[2017] **JMSC Civ 85**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 06351

BETWEEN	**VEREL WILLIAMS**	**CLAIMANT**
AND	**PABLETO HENRY**	**DEFENDANT**

Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright & Company for the claimant

Everton S. Bird for the defendant

Heard: 14th & 15th December, 2015; 16th January & 2nd June, 2017.

Negligence – Contributory negligence - Damages – Assessment of damages - Conflicting medical evidence - Duty of care - Law Reform (Contributory Negligence) Act. S. 3(1).

EVAN BROWN, J

INTRODUCTION

[1] Mr. Verel Williams, the claimant, is a thirty-nine year old self-employed mechanic. The defendant, Mr. Pableto Henry, is a musician and the owner and driver of a motor car registered 0731 FP. Mr. Williams seeks damages for injuries he sustained as a result of being hit down by Mr. Henry. The claim against Mr. Henry is, therefore, for negligence. The over-arching issue is one of credibility as Mr. Henry staunchly denied being involved in a motor vehicle accident with Mr. Williams. Having considered the claim on a balance of probabilities, I accepted the evidence of Mr. Williams and entered judgment in his favour.

Factual Background

[2] On the 15th October, 2009, at about 9 AM, both parties were users of the Half Way Tree Road in the parish of St. Andrew. Half Way Tree Road is a major thoroughfare for traffic travelling in the direction of Cross Roads to the east and Half Way Tree (HWT), to the west. The road accommodates two lanes in either direction. The National Bakery Company (on the left as one faces HWT) and the Kingston School of Nursing (on the right as one faces HWT) are two well-known landmarks along the Half Way Tree Road. In the vicinity of those two land marks is a pedestrian crossing.

[3] Mr. Williams was on foot in the vicinity of the National Bakery Company and wished to cross over to the side of the Kingston School of Nursing. At that time, motor vehicles were proceeding towards HWT in the left lane only. As it later turned out, Mr. Henry was at that time driving his motor car in the direction of HWT in the right lane. Traffic was proceeding towards Cross Roads in both lanes.

[4] Traffic heading towards Cross Roads in both lanes came to a halt, as well as traffic in the left lane going towards HWT. Mr. Williams then set about making his way to the other side of the road on the pedestrian crossing. He passed the vehicles in the left lane. Reaching the right lane, he noticed a black Toyota Corolla motor car approaching from the direction of Cross Roads. That motor car was "coming up with a speed". Mr. Williams tried to run but was struck on the left inner ankle by the right side of the front bumper of the motor car.

[5] That caused Mr. Williams to fall onto the roadway. From there he noticed that the motor vehicle slowed down then drove away. Another motorist supplied Mr. Williams with a pen which he used to record the registration of the offending vehicle. He was removed from the roadway by a policeman from the Cross Roads police station who transported him to the Kingston Public Hospital (KPH). There he was treated for tenderness over the left leg and released the same day.

Mr. Williams subsequently saw Dr. Cryril Gray who diagnosed that he was suffering from a badly sprained ankle as a result of the motor vehicle accident.

Issues for Resolution

[6] Almost every question of fact was hotly contested at the trial. Firstly, Mr. Henry disputed that he was involved in a motor vehicle accident with Mr. Williams. Therefore, accepting that Mr. Williams was in fact hit down along the Half Way Tree Road at the material time, it must be established that the vehicle concerned was the one that was owned and being driven by Mr. Henry. Central to the determination of this question is the credibility of both parties. If this question is settled in favour of Mr. Williams I will go on to consider the second issue.

[7] The second issue is, was Mr. Henry negligent when his vehicle collided with Mr. Williams? If this answer is in the affirmative, the next question which must be considered is whether Mr. Williams was himself negligent in his use of the road. That is, was Mr. Williams contributorily negligent, as averred by Mr. Henry?

[8] The fourth issue relates to the nature and extent of the injuries resulting from the accident and will be addressed in the section concerned with the assessment of damages. This issue arises from an apparent conflict on the medical evidence. Whereas Mr. Williams was treated for tenderness over the left leg at the KPH, the physician and surgeon who subsequently treated him diagnosed him with a badly sprained ankle.

Discussion and analysis

[9] Taking the issues chronologically, was the vehicle that hit down Mr. Williams the one that was owned and driven by the defendant, Mr. Pableto Henry? Mr. Williams did not see the face of the driver of the motor car that hit him down as, on his evidence, the driver did not exit the vehicle after the accident. The only information he had to assist in the identification of the driver and owner, was the registration of the vehicle.

[10] It was the policeman who transported Mr. Williams to the KPH who facilitated the discovery of the name, address and insurance particulars of the owner of the vehicle. Mr. Henry admits to being the owner of 0731 FP in his amended defence. Mr. Henry, however, denied being the driver of the motor vehicle.

[11] While he denied the allegations of negligence, Mr. Henry admits in the above mentioned defence that he was driving the same motor vehicle along Half Way Tree Road in the right lane, from the direction of Cross Roads, on the 15th October, 2009 at about 9.15 AM. There is, therefore, no difficulty in finding as a fact that Mr. Henry was the driver of the black Toyota Corolla motor car 0731 FP.

[12] Mr. Henry, however, said no one was crossing on the pedestrian crossing in the vicinity of the Kingston School of Nursing. He encountered pedestrians trying to traverse the road from left to right, as Mr. Williams said he was. These pedestrians stopped in the middle of the road but to the right of his vehicle. He was positioned to make a right turn onto Oxford Road. As he passed them, all except one man crossed behind his vehicle. This man had stepped back to where he was with the group. Mr. Henry heard "a thumping sound at the back of his car". After completing the turn he stopped, investigated and discovered no damage. After that Mr. Henry continued along his way merrily.

[13] On this account, Mr. Henry's passage along the Half Way Road was without incident except for the "thumping sound" on the back of his car. It is interesting that on Mr. Henry's version only one man did not make it across the road. What his description does, however, is place him in the vicinity at the material time. And, as counsel for Mr. Williams submitted, his narrative discloses that he was not a driver who yielded to pedestrians.

[14] What is also interesting is that Mr. Henry puts a lone man standing in the middle of the roadway. To be fair to Mr. Henry, he said this man was initially with the group that made it across the road. Further, Mr. Henry asserted that no one crossed in front of his vehicle, which is what Mr. Williams said he did. Mr.

Williams, in answer to the court, said he was crossing alone and no one crossed before or after he attempted to do so. I believe Mr. Williams that he was crossing the road alone and find that he was the man in the middle of the road as Mr. Henry drove along the Half Way Tree Road. Since he was the man in the middle of the road, I also find that he was crossing in front of and not behind the car being driven by Mr. Henry.

[15] Now, having seen this man at the rear of his vehicle, Mr. Henry heard the "thumping sound" to the rear of his vehicle. Since he heard the sound simultaneously with seeing the man at the rear of his vehicle, prudence dictated an investigation for any connection between that sound and the pedestrian. Mr. Henry's concern, however, was only for the integrity of his vehicle.

[16] The only person who could have thumped the car was Mr. Williams, the man in the middle of the road. He was not asked if he did so and he did not volunteer the information. In any event, it is highly improbable that Mr. Williams was responsible for the "thumping sound" since he placed himself at the front of the vehicle. Accordingly, I reject that there was a "thumping sound" towards the rear of the vehicle. I infer that the sound Mr. Henry heard was that of the impact with Mr. Williams which could only have come from the front of the vehicle.

[17] Mr. Williams alleged that the vehicle that hit him slowed down then continued. Mr. Henry, likewise, drove away after the impact. He neither stopped along Half Way Tree Road nor said where along Oxford Road he stopped. He, therefore, could have been out of the view of Mr. Williams when he stopped. One thing is certain, there was an impact involving his vehicle after which Mr. Henry drove away. The only difference between what he said and what Mr. Williams said is that Mr. Henry never said that he slowed down after the "thumping sound".

[18] So then, when the story as told by Mr. Williams is juxtaposed with that told by Mr. Henry, it appears more probable than not, that Mr. Henry was the driver whose vehicle hit down the claimant. Beyond that juxtaposition of accounts, Mr. Williams

impressed me as being disposed to honouring his oath. He was a testy but truthful witness. The crucible of cross-examination left him unshaken.

[19] Mr. Henry, on the other hand, who I also saw and observed, I did not find to be credible. Even while he asserted that everything in his amended defence was correct, he did not take responsibility for everything that was said in it. As it concerned the “thumping” at the back of his car, Mr. Henry was at pains under cross-examination to say he did not know who did so. He, however, averred that the claimant either ran or walked into the side of his vehicle and failed to use the pedestrian crossing. In those averments Mr. Henry was clearly making a connection between the claimant and the lone man standing in the middle of the road. Lastly, there is the incongruity of Mr. Henry averring in his amended defence to seeing three or four persons in the middle of Half Way Tree Road, failing to yield to them but asserting in evidence that he "always think (sic) of the pedestrian". There is, therefore, no difficulty in answering the first issue in the affirmative.

[20] Before moving on to the next issue, a brief reference must be made to the submissions of counsel for Mr. Henry. With all due deference to counsel, the submission that the “claim lacks the factual foundation capable of forming the basis for proof on a balance of probability” is itself without foundation. Without itemising the several matters raised in support of that submission, it suffices to say on the totality of the evidence there is no doubt that the accident occurred on the 15th October, 2009. Equally, it was sufficiently established that the claimant was struck on the inner aspect of the left ankle by the motor car. I find that to be entirely consistent with someone trying to traverse the Half Way Tree Road in the manner described by Mr. Williams. That conclusion was arrived at without embarking on the journey of conjecture undertaken by learned counsel for the defence. With that said, attention is now turned to the second issue.

[21] The second issue is, was Mr. Henry negligent when his vehicle collided with Mr. Williams? The starting point is an encapsulation of the law of negligence,

relevant to the instant case. Broadly defined, negligence is the breach of a legal duty to take care which results in damage to the claimant: ***Commonwealth Caribbean Tort Law*** 3rd ed. Page 63. That breach of duty results either from "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do". (***Blyth v Birmingham Waterworks Co***. (1856), 11 Ex.781)

[22] To succeed in a claim for negligence, therefore, the claimant must establish, on a balance of probability, the ensuing four elements. First, it must be proved that the defendant owed the claimant a duty of care in the circumstances in which the claim arose. Secondly, the claimant must establish a breach of that duty by the defendant. That is to say, it must be shown that the defendant failed to approximate the standard set by law. Thirdly, the claimant must prove that he suffered damage as a result of the defendant's breach of the duty owed to him. In short, there must be a causal link or nexus between the defendant's act or omission which is called into question and the damage complained of. Lastly, it must be proved that the damage suffered by the claimant was foreseeable. In other words, the damage sustained was not so remote as to be unforeseeable. (See ***Clerk & Lindsell on Torts*** 19th ed para 8-04 and ***Commonwealth Caribbean Tort Law*** *op.cit.*)

[23] In cases such as this, the general principle is that each road user owes a duty of care to other road users. If there is a breach of that duty which results in foreseeable damage, liability in negligence will arise: ***Clerk & Lindsell*** *op.cit.* para 8-157. A duty to move with care is imposed on road users whose movement in relation to each other involves the risk of collision. The duty to take care bears equally upon vehicular and pedestrian users of the road: ***Nance v British Columbia Electric Rly. Co. Ltd.*** [1951] A.C. 601.

[24] The duty to take care includes taking into account the anticipated carelessness of the other road users: ***London Passenger Transport Board v Upson*** [1949]

A.C. 155. To paraphrase Lord Uthwatt (at page 173), drivers are not entitled to assume that other drivers and pedestrians will use the road with reasonable care. While he is not bound to anticipate extreme follies, he must have within his contemplation those follies which arise from common experience.

[25] Following on from that, it is instructive but not decisive to have regard to the guidance provided for road users in the ***Road Code*** published by the Island Traffic Authority under section 95(2) of the ***Road Traffic Act***. A failure to observe any of the provisions of the ***Road Code*** may be relied upon by any party to establish or negative liability, by virtue of section 95(3) of the ***Road Traffic Act.***

[26] In the United Kingdom, where a failure to observe the Highway Code may be relied to establish liability, it has been held that that failure does not necessarily attract liability in negligence: ***Rosser v Lindsay***, The Times February 25, 1999. The opposite is also true, proof of compliance with the provisions does not automatically result in absolution from negligent liability: ***White v Broadbent and British Road Services*** [1958] Crim. L.R. 129. Having said that, the ***Road Code*** represents the minimum standard imposed on road users. What, then, is that minimum standard?

[27] The driver of a motor vehicle, "when approaching a pedestrian crossing ... [should] slow down and always be prepared to stop" (***Road Code*** #32). This is just another way of saying he must keep a proper lookout. The driver is bound to keep a proper lookout for one simple reason. The reason sounds in the vein of the neighbour principle.

[28] This is the reason, when the vehicle is near a pedestrian crossing a duty is owed by the driver to persons on the pedestrian crossing not to allow it to continue its forward motion so as to injure them. In those circumstances it is clearly foreseeable that if the driver fails to stop in a manner which does not impede the pedestrians, physical injury may result. To put the point succinctly, the pedestrian on the crossing has precedence: ***Errol McDonald v Zoukie Trucking Services***

and Ainsley Wallace Claim No. 2009/HCV1374 dated 14th April, 2011. Or, as it is expressed in the ***Road Code***, the pedestrian has the right of way (***Road Code*** # 15).

[29] In the case at bar, Mr. Williams said the car was "coming up with a speed". In his amended particulars of claim, Mr. Williams averred that Mr. Henry was driving at a speed which was excessive in the circumstances. Mr. Henry's counter-averment was that as he approached the pedestrian crossing he "maintained a speed of between 5 and 10 miles per hour". His evidence was a virtual photocopy of his pleading.

[30] Mr. Henry's duty was to slow down as he approached the pedestrian crossing, not maintain his speed. I understand Mr. Henry to be saying, however, that he was already travelling so slowly that he could have stopped if required to do so. I, however, do not accept that he was either driving in a line of traffic or at the speed he contended. Secondly, he was required to accord precedence to the pedestrians. It is noteworthy that in cross-examination Mr. Henry said pedestrians have the right of way at all times. So that, although he spoke of a group of pedestrians above, and not on the pedestrian crossing, he knew his duty was to extend courtesy and consideration to them by stopping to facilitate their passage across the road. So, on his own account, he fell below the standard required of a reasonably competent driver.

[31] By approaching the pedestrian crossing at an excessive speed and failing to slow down Mr. Henry was not keeping a proper lookout. Mr. Henry continued speeding along in circumstances where the other three lanes of traffic were stationary. That other traffic was stationary in the vicinity of the pedestrian crossing should have put him on notice to proceed with caution. In consequence of that, he further failed to do anything to avoid hitting Mr. Williams. In sum, I find the particulars of negligence proved, on a balance of probability.

[32] The takes me to the third issue, was Mr. Williams negligent in his use of the road? Has it been established that Mr. Williams did not in his own interest take reasonable care of himself, and contributed, by that want of care, to the injury he received? In essence, was Mr. Williams in part the author of his fate? In order to establish the defence of contributory negligence it must be proved that the claimant, Mr. Williams, failed to take care for his own safety as a reasonable and prudent man and that his failure contributed to the cause of the accident. The burden of proof rests on Mr. Henry (***Wakelin v L. & S.W. Rly.*** (1886) 12 AC 41 at 47) but contributory negligence may be evident on the case for the claimant: ***Sharpe v S. Rly***. [1952] 2 K.B. 311.

[33] Mr. Henry, in his amended defence, listed six particulars of negligence of Mr. Williams. First, he alleged that Mr. Williams "failed to keep a proper lookout". Second, he averred that Mr. Williams "stepped out onto a major or arterial roadway when it was unsafe to do so". Third, Mr. Williams was accused of "stepping onto a major or arterial roadway in front of a vehicle at the middle of the roadway without making sure that it was safe to do so". Fourth, "walking or running into the side of the rear section of a moving motor vehicle". Five, "failing to allow vehicle to pass him or stop before reaching him, before crossing the road". Six, "failing to utilize a nearby pedestrian crossing while crossing a busy major or arterial roadway".

[34] The defendant, Mr. Henry, gave no evidence to support his averments that Mr. Williams was negligent. Before going on to consider the material which could support the defence, I make one observation. Particular number three appears to be inconsistent with number four. In the former the claimant is said to stepped in front of the vehicle, while in the latter the claimant either walked or ran into the side of the motor vehicle. In any event, I have already rejected the contention that Mr. Williams made contact with the rear of Mr. Henry's vehicle. Following on that, having accepted that Mr. Williams was utilizing the pedestrian crossing, particular number six is also rejected.

[35] I will now consider the other particulars of negligence on the basis of the evidence given by Mr. Williams. When Mr. Williams started across the HWT Road, vehicles in the left lane from Cross Roads towards HWT had stopped. There were no vehicles in the right lane proceeding towards HWT. Vehicles in both lanes from HWT towards Cross Roads had also stopped. Having cleared the left lane, Mr. Williams noticed Mr. Henry's vehicle in the right lane approaching from the direction of Cross Roads.

[36] When he saw Mr. Henry's vehicle it was then about 28 feet away from the pedestrian crossing. That was a distance Mr. Williams pointed out in the courtroom which was measured. In his judgment, the motor car was then travelling fast. He, therefore, tried to move faster by trying to run, as he expressed it. He said when he did that, "I already got hit".

[37] So, on his evidence, Mr. Williams tried to outrun this speeding motor car. He either underestimated the speed of the motor car or overestimated his own agility. In short, he showed poor judgment in deciding to continue crossing the road. He having adjudged the car to be travelling fast, with only approximately 28 feet separating them, it was highly doubtful that he could have safely crossed the road. That was not just an error in judgment, it was also an act of careless.

[38] In the circumstances in which Mr. Williams sought to traverse the right lane for traffic proceeding from the direction of Cross Roads, he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man he might sustain some injury. Put another way, when Mr. Williams tried to outrun the speeding the motor car he did not take care for his safety as a reasonable and prudent man would. Although when he first stepped onto the road it was safe to do so, it was manifestly unsafe to attempt to continue his passage across the right lane in the face of a speeding car approaching from 28 feet away.

[39] It is apparent that Mr. Williams misapplied the injunction to "cross as quickly as possible". The ***Road Code*** # 15 cautions pedestrians "not to adopt the attitude

that because you have the right of way you may do as you like". To that end, a pedestrian is enjoined to exercise caution when using a pedestrian crossing. Proper use of the pedestrian crossing requires an assessment that the motorist can see the pedestrian "clearly and in good time, so that he can make ample preparations to stop" (***Road Code*** # 14), before he steps into the crossing.

[40] So that, having correctly entered the crossing after three lanes of vehicular traffic had stopped, Mr. Williams was still under a duty to make sure the motorist approaching in the right lane could clearly see him and in good time to stop. In seeking to hurtle across the right lane he was neither exercising caution nor looking out for his own safety. By so doing, Mr. Williams was both a contributing cause of the accident and the resultant damage he sustained.

[41] The defendant having pleaded and proved contributory negligence, the court must now consider the question of apportionment. By virtue of section 3 (1) of the ***Law Reform (Contributory Negligence) Act***:

> *"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, ... the damages recoverable ... shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".*

The court, having assessed the damages on the basis of the sole culpability of the defendant, must go on to reduce the award to "such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".

[42] According to Denning L.J. in ***Davies v Swan Motor Co. (Swansea) Ltd.*** [1949] 2 K.B. 291 at 325 approved by the House of Lords in ***Fitzgerald v Lane and another*** [1989] 1 AC 328.

> *"The Act seems to contemplate that, if the plaintiff's own fault was one of the causes of the accident, his damages should be reduced by the self-same amount as against any of the others whose fault was a cause of the accident."*

That said, the court is enjoined to "deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party," per Lord Reid in ***Staply v Gypsum Mines Ltd***. [1953] AC 663 at 682. When assessing the claimant's share in the responsibility for the damage, the "relative importance" of the acts of the claimant, together with his blameworthiness must be taken in account.

[43] I must therefore ask myself, to what extent the claimant has been part author of his own damage? In order to answer that question, the claimant's conduct must be weighed against the background of the circumstances. The circumstances will, of course, include the conduct of the defendant (***Fitzgerald v Lane***, *supra*). The initial danger was created by the defendant who drove with little or no regard for any pedestrian who may have been using the crossing, in the face of the other three stationary lanes of traffic. The claimant, however, seeing the danger, exercised the careless option of trying to outrun the speeding car.

[44] Although Mr. Williams had the right of way, his responsibility was to ensure that he could make it to the opposite kerb, or more precisely, to the right lane for vehicle proceeding to Cross Roads (his central refuge) without endangering himself. Although the precise speed of Mr. Henry's vehicle is not in evidence, so that the analysis cannot properly extend to thinking and braking distances, it appears that much was being asked of Mr. Henry from a distance of 28 feet away.

[45] In ***Clifford v Drymond*** [1976] RTR 134, the plaintiff was held to bear 20% of the blame for her resultant injuries in circumstances where she attempted to cross on the pedestrian crossing when the vehicle was about 70 to 80 feet away. There, as here, the pedestrian was required to allow vehicles plenty of time to slow down or stop before crossing the road; (under the Jamaican ***Road Code***, the motorist is to be given ample time to stop, he should not be caused to stop suddenly). As was said of that plaintiff, Mr. Williams should have appreciated "that the car was, having regard to its speed, near enough to make it doubtful

whether the car would pull up to allow [him] precedence". Applying ***Clifford v Drymond***, I hold that Mr. Williams was 40% to blame for the damage he suffered.

Assessment of Damages

[46] Mr. Williams was examined at the KPH on the day of the accident, 15th October, 2009, by Dr. Richard Harrison. He diagnosed Mr. Williams as suffering from tenderness over the left leg. In Dr. Harrison's opinion, the injury was not serious and consistent with infliction by a blunt object. His further opinion was the injury was not likely to be permanent.

[47] Mr. Williams was next treated by Dr. Cyril Gray. Dr. Gray first examined Mr. Williams on the 5th May, 2010, approximately seven months post accident. Mr. Williams complained of pain and swelling in his left leg and ankle, associated with intermittent stiffness of the ankle. On examination, Mr. Williams appeared to be in discomfort from his facial expression and walked with a limp. He had difficulty getting up on the examination table due to the seeming discomfort in his leg. There was significant swelling around the left ankle associated with pain on palpation. There was also significant restriction of movement in all directions of the ankle joint due to pain.

[48] Dr. Gray's "impression" was that Mr. Williams was suffering from a badly sprained ankle as a result of having been hit by the motor vehicle. He was treated with Ponstan Forte, twice daily, Prednisone (5mg), once daily and Beserol, twice daily. Mr. Williams was advised to return in approximately four weeks for further assessment.

[49] The first review was on 9th August, 2010. Mr. Williams was walking much better. He could stand on his affected leg for a much longer time without any significant swelling. There was no significant discomfort around the left ankle joint. He was required to take medication only on occasions when the ankle acts up in aggravating situations, such as long standing or walking on uneven surfaces.

[50] Dr. Gray next reviewed Mr. Williams on the 27th December, 2010. His overall condition was much improved. The doctor's opinion was that there should be many pain-free days during which he would be able to work his normal hours but full resumption of work was not recommended since his work involved long standing. There was no swelling of the ankle but the prognosis was continued experience of discomfort, enough to prevent him from doing his normal duties for approximately 1-2 hours daily. Dr. Gray's concluding remark was that it was obvious that Mr. Williams had come a long way since the accident on the 15th October, 2009.

[51] The final review took place on the 26th January, 2011. Mr. Williams' overall health status had improved significantly but Dr. Gray entertained serious concerns nonetheless. Mr. Williams reported he was back to normal working hours, often times without being on medication and enjoyed many pain-free days. He, however, was unable to stand all day to work, as was his wont. Neither was he able to play football nor jog because of the discomfort and swelling he would experience around the left ankle. It was estimated that it would take 12-18 months before Mr. Williams could resume vigorous physical activities such as jogging and football.

[52] Dr. Gray's prognosis was that it is unlikely that the injured leg will return to the pre-accident status. He estimated that Mr. Williams was left with a 5% disability of the whole person. A twice per year evaluation over the next five years was recommended. He was advised too, to enrol in a gym and do muscle strengthening exercises for two to three years to improve body tone and strength round his ankle.

[53] Dr. Gray was cross-examined. Respectfully, the cross-examination did not weaken the claimant's case in any material aspect. In sum, his findings were consistent with the history given by Mr. Williams. Although the injury could have been caused by a hard tackle during football or a fall down a flight of stairs, it was unlikely that the injury was inflicted within a week before Dr. Gray saw Mr.

Williams. There were no scratches, bruises or cuts which have a lifespan of three to four weeks. His considered opinion was that the patient was not feigning when he was examined.

[54] He was asked about the use of "leg" in Dr. Harrison's report. He would not use "leg" to describe the area just below the waist. He would have been specific. "Leg" is an inexact description of part of the human anatomy. Although he would want to know what part of the leg was specifically injured, he did not speak with Dr. Harrison.

[55] It is fair to conclude that when Dr. Gray saw Mr. Williams he presented with an old injury. Although Dr. Gray admitted that the blunt force which caused the injury to the left ankle could have been a fall down a flight of stairs, there was no evidence that Mr. Williams fell, or could have fallen, down a flight of stairs. Consequently, it would be a matter of speculation that that was how the injury was inflicted. Equally, it would be speculation to conclude that the injury came about as a result of a hard tackle during football, as this too lacked the necessary evidentiary foundation.

[56] What, then, of the complaint concerning the apparent difference in diagnoses? Dr. Harrison said there was tenderness over the left leg while Dr. Gray said there was a badly sprained left ankle. The common threads in the reports are an injury to the left leg and the history the patient gave. It was not that the Mr. Williams presented each doctor with an injury to a different body part. On the facts of this case, it is more probable than not that the tenderness over the left leg concealed the sprain at the site of the ankle. It is common knowledge that a recent sprain often presents with tenderness in the general area. In any event, the consistency of the injury with the history given by the patient to Dr. Gray is sufficient for proof on a balance of probability that the injury was inflicted in the motor vehicle accident.

[57] Counsel for Mr. Williams submitted ***Caswell Rodney v Audrey Binnie-Palmer and Norman Spaulding*** Claim No. HCV 1950/2004 dated 3rd March, 2005 (***Rodney v Binnie-Palmer***) as a suitable guide to the quantum of general damages to be awarded. That claimant suffered a fracture to the medial malleolus of the right ankle. At his election, he was managed in plaster for eight weeks with instructions for strict non-weight bearing on the affected ankle. He graduated to partial weight-bearing after eight weeks and full weight-bearing after three months. Medical examination, approximately fifteen months after the accident, confirmed the early onset of osteoarthritis. He was assessed as having suffered a permanent partial disability of 10% of the function of the right lower limb. He was awarded $650,000 for pain and suffering and loss of amenities. Updated, that award is $1,795,310.66, using the Consumer Price Index (CPI) of 235.6 for November, 2016. Further updated, using the April, 2017 CPI of 329.3, the award is $2,509,320.

[58] Counsel for Mr. Williams further submitted that the "award however should not be reduced because even though there was no fracture, the Claimant has suffered a 5% disability". Counsel for Mr. Henry, on the other hand, submitted that "there is no comparability between the case at bar" and ***Rodney v Binnie-Palmer***. Mr. Henry's counsel, however, offered no assistance in this regard. He was content to maintain that the instant case is a "spuriously false claim".

[59] In assessing general damages, I bear in mind that the aim is to put the claimant in the position he would have been in had the tort not been committed. I remind myself that personal injury awards should be reasonable and assessed with moderation and, as far as possible, comparable injuries should receive like awards: ***Beverley Dryden v Winston Layne*** SCCA 44/87 dated 12th June, 1989. Both the physical injury, which is the objective element, and the pain and suffering, which is the subjective element, are to be borne in mind (***Dacres and Dacres v Reid*** SCCA 103/00 dated 11th April,2003). Having said that, compensation should be based less on the nature of the injuries and more on the

consequential loss of amenities: ***H. West & Son Ltd. V Shepherd*** [1922] 2 A.C. 242.

The Award: General Damages

[60] Attention is turned now to the award. If, as I must, have regard to the physical injury suffered, I must accordingly disagree with counsel for Mr. Williams that no discount should be made on account of no fracture in the instant case. The fact is, both the claimant at bar and the claimant in ***Rodney v Binnie-Palmer***, *supra*, sustained PPD. The difference in PPD lies in the assessment of the former of the whole person and of the latter, of the right limb. That is a difference without distinction as no guidance was provided as to how they might be contracted in weight.

[61] I also considered several other cases reported in ***Harrisons' Assessment of Damages*** 2nd ed. in which injury was sustained to the ankle. Of note is ***Edna Webb v Fitzroy Bonner and Uriah Riley*** at page 17. That claimant was injured while a passenger in the defendant's motor vehicle on the 26th May, 1990. She suffered a severe abrasion over the outer aspect of her left foot involving the base of the lateral four toes and an undisplaced fracture of the of the medial malleolus of the tibia. Radiographs on the 5th July, 1990 showed that the fracture of the medial malleolus had united and the wounds healed. Despite the healing of the fracture, the claimant complained of some swelling of the ankle after prolonged standing or walking. There was also an occasional aching pain in her ankle after prolonged walking. She was left with a disability of 5% of the function of her lower extremity. Damages were assessed at $180,232.00 on the 2nd October, 1996, which updates to $1,433,896.00 using the April, 2017 CPI of 392.3.

[62] Both awards are discounted to account for the differences in injuries. However, the longer time over which Mr. Williams endured and is expected to endure some pain and suffering has to be placed in the scale as well. Taking all relevant

factors into consideration, against the background of the applicable principles, an award of $1,600,000.00 appears to be just.

Special Damages

[63] The item of loss of income is without direct medical support. However, taking into consideration the impact the injury had on him according to Dr. Gray, the court is disposed to allow four weeks, that is half the amount claimed. The award for special damages is therefore $155,589.76. The sum of $25,000.00 is awarded for future medical care in respect of the recommended visits for evaluation.

Conclusion

[64] I give judgment for the claimant, holding him 40% to be blamed for the accident. General damages are assessed at $1,600,000.00 with interest at 3% from the 7th February, 2012 until the 2nd June, 2017. Special damages are awarded in the sum of $155,589.76 with interest at 3% from the 15th October, 2009 until the 2nd June, 2017. The sum of $25,000.00 is awarded for future medical care. The claimant will have 60% of his costs, to be taxed if not agreed.