she turned around, she was facing the car.
- [21]** She also says that she noticed that the Defendant's car had a spoiler but did not notice if it had a muffler as she was just focusing on the licence plate. She says further, that before she felt the impact, she did not hear any sound behind her. She did not hear the car started. She did not hear the car door opened. She estimates the distance between where she was standing on the asphalted area to where the car was parked, to be arm's length. She denies that she suddenly stepped down from the raised area unto the asphalted area when the car was approaching. She

denies the suggestion that the Defendant's car did not hit her back. She further denies that it was only her hand that came in contact with the car.

### **The Medical Report**

**[22]** The Medical report from Doctor Carrol Jones is dated August 27, 2015. He made the following observations:

*Mrs. Alecia Walters-Aikman was first seen on January 30, 2015. She complained of pain on the entire right side of her back. Mrs. Aikman reported that on the night of January 29, 2015, she was standing at her place of employment when she was hit by a reversing motor vehicle on the right side of her back. On physical examination, he noted "no significant findings."*

**[23]** He diagnosed her with low back pain secondary to acute muscle spasm, due to the trauma. She was prescribed oral and topical anti-inflammatory medications.

**[24]** Doctor Jones further states that on the 4th of February 2015, Ms. Walters-Aikman returned, complaining of worsening pain and discomfort in her back. She was granted sick leave and referred for physical therapy. She returned on the 14th of February 2015, where improvements were noted, but still complained of being in an amount of pain rendering her unable to work. Therefore, she was again given further sick leave. Her last visit was on the 30th of July 2015 having completed physical therapy.

**[25]** He noted that Mrs. Aikman Walters has regained approximately 95% of her pre-injury function. She experiences residual discomfort after long work shifts. She is primarily pain-free once properly rested. This discomfort should go after some time. He concluded that there is no permanent disability from the accident.

## **The Defendant's Case**

### **The Evidence of the Defendant;**

- [26]** In his evidence in chief Mr. Richard Hibbert states that he is a customs officer. In 2015, he owned a Honda Civic motor car, with license plate 4411DY. On the 29<sup>th</sup> of January 2015, at approximately 12:30 a.m., he was involved in an accident at Cotterel's Texaco Gas Station on Halfway Tree Road. He drove and parked his vehicle between two other cars outside the mini-mart on the gas station premises. The front of his car was facing the mini-mart. After purchasing items from the mini-mart, he returned to his car.
- [27]** The defendant indicated that in order to exit the gas station, he had to reverse his car. He thoroughly checked through the rearview mirror and the two wing mirrors to ensure a clear path. The path was clear, so he began to reverse slowly while looking behind to ensure that the way remained clear. As he slowly reversed, he noticed a female pump attendant stepping backward from the raised pump area. Despite applying the brakes, she hit her left hand on the rear spoiler of his car. The vehicle did not make contact with her back or any other part of her body except her left hand.
- [28]** He states that after the incident, he spoke with the pump attendant, to inquire about her well-being. Based on her response, he concluded that she was okay. He asserts that while reversing the lights on the back of his vehicle were on. The car had a modified muffler system with a loud noise, so he believes that the pump attendant was alerted to his reversing motor vehicle.
- [29]** On being shown two (2) Photographs of the location (That is exhibits 5A and 5B), he disagrees that at the point of impact, the Claimant was standing on the asphalted area that she pointed to. He indicated an area on the asphalted area close to the edge of the raised area as the point of impact.
- [30]** On Cross-Examination Mr. Hibbert states that his car had two spoilers. One was just above the licence plate and the other was attached to the top of the trunk. He



insists that it was the Claimant that hit his car. He says that when he was reversing his windows were down. The point of impact was approximately one (1) foot from the platform. He states that he saw the Claimant before the impact. When he first saw her, she was on the island. Her back was turned talking to somebody in the vicinity.

**[31]** He maintains that the Claimant stepped backward in the path of his motor vehicle. He did stop, but she hit his car, in the area of the spoiler. He also says that the distance between the point of impact and where the car was parked was about 3 feet. He reversed about two and a half (2 ½) feet before the impact. The Claimant hit the car with her left hand.

**[32]** Mr. Hibbert states that he told the Claimant, "You have to look what you are doing" He insists that she stepped off the platform backways while talking to the person. He asserts that he knew that his reverse lights were working because of the nature of his job they have to be checked periodically. He can say his reverse lights were on because the lights gave off a glare on the ground when he was reversing. He also says that the Claimant did not hit the car three (3) times but once. When she hit the car, it was not in motion, it had stopped.

**[33]** He denies that the car hit the Claimant, in her lower back. He states that before the impact, he had a full view of the elevated area. He denied saying he never saw her. He said he asked her if she was okay, and she said yes, he could go. He also denies, not seeing the Claimant before the impact.

## **ISSUES**

**[34]** The issues arising in this Claim are;

- (i) Whether the Defendant owed a duty of care to the Claimant;
- (ii) Whether the Defendant breached a duty of care owed;
- (iii) Whether the Claimant suffered damage as a result.

## THE LAW

- [35] The locus classicus as it relates to the law of negligence is the case of **Donoghue v Stevenson** - [1932] A.C. 562, in which Lord Atkin stated that:

*“One must take reasonable care to avoid acts or omissions which can be reasonably foreseen would be likely to injure your neighbour. One’s neighbour-in-law, he said, is a person who is “so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.” (See also the case of **Ann v Merton** 1997 2 ALL ER 492 and **J.P.S. Co. Ltd v Pamela Rance** Civ. App. No 11/92). [42*

- [36] In the case of **Bourhill v Young** [1943] AC 92, the court stated that:

*“the driver of a motor vehicle must exercise reasonable care, which an ordinary skillful driver would have exercised under all the circumstances, including the avoidance of excessive speed, keeping a proper lookout and observing traffic and signals, to avoid causing injury to persons or damage to property”.*

- [37] Similarly, the court in the Jamaican case of **Esso Standard Oil SA Ltd -Another v Ian Tulloch** [1991] 28 JLR 553 echoed this principle by stating that; “all users of the road owe a duty of care to other road users” With regards to any damages sustained, it must be established that it was the Defendant’s breach of a duty of care to the Claimant that caused these damages. In case of **Glenford Anderson v. George Welch** [2012] JMCA Civ.43 by Harris JA, stated that;

*“there must be evidence to show that a duty of care is owed to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty.” ( See page 26 of the Judgment)*

### Submissions on behalf of the Claimant

- [38] Ms. Wright has made the following submissions: The Defendant as a motorist owed a duty of care to The Claimant as a pedestrian. This is a common law duty of care owed by a motorist to other road users to exercise reasonable care. This duty applies in all cases where a motor vehicle operates on a public thoroughfare. (She relies on the cases of *Bourhill v Young (Supra)*; and *Ena Pearl Nance v. British Columbia Electric Railway Company*, [1951] AC 601.)
- [39] She points out that, the *Road Traffic Act* defines 'Public thoroughfare as a road by which the public has access". She relies on the case of *Regina V Michael Hanlan* (1995) 32 JLR 137(CA), in which the Court ruled that "a petrol station forms part of the 'road' under the *Road Traffic Act* because the public has access to it", to say that the duty of care that the law places on a motorist to other road users, also applies at a gas station.
- [40] She further submits that; a gas station is a public area where the Defendant as an ordinary skilled driver was expected to take extra precaution to ensure that the area behind him was clear before reversing. He was expected to keep proper lookout for pedestrians and other motor vehicles. If he had done so there would not have been a collision with the Claimant. He would have had sufficient time to take adequate measures to avoid the accident.
- [41] She acknowledges that the Claimant as a pedestrian has a standard of care. She however posits that because the Defendant was a motorist, and because he was pulling out of a parked position (reversing) from in front the Star Mart in the gas station, he had a greater duty and a higher standard of care. He had a duty to look behind and take adequate and reasonable measures to ensure that he reversed without causing harm to other users of the public area in which he was operating his motor vehicle.
- [42] She also submits that the injuries suffered by the Claimant are consistent with those documented by Doctor Carroll Chester Jones in his medical report dated

August 27, 2015. She is asking the court to find that they were caused by the accident.

- [43] She further submits that the court should view the admission of the Claimant that she was saying for the first time in court that she was pushed by the Defendant's motor vehicle as indicative of her frankness. She has asked the court to find as credible, the Claimant's explanation that she did not use the word push but used the word impact. She submits that the evidence points to the Defendant reversing after the Claimant had turned her back and that he did nothing to alert her to Danger.
- [44] Ms. Wright also points to inconsistencies between the oral evidence of the Defendant and his witness statement. That the Defendant has said in court that he told the Claimant that she "has to look what she was doing" but this was not included in his witness statement. She also highlights the fact that in his defence he admits that there was a collision, in his witness statement he admits that there was an accident but in court he is now saying that his car did not hit the Claimant, it was she that hit his car.
- [45] Ms. Wright submits that the inconsistencies that she has highlighted affects the credibility of the Defendant. She poses the question, "If it was the Claimant that hit his car why say it was an accident?".
- [46] She also submits that the Defendant is completely liable for the accident. She further submits that in the event that the court finds the Claimant contributory negligent, the court should find that the Claimant was only 1/5 contributory negligent. As such she commends to the court the case of ***Davies v Sawn Motor Co*** (1949) 2KB 291.

## The Defendants submission

[47] Ms. Burton Campbell made the following submissions;

*The Defendant is not denying that his car made contact with the Claimant. The only issue is what part of her body made contact with his car*

[48] She submits that the duty of care of the motorist is sometimes overemphasized, giving rise to the impression that pedestrians have an absolute right of way in their use of the roadway. However, the courts have not hesitated in finding pedestrians completely or partially responsible for accidents or resulting injury.

[49] She further submits that the “**section 84 (7) of the 1987 Road Traffic Act**” states that:

*“A pedestrian on a road shall not act in a manner that constitutes, or is likely to constitute, a source of danger to himself or to other traffic which is or maybe on the road”.*

[50] She went on to say that this section may not have been replicated in the 2023 Act. She however, put forward the position that this duty of care exists at common law. She relies on the cases of **Chan v Peters** [2021] EWCH,2004; **Kayser v London Transport Board** [1950]1 All ER, 231 and the Canadian case of **Gellie v Nalor and Laidlaw Transport Ltd** (1986) 15.O.A.C,129 (Ca).

[51] In reference to the case of **Gellie v Nalor** she made the point that in that case the court held that the Defendant had no duty to anticipate the unexpected dash of a pedestrian from a safe position to one that is unsafe. She points out that in the case of **Chan v Peters**, a 17-year-old pedestrian was held to be completely responsible for his injuries when the motorist was travelling below the speed limit and the pedestrian left from a kerb and entered the road into the path of the Defendant’s vehicle.

[52] She submits that there was a reciprocal duty on the Claimant to be vigilant and be aware of her surroundings. She highlights the fact that the Claimant admits that she knew that the only way motor vehicles parked on the gas station compound

could leave that parking position was by way of reversing, yet she stood with her back to them. It is her view that whether the reverse lights of the Defendant's car were on or not, is irrelevant as the Claimant's back was turned at the time of impact. Therefore, she could not have seen them.

[53] She posits that the Claimant was distracted talking to someone 35 ft away not being aware of her surroundings. She raises the point that a driver has to open the car door in order to enter. Therefore, being arm's length from the Defendant's car, she was in a position to and should have heard the door being opened and closed and the engine being started. She also reminded the court that the complainant's evidence is that activities at the place were slow, so there was no noise to prevent her from hearing.

[54] She also submits that the Claimant had put herself in a precarious position for five (5) minutes and at no point in time she turned around prior to the impact. She says the Defendant cannot be blamed for the accident as he was on continuous lookout. He has not denied that he knew that the Claimant was on the raised area. He could not have been going at any fast speed, otherwise the Claimant would have been run over. Despite seeing her before the impact, she being an adult there is no way he could anticipate that she was going to step backwards.

[55] Counsel also took issue with Doctor Jones' diagnosis of the Claimant, on the basis that his finding is not based on any independent examination. She questions, on what clinical basis he came to this finding. She submits that his conclusion appears to be based on what he was told. On physical examination he had no significant finding. There is nothing in the report as to whether an Xray was conducted. She submits that in the absence of this information, the report in fact supports the contention of the Defendant, that he did not hit the Claimant in her back, and that it was only her hand that came in contact with his motor vehicle. She contends that the Doctor's diagnosis should be rejected. She relies on the case of ***Dixon-Hall (Cherry) v Jamaica Grande Limited*** SCCA 26/2007.

## **ANALYSIS**

- [56] In civil proceedings the Claimant bears the responsibility to prove on a balance of probabilities, that she is entitled to the remedies sought. There is no challenge on the evidence that the gas station forms part of a road. Additionally, it has been accepted that the Defendant was a motorist at the gas station and the Claimant was a pedestrian. Consequently, it has been established on the evidence that the Defendant as a motorist owed a duty of care to the Claimant.
- [57] However, the burden still remains on the Claimant to prove on a balance of probabilities that the Defendant breached that duty of care and that, that breach caused injuries to her back. She has to prove, that it is more likely than not, that the Defendant reversed his motor vehicle without due care and attention and without due regard to her a pedestrian, thereby colliding his car in her back and that as a result she suffered the injuries as alleged. In assessing the evidence of both parties, I have also carefully observed their demeanour as regards to the credibility of their evidence.
- [58] I have observed that in her submissions Ms Wright made reference to a higher standard of care on the part of a motorist as it relates to a pedestrian. Consequently, I have reviewed the law to include the cases relied on by both counsel in order to discover whether there is a general principle of law that places a higher duty of care on motorist than on a pedestrian.
- [59] In my review, I have found that the authorities have in fact stated that the expected duty of care, in relation to a certain class of pedestrians, on the part of a defendant motorist, is higher than that which is expected towards the general class of pedestrians. These cases make specific reference to young children.
- [60] In the case of *Donnovan Murray and John Rose v Dwayne Flowers (by his mother and next friend Sandra England)*, Supreme Court Civil Appeal No:117/2000 the court said that the duty of care placed on the defendant motorist

in relation to a young child “is much higher than that to be expected if the pedestrian was an adult or a child of mature age or judgment”.

[61] Additionally, in the case of **Jones v Lawrence** [1969], 3 All E.R 26, in assessing whether the Defendant has failed to discharge his duty of care towards a child pedestrian, Cummings Bruce J at page 270 said, one of the questions to be answered is:

*“Whether the child’s behaviour was anything other than a normal child who is regretfully momentarily forgetful on the perils of crossing the road.”*

[62] However, the case of **Lunt v Khelifa 2002 EWCA Civ 81**, involved an adult pedestrian. In that case the pedestrian stepped out into the carriage way at a recognized crossing point where the lights were not working. A car was approaching from twenty-five (25) miles away at a speed of 20 to 25 miles per hour when the pedestrian left the kerb and entered into the roadway. The pedestrian was struck after taking two (2) steps into the road. The motorist did not see him at all prior to the impact. Though, on appeal, the court did not disturb the findings of the lower court, that the Defendant was two thirds (2/3) negligent and the Claimant one third (1/3) negligent, the Court thought that the court below was generous towards the Claimant.

[63] Moreover, Latham J, while recognizing that the pedestrian was the one who created the dangerous situation, by stepping out as he did into the carriage way when the Respondent’s vehicle was so close, did make the point that:

*“the courts have consistently imposed on the drivers of cars a high burden to reflect the fact that a car is potentially a dangerous weapon” (See paragraph 20)*

[64] Additionally, in the case of **Eagle v Chambers** [2004] RTR 9 Hale, L J at paragraph 16, in emphasizing this principle stated that;

*‘... it is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle.’*



[65] Therefore, on a review of the cases, there does appear to be a general principle, that as it relates to negligence involving motor vehicles accidents between motorists and pedestrians, the court imposes a high burden on the motorist. However, this is not to say that the pedestrian owes no duty of care to other road users. Additionally, this does not absolve a pedestrian from paying due regard for his or her own safety.

[66] As it relates to Ms Burton Campbell's submission that a "**Road Traffic Act of 1987**" imposed on a pedestrian a duty of care for his own safety and that this provision may not have been replicated in the 2023 Act, I believe that this is an error on part of Counsel as the reverse is in fact what obtains.

[67] In my review of the **Road Traffic Act of 1938** and the subsequent amendment, I have found no detailed provision clearly outlining the responsibility on the part of the pedestrian for his own safety. However, the New **Road Traffic Act** that was passed on the 31<sup>st</sup> of December 2018, and came into operation February 2023, repealed, and replaced the former **Road Traffic Act**. This new legislation, in **Section 84, clearly** outlines the duties of the pedestrian. It places a responsibility on the pedestrian for his own safety.

[68] **Section 84 (2)** reads:

*'a pedestrian shall not suddenly enter a pedestrian crossing and walk or run into the path of a vehicle which is so close that it is not possible for the driver or operator to yield.'*

[69] **Section 84 (7)** reads:

*"a pedestrian on a road shall not act in a manner that constitutes or is likely to constitute a source of danger to himself or to other traffic which is or maybe on the road."*

[70] It may be argued, and correctly so, that these provisions are not applicable to the Claimant as the accident occurred in 2015. However, it is my view that the principle

outlined in these provisions already existed at common law. In essence the Section codified and clarified the common law position.

[71] In ***Clifford v Drymond*** [1976] RTR 134, the pedestrian failed to look to her right before stepping out into the road. Had she done so she would have seen a vehicle about 75ft away travelling at approximately 30mph. Negligence was apportioned at 20% against the Claimant. Lord Justice Bridge stated as follows: “a pedestrian who leaves the pavement and set foot on the carriage way, there is a duty on the pedestrian to keep that car under observation and to see whether the car is going to stop.”

[72] In fact, the case of ***Ena Pearl Nance v. British Columbia Electric Railway Company***; which is frequently quoted and relied upon in negligent cases, involved a motorist and a pedestrian. The Privy Council in that case stated that:

*“Generally speaking when two parties are so moving in close relation to one another as to involve a risk of collision, each owes to the other a duty to move with due care, and that is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a motor vehicle. ... when a man steps from the kerb into the roadway, he owes a duty to the traffic which is approaching him with the risk of collision to exercise due care.” (see page 4 of the Judgment)*

[73] Furthermore, I am also guided by the approach of the court in the case of ***Jackson v Murray*** [2015] UKSC 5. At paragraph 50 the court noted that “*the case law points up general principles but; each case must depend on its particular facts*”.

[74] Therefore, the question that I have to decide in this case is whether the Claimant has proven on a balance of probabilities, that as a motorist, being in charge of a motor vehicle, the Defendant did not exercise the due care and attention at the standard that is expected of a reasonably skilled driver towards a pedestrian.

[75] I will now proceed to assess the evidence in the instant case. The Claimant admits that at some point she was on the platform. She also admits that at some point she left the platform and stood on the asphalted area. She further acknowledges that

she knows that the only way motor cars that were parked in front the Star Mart could exit the area was by reversing on the asphalted area.

**[76]** I also take note of her evidence, that she was walking towards the Star Mart. The direction she was walking towards was towards the general direction where the Defendant's Car was parked. Her motion was interrupted by the customer saying something to her and she turning her back to direction of the parked cars in order to speak to that customer. She also admits that her intention was still to go to the Star Mart.

**[77]** Her evidence is that she had already stepped down onto the asphalted area, before turning around to talk to customer. The Defendant has challenged this evidence. His version is that he saw her stepping from the platform area while he was reversing. That is, immediately before coming into contact with the Defendant's car. Despite the issue being raised that the Defendant needed to establish that reverse lights on his motor vehicle were turned on, I do not believe that is an essential issue for me to determine regarding the question of liability. This is consequent upon the fact that both agree that the impact occurred at the point that the Claimant's back was towards the motorcar. Therefore, both have agreed that in this position she would not have been able to see whether the lights were on or off. Essentially with her back towards the motor vehicle reverse lights could not have assisted her in recognizing that the motor vehicle was reversing.

**[78]** Having assessed the evidence of the Claimant and the Defendant as regards credibility I find that the version presented by the Defendant as to the cause of the impact appears to be more credible than that of the Claimant. To begin with, I find that there is a material contradiction on the Claimant's case that affects her credibility. Her evidence in chief is that when she felt the impact she glanced quickly and realized that a motor car had reversed and hit her in her back. She used her hand to hit against the trunk several times before the driver stopped reversing. However, on cross-examination she has introduced not only a new but a significant piece of evidence. She states that the car not only hit her but was

also reversing and pushing her. She admits that it was not mentioned in her witness statement, her evidence in chief, that the car was pushing her while reversing. Counsel, Ms Wright has submitted that her admission of the absence of this evidence from her witness statement should be viewed as evidence of her candour. However, I do not subscribe to this view. I find that, the fact of the motor vehicle pushing her is of significance, that this detail I would expect to find in her description of the collision not only in her Particulars of Claim but in her witness statement. Additionally, there was an opportunity for this detail to be elicited on amplification, yet it is just being introduced on cross examination.

**[79]** Further, there is no evidence that the Claimant fell at any point. Notwithstanding, there is no explanation as to how she was able to maintain her balance with a motor vehicle in motion pushing her. Moreover, on cross-examination she says that after she felt the impact she turned around. Considering her evidence that the car did not stop immediately on impact it stands to reason that the car would still be pushing her when she turned around. Nonetheless, when she was asked whether she continued to feel the impact when she turned around, her answer was “No.” Besides, there is no evidence of her suffering injury other than to her back.

**[80]** In the case of **Lambert v Clayton** [2009] EWCA Civ. 37, at paragraph 39, Smith, L.J made the following pronouncements;

*“if there are inherent uncertainties about the facts.....This may well mean that the party who bears the burden of proof is in difficulties but that is one of the purposes behind a burden of proof; that if the case cannot be demonstrated on the balance of probabilities, it will fail.”*

**[81]** I now turn to the medical evidence. Ms. Wright submits that the injuries complained of by the Claimant are consistent with those documented by Doctor Carroll Chester Jones in his medical report dated August 27, 2015. Additionally, she is asking the court to find that these injuries were caused by the accident.

[82] However, Ms. Burton Campbell is of the view that the Court should reject Doctor Jones' Diagnosis. The base of her contention is that in her view, apart from the complaints of the Claimant, the Doctor has not demonstrated on what clinical basis he arrived at his diagnosis. Further, she takes the position that in the absence of any independent clinical findings, the medical evidence would support the contention of the Defendant that the Claimant's back did not come in contact with his motor vehicle, it was only her hand.

[83] This court recognizes the legal principle that;

*"Where experts are appointed by the Court their duty is to the Court and not the party calling them. (See paragraph 39 of **Dixon-Hall (Cherry) v Jamaica Grande Limited** SCCA 26/2007)."*

[84] It has also been said that:

*"the court should very rarely discard the evidence of a single joint expert. The judge must evaluate such evidence and reach an appropriate conclusion with regards to it and that appropriate reason should be given for any conclusion reached." (See Panton JA in the case of **Dixon-Hall (Cherry) v Jamaica Grande Limited** at paragraph 36; See also the case of **Cooper Payen Ltd v South Hampton Terminal Containers Limited 2003** (ECWA 1223)*

[85] In the case **Cooper Payen Ltd v South Hampton Terminal Containers Limited** in the Judgement of Clarke L. J the court stated, inter alia, that "all depends on the circumstances of the particular case. For example, where the expert is the only witness on a particular topic as where the facts on which he expresses his opinion are agreed, then in those circumstances it would be difficult to decide such a case on the basis that the expert opinion were wrong".

[86] Nonetheless, I am also cognizant of the law that I do not automatically accept the opinion of the Doctor simply, because he is an expert. I am responsible to assess his evidence, having regard to all the evidence in the case, and am entitled to reject his evidence, if I find it unreliable.

[87] In the case of **Cooper Payen Ltd v South Hampton Terminal Containers** at paragraph 40 Clarke L.J expressed the view that:

*“More often the expert opinion will only be part of the evidence in the case. For example, the assumption upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant ... However, at the end of the trial, the duty of the court is to apply the burden of proof and to find the facts, having regards to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate.”*

- [88] I bear in mind that the evidence of the expert is an opinion, as it relates to the fact in issue and not a fact as to occurrence of accident, or the cause of injuries as he was not a direct witness to the accident. As such my approach as it relates to my assessment of the medical evidence is to decide whether it lends credence to the Claim.
- [89] One of the issues the Court of Appeal had to determine in the case of ***Dixon-Hall (Cherry) v Jamaica Grande Limited (Supra)***, was whether McDonald Bishop J (as she then was), was correct in rejecting the opinion of Doctor Williams in his medical report that the fall exacerbated the Claimant’s pre-existing condition of Lupus. In her Claim for Damages, the Claimant alleged that she was diagnosed with Lupus in 1998 and never experienced any flare-up prior to her fall. The doctor stated that she came under his care May 20, 2003. That is when he started treating her. He stated in his report that she was diagnosed with systemic lupus erythematosus but did not state who diagnosed her.
- [90] In the judgment of the Court of Appeal, Panton JA stated that the doctor would not have been in a position to make any proper assessment of her pre-existing condition or to give an opinion about a medical condition that he had no personal of. In that regard he found that Mc Donald Bishop J, (as she then was), in court below, was correct to have rejected his opinion that the fall had exacerbated her lupus condition (See paragraph 51 of the Judgment).
- [91] In the instant case I find that Doctor Jones seems to have relied wholly on the complaint of the Claimant to arrive at his diagnosis. This is in view of the fact that he states that on physical examination he noted no significant

findings. Notwithstanding, he has not stated what led him to diagnose her with, “low back pain secondary to acute muscle spasms due to the trauma”.

- [92]** The Claimant in her evidence said that the doctor referred her to x-ray examination which she has indicated that she did. The doctor however has made no reference to x-ray findings in his diagnosis or anywhere in his report. He has not mentioned any findings on any examination that are consistent with what was reported to him by the Claimant. I therefore agree with Ms. Burton Campbell that there is no independent clinical basis for Doctor Jones Diagnosis. In this regard I accept his evidence that the Claimant did complain to him of pain in her back, but his examination revealed no findings in this regard.
- [93]** Consequently, in light of the absence of any independent clinical finding other than the complaint of the Claimant I find that there is insufficient for me to conclude that the medical evidence lends support to the evidence of the Claimant regarding her injuries. In the absence of any clinical finding contradicting Doctor Jones’ evidence that there was no significant findings on his physical examination of her, I find that the only evidence before this court that the Claimant had injuries to her back is that of the Claimant.
- [94]** In any event, having assessed the totality of the evidence in the instant case and the description of both parties of the accident, I find that it is more probable that the impact of the Defendant’s car was with the Claimant’s back. In that regard I find the evidence of the Claimant more credible as it relates to the part of her body that came in contact with the Defendant’s motor vehicle.
- [95]** However, I find the Defendant to be more credible as it relates to the issue of causation. I note that Ms. Wright has highlighted certain inconsistencies in the evidence of the Defendant. On cross-examination, the Defendant did say that he told the Claimant that “you have to look what you are doing” Admittedly, this detail is absent from his witness statement which was permitted to stand as his evidence in chief.

**[96]** Nevertheless, I do not view this omission as a significant diversion from his statement. This is in light of the fact that in his statement, he did say, that he spoke with her to find out if she was all right. I find that on cross-examination he provided the details of that conversation.

**[97]** Besides, in my view, this omission or inconsistency does not affect the gravamen of his case. Essentially it does not affect his evidence as to how the impact occurred.

Additionally, Ms. Wright has pointed to his use of the word “collision” in his defence. That is, in his defence, he did admit that there was a collision between his motor vehicle and the Claimant. In his statement, he mentioned that he was involved in an accident. However, Counsel Ms. Wright takes the position that this contradicts his evidence on cross-examination that his car did not hit the Claimant, but it was she that hit his car.

**[98]** However, again, in my view his evidence on cross-examination does not appear to be a significant departure from his defence or his examination in chief. In paragraph 3 of his statement, the Defendant said he was “involved in an accident.” However, at paragraph 6 in the very statement he did give an explanation of what he describes as an accident. He states that “While reversing the Claimant stepped off the raised area, he applied his brakes, but she hit her left hand on the rear spoiler of the car” In paragraph 3 of his Defence he did admit that there was a collision between his motor car and the Claimant. In paragraph 4 he avers that she stepped off the platform into the path of the car.

**[99]** Therefore, in his defence, his witness statement and on cross examination his version as to how the accident occurred has been consistent. That it was the Claimant who stepped from the Platform into the path of car while he was reversing. As such, I do not share the view that his insistence on cross examination that his car did not hit the Claimant, but it was she that hit his car, is inconsistent with his defence. However, as I earlier indicated, considering that both parties have indicated that the Claimant’s back was towards the Defendant’s motor vehicle on impact, I find that it is more likely than not that the Claimant’s back did come in



contact with the Defendant's motor car . Essentially, I do not find the aspect of the Defendant's evidence that it was only the Claimant's hand that hit his motor vehicle credible.

**[100]** However, despite the fact that, I find that the Defendant is not completely credible, the issue I must resolve is whose version on a balance of probabilities appears to be more credible. I have noted the Claimant's evidence regarding the layout of the gas station which has not been challenged by the Defendant. Against this background, it is my view that unless the Defendant deliberately intended to damage his own vehicle, I find that it is more probable that the Defendant in the process of reversing did check his mirrors, in order to see how far back to reverse without colliding in the raised area, the pump, or any other object. I find that in checking, it is more probable than not that he did see the Claimant on the platform with her back towards his vehicle speaking to a customer. I find it more probable that when he commenced reversing, she was still on the platform. I find it more probable that Claimant was distracted by her conversation with the customer. Consequent on this distraction, she stepped from platform with her back still turned, as it was still her intention to go towards the Star Mart. I find that it is more probable that in stepping from the Platform her back was impacted by the Defendant's motor car. Essentially, I find that the evidence of the Defendant regarding causation more credible than that of the Claimant.

**[101]** In the case of **Chan v Peters**, the Claimant was 17 years old at the time of the accident and was injured when he went jogging across the Road outside his school. The court found as a fact that the Defendant was driving below the speed limit and that the Claimant did not look in the direction of the Defendant's car before stepping into the road.

**[102]** It was argued before the court that the Defendant failed to see the Claimant when he was there to be seen when he came out of the school gate and stood at the kerb ready to cross. It was further argued that the Defendant should have seen that the Claimant was distracted and was about to cross the road; and if the

Defendant had acted in a manner expected of a reasonable and competent driver she would have stopped in time and avoided the collision entirely. (See Paragraph 10 of the Judgment).

[103] However, the Court ruled that it did not expect that a reasonable driver in the position of the Defendant would see that there was a real possibility that someone would emerge unexpectedly from the parking Bay into her path.

[104] In the instant case, I do not expect that the Defendant as a reasonably skilled driver, could anticipate that an adult on a platform, with her back turned towards his vehicle, having a conversation, would have stepped from the platform with her back turned into the path of his moving vehicle.

[105] The case of London **Transport Board v Upson** [1949] AC,155, involved a child pedestrian. At page 175 the court, in pronouncing on the issue, stated that:

*“If the possibility of danger emerging is reasonably apparent then to take no precaution is negligent, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man then there is no negligence in not having taken extraordinary precaution”.*

[106] In the case at Bar, both parties agree that the distance the car reversed before the impact was a relatively short distance. The Claimant said arm’s length, the Defendant said two and half to three feet. In my view, in these circumstances, even with a proper look out, with such a short distance travelled before impact, even with the application of his brakes it would have been extremely unlikely that the Defendant, not anticipating the Claimant to stepped down from the platform, could have avoided the impact.

[107] Consequently, I find that the Claimant has failed to prove on a balance of probabilities that the impact between herself and the Defendant’s motorcar was as a result of the Defendant’s failure to exercise due care and attention towards her as a road user. I find that the evidence points more towards her failure to exercise due care for her own safety. Essentially, I find that it has not been proven on a

balance of probabilities that the Defendant can be faulted for the accident in any respect. As such I enter Judgment for the Defendant.

**ORDERS**

1. Judgment for the Defendant
2. Cost to the Defendant to be agreed or Taxed.

.....  
**Andrea Thomas**  
**Puisne Judge**