[2014] JMSC Civ. 111

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 03212

BETWEEN	**JACQUELINE WILSON**	**CLAIMANT**
AND	**CHRISTOPHER MOULTAN**	**1ST DEFENDANT/ 1ST ANCILLARY DEFENDANT**
AND	**HOJAPI LIMITED**	**2ND DEFENDANT/ ANCILLARY CLAIMANT**
AND	**ROBERT WILLIAMS**	**3RD DEFENDANT/ 2ND ANCILLARY DEFENDANT**
AND	**NEVILLE WILSON**	**4TH DEFENDANT 3RD ANCILLARY DEFENDANT**
AND	**OWEN SAWYERS**	**5TH DEFENDANT/ 4TH ANCILLARY DEFENDANT**

CONSOLIDATED WITH CLAIM NO. 2012 HCV 00710

BETWEEN	**SHARON CAMPBELL**	**CLAIMANT**
AND	**CHRISTOPHER MOULTON**	**1ST DEFENDANT/ 1ST ANCILLARY DEFENDANT**
AND	**ROBERT WILLIAMS**	**2ND DEFENDANT/ 2ND ANCILLARY DEFENDANT**
AND	**HOJAPI LIMITED**	**3RD DEFENDANT/ ANCILLARY CLAIMANT**
AND	**NEVILLE WILSON**	**4TH DEFENDANT**
AND	**OWEN SAWYERS**	**5TH DEFENDANT/ 3RD ANCILLARY DEFENDANT**

Representation:

Allia Leith-Palmer instructed by Kinghorn & Kinghorn for the Claimants

Daniel Chai & Deandra Butler instructed by Samuda & Johnson for the 2nd Defendant/ancillary Claimant

Camille Wignall-Davis instructed by Nunes Scholefield DeLeon & Company for the 5th Defendant/4th Ancillary Defendant

Written Judgment delivered 18th July and 31st October 2014

> ***Negligence/Motor Vehicle Accident/ Bob Cat tractor travelling without pilot and crossing main road/ Bobcat and Driver hired together/ can employer be held vicariously liable/ is employer independently liable in negligence/Ancillary defendants not filed defence in main claim nor ancillary claim***

CORAM: GEORGE J.

[1] The Claimants, Jacqueline Wilson and Sharon Campbell, by way of consolidated Claims, seek to recover against the Defendants, damages in negligence for personal injuries sustained by them in an undisputed motor vehicle accident which occurred on January 5, 2007. Both Claimants were travelling as passengers in the 5th Defendant's Toyota Corolla motor car which was being driven as a taxi.

[2] It is undisputed that:

(i) The 1st Defendant was the driver of the Bobcat Tractor

(ii) The 4th Defendant was at the material time the driver of the said vehicle and that at the time of the collision, it was being driven along the Pear Tree Bottom main road.

(iii) At the material time, the 4th Defendant was acting as servant and or agent of the 5th Defendant, Mr Owen Sawyers

(iv) The first Claimant Ms Wilson was a passenger in the left back seat, whilst Ms. Campbell was seated in the front passenger seat.

(v) The collision occurred with a Bobcat/Tractor, which was being used in completion of the Grand Bahia Principe Hotel, which although had been in operation, had not yet, been fully constructed.

(vi) The 2nd Defendant, Hojapi Limited was the operator of the project and was responsible for the works that were being carried out to complete the construction.

(vii) The Bobcat Tractor ought to be piloted when traversing a public road

[3] The Claimants alleged that the 1st Defendant, Mr. Christopher Moulton was the driver of the Bobcat. The 3rd Defendant Mr. Robert Williams along with the 2nd Defendant, Hojapi Limited, it is contended were owners and or custodian of the Bob-Cat and employer of the 1st Defendant. It is Hojapi's contention that they merely hired/rented the Bob-Cat from Mr. Williams; the arrangement being that the Bob-cat came as a package in that "it was rented with a driver". Both claims were consolidated and were tried together at the trial herein.

[4] It is in the context of these allegations that the 2nd Defendant contends that the 1st Defendant, the driver of the Bob-cat was employed by Mr. Robert Williams. The 2nd Defendant filed an ancillary claim in both suits, claiming an indemnity or contribution, in the event that it is found liable; alleging negligence against Mr Christopher Moulton and Mr Neville Wilson, the drivers of the motor vehicles; and also claiming against Mr Robert Williams as employer of Mr. Moulton and owner of the Bob-Cat and Mr Sawyers as owner of the motor vehicle driven by Mr Wilson.

[5] The 1st and 3rd Defendants filed an acknowledgement of service to the claims (not the ancillary claim), but no defence to the Claims nor the Ancillary Claim. There is no indication that they were given notice of the trial by either the Claimants or the Ancillary Claimant. No appearance was put in on their behalf. The records do not indicate that the Claimants in the initial claim applied for and or obtained default judgment against them prior to the trial. Although default judgment was applied for, entered and subsequently set aside against the 2nd Defendant. No application in respect of them was made by the Claimants at trial. The 4th Defendant was not served and did

not give evidence at the trial. Therefore only evidence from the Claimants, and the 2nd and 5th Defendants was received and they were the only parties appearing and or represented at the trial. These factors become particularly relevant in the context of the ancillary claim which is considered below.

The Defences

[6] The 2nd Defendant (Hojapi Ltd. is the 2nd Defendant in the first of the Claims and the 3rd Defendant in the other. For ease of reference, it will be referred to as the 2nd Defendant throughout this judgment. The 2nd Defendant has denied the allegations made by the Claimants and contend that the Bob-Cat and the 1st Defendant, Mr Moulton, were hired from the 3rd Defendant, Mr. Williams who was an independent contractor and for whom they cannot be held vicariously liable. They also contend that they were not negligent.

The 5th Defendant

[7] The 5th Defendant's defence amounts to a denial of the allegations in the Amended Claim and particulars and ancillary claim. It is his contention that the collision was caused by the negligence of the Bob-cat driver 'who without the assistance of flag men or a pilot vehicle and without due care entered the said main road and collided into the 5th Defendant's motor vehicle while it was being lawfully driven thereon'. In addition, it is contended that the 2nd Defendant failed to ensure the safe piloting of the Bob cat across the roadway and therefore failed to "discharge that obligation at the material time"....

[8] The claims were initially filed against the 1st, 2Nd and 3rd Defendants. However, subsequent to the 2nd Defendant's filing of his defence, the 4th and 5th Defendants were added to the proceedings.

[9] The 2nd Defendant filed ancillary proceedings against all the other Defendants for contribution and or indemnity. In relation to the 5th Defendant it is on the basis that the 4th Defendant was negligent and therefore responsible for the accident. The 5th Defendant has denied this; blaming the accident solely on the 1st Defendant and

contends that the 2nd Defendant Hojapi Ltd, is thereby vicariously liable and or independently negligent.

Liability

[10] Every person lawfully using the highway owes a general duty of care to all persons using the highway. This duty is succinctly highlighted at paragraph 9 -192 of the eleventh edition of Charlesworth and Percy on Negligence, which states that:

> **" ....an underlying principle of the law of the highway is that those lawfully using the highway must show mutual respect and forbearance". Hence the duty of a person who either drives or rides a vehicle on the highway is to use reasonable care to avoid damage to persons, vehicles or property of any kind..... In this connection, reasonable care means the care which an ordinarily skilful driver or rider would have exercised under all the circumstances, and connotes an "avoidance of excessive speed, keeping a good look out, observing traffic rules and signals and so on".**

[11] This case turns on the issue of negligence and so for any of the Claimants to succeed, they are required to establish on a balance of probabilities that the collision occurred due to the negligence, vicarious or otherwise of one or more of the Defendants, as other users of the Highway. In considering the question of liability, it is obvious that reliance has to be placed on the proven facts- i,e evidence accepted by the court, on a balance of probabilities, as to how the accident occurred that day. The next step of course, is always, to apply the law to those proven facts.

[12] On the whole, I accept the evidence of the Claimants. The 2nd Defendant's evidence was also generally accepted and in some respects, albeit unwittingly, has supported the Claimants' and 5th Defendant's allegations of negligence. The only other Defendant that gave evidence was Mr. Owen Sawyers. His evidence was of little evidential value, in that he was not a witness to the accident. However, any evidence

he gave as to matters within his own knowledge, was evidence accepted by me as I found him to be a truthful witness. I found his demeanour to be forthright and credible.

The Proven Facts

(i) The 1st Defendant

[13] The Claimants gave evidence that they were passengers in the 5th Defendant's motor vehicle, which was driven by the 4th Defendant. They gave evidence that they were travelling from the direction of St. Ann's Bay and going in the direction of Discovery Bay. Upon reaching the area known as Pear Tree Main Bottom, near to reaching the main gate of the Grand Bahia Principe, they saw a Bob-cat crossing the road, (i.e the main road) from another road (a minor road). It was moving from the right to the left of the main road. This Bob-cat collided into the front right side of the motor vehicle in which they were travelling. It was not being piloted. This evidence is unchallenged and the facts therein is in contravention of Section 51(d) of the Road Traffic Act which makes it clear that a motor vehicle "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". It is clear from the evidence that the 1st Defendant was not only in breach of this provision but also in breach of its duty to the Claimants as other road users when it crossed the road obstructing the taxi in which they were travelling and thereby causing a collision.

[14] The Bob-cat was not being piloted although the evidence of the 2nd defendant is that this is usually done by one of its engineer. It is asserted by the 5th defendant and admitted by the 2nd defendant through the evidence of its witness, that a pilot would have assisted the 1st defendant in safely manoeuvring the Bob Cat across the road. It would have also provided some assistance to other road users in heeding its presence on the road. This is judicially noticed and in any event the additional safeguard of a pilot is a fact admitted by the 2nd Defendant's witness in evidence and as such is accepted as proof without the need to call further evidence.

The evidence of the 2nd Defendant makes it patently clear, that this was a system with which the 1st defendant would have been familiar. He nevertheless proceeded in taking

the risk, to traverse the main road without a pilot; without or with little, due regard for his fellow road users.

[15] The particulars of negligence of the 1st Defendant were inter-alia that (i) he failed to see the taxi driven by the 4th defendant (ii) Failed to apply his brake within sufficient time or at all (iii) attempting to cross the Runaway Bay Main Road when it was manifestly unsafe to do so (iv) Obstructing the path of the said taxi (v) driving into the path of the taxi and (vi) Failing to stop, slow down, swerve, or otherwise conduct the operation of the Bob Cat so as to avoid the said collision. I find that these have been made out on the evidence.

[16] I find that the motor car was in its correct lane – i.e. the left side of the road and that the right side including the bonnet; the right headlamps and right fender of the motor vehicle sustained damage and is consistent with the evidence that the Bob-cat tractor drove into the path of the vehicle being driven by Mr Wilson. This evidence is supported by both Claimants and is an indication of the respective positions of the 4th and 1st Defendant, whilst driving their vehicles at the time of the accident. It is clear that it was the Bob-cat driven by the 1st Defendant that was crossing the main road and was coming from a minor road. On an assessment of these facts, I find that it was the negligent driving of the 1st Defendant as driver of the Bob-cat, which was a substantial cause of the collision.

(ii) The 4th Defendant

[17] The particulars of negligence made by both Claimants against the 4th defendant, the driver of the taxi, in which they were passengers are inter-alia (i) Driving at too fast a rate of speed in all the circumstances (ii) causing the taxi to collide with the Bob Cat (iii) Failing to see the Bob Cat Tractor within sufficient time or all (iv) Failing to allow the said Bob cat to safely cross the road (v) Obstructing the path of the said Bob cat Tractor (vi) Driving into the path of the said Bob cat tractor (vii) Failing to stop, slow down, swerve, or otherwise conduct the operation of the said motor vehicle so as to avoid the said collision.

[18] In the witness box, both Claimants indicated that the motor vehicle, in which they were travelling," was not going fast". This is inconsistent with their pleadings. Their amended Particulars of Negligence, for the 4th Defendant, was that "he was driving at too fast a speed". The Claimants evidence is that it is true, that the 4th Defendant's motor vehicle "was not going fast". According to the 1st Claimant "At the time, I did not remember clearly when I signed the statement but I know for sure it was not going fast.

[19] The Court accepts that, the general nature of pleading is indeed a function of drafting, which common-sense dictates, is at best attributable to the draftsman. It is also accepted that speed can be a very relative concept. There has been no evidence in rebuttal indicating that the 4th Defendant was indeed speeding and insufficient material upon which such an inference can be drawn. In any event, speeding by itself is not sufficient for a finding of liability in negligence. There has been no accident reconstruction report or police accident report that might have assisted in drawing such an inference. The 2nd Defendant's witness, Mr Arryo, attempted to give some such evidence but this was clearly, purely, based on 'hearsay' and inadmissible.

[20] It is clear from the uncontroverted evidence of the Claimants that at the material time, when they first saw the Bob-Cat it was a little distance away. Jacqueline Wilson indicated that it was about some 20ft away; whilst Sharon Campbell indicates about 10ft away. They were seated at different positions; with different vantage points; and clearly with different observational skills. Strangely, it is Ms Wilson, who was seated in the back that appeared to have first seen the Bob-Cat as she saw it at the greater distance away. There is no evidence as to why Ms Campbell, who was seated in the front, appeared not to have seen it first but this could be due to many reasons for which I make no speculation. What is clear is that the Bob cat was very close when it was seen by both Claimants. I draw the inference that Mr Wilson would more than likely have first seen the Bob cat when it was within close proximity to him.

[21] It is the evidence of both Claimants, that when they saw the Bob- Cat, it came 'straight across the main road, from right to left, without stopping' and collided with the motor vehicle, in which they were passengers. Notwithstanding that there was a 'slight bend', the accident happened shortly after coming around this bend. It has to be borne

in mind that according to Ms Wilson the Bob cat travelled some 20ft before colliding. She saw it for that distance before the collision. Unlike, Ms Campbell, who did not see the Bob-Cat until some 10ft away, Mr Wilson, does not have the privilege of being less vigilant than Ms Wilson. He was the driver and so expected to keep a proper look out, so in the event that the possibility of an accident arose, by the carelessness of another road user, he was able to, as far as possible, take steps to avert any danger and or avoid an accident.

[22] If Ms Wilson, seated at the back, saw the Bob-Cat some 20ft away as it made its way across the road, then it is reasonable to expect Mr Wilson, the driver, and seated at the front, looking out properly, to have also seen the Bob-Cat from at least the same distance, as Ms Wilson, if not earlier. This begs the question whether 20ft away would have given this driver sufficient time to have taken evasive action or even to have stopped before the collision. On the face of it, 20 ft appears insufficient, without more. There is no evidence as to the distance from the bend to the place of the accident or whether there was sufficient stopping distance in the circumstances, for Mr Wilson to safely stop before the collision. There is also no evidence from which it can be inferred nor was any expressly given as to how far ahead the 4th defendant ought to have seen if he had been keeping a proper-look out. There is also no evidence that he obstructed the path of the Bob Cat.

In examining the accepted evidence of both Claimants, it is clear that there is insufficient evidence to make any findings of negligence in relation to those alleged against the 4th defendant in the pleadings, particularly in light of the evidence that the Bob Cat 'came straight across the road".

The issue of Vicarious Liability

[23] I accept on the facts presented by the 2nd Defendant, that the 1st Defendant was an employee of the 3rd Defendant and that the relationship between the 2nd Defendant and the 3rd Defendant was one of employer and Independent Contractor. It is of course true, that in determining whether an actual wrong doer is a servant or agent or an independent contractor, consideration has to be given to whether or not the employer

not only determines what is to be done, but retains the control of the actual performance of the tasks to be done. If he does retain such control, then the wrong doer is clearly a servant or agent. If however, the employer, while stipulating what work was to be done, nevertheless has no control over how it should be done, then the wrong-doer in this instance would be an independent contractor.

[24] It can be gleaned and is accepted from the evidence of the 2nd defendant's witness, that Mr. Robert Williams is the owner of the Bob-cat tractor. Although Ms Wilson, gave evidence that the name Hojapi was written on this tractor; that she had seen it being stored at the hotel and that she had seen that tractor on the compound on several occasions; this is insufficient to make a finding that the 1st Defendant was an employee of Hojapi; nor that the Bob-Cat belonged to or was in the complete custody and control of Hojapi. In fact I do not accept that the name 'Hojapi' was written on the Bob-cat. This is because the 2nd Defendant's evidence, and this aspect I accept, clearly demonstrates that the Bob-Cat had been hired. It would then be incredulous that they would nevertheless go to the time and expense involved in marking its name on it. Further it is unlikely that the 3rd Defendant, the owner of the Bob- Cat would have permitted this.

[25] I do accept the 2nd Defendant's evidence that this Bob- Cat tractor was hired from the 3rd Defendant. I also accept that the driver, the 1st Defendant was an employee of the 3rd Defendant, Mr Robert Williams. It is also clear from the evidence that at the time of the accident, the 1st Defendant was acting in the course of his employment and that although he received instructions from Hojapi as to where to go and what to do, these instructions did not involve how he was to carry out his work. The principles as to when a worker is an employee or an independent contractor, have been refined and developed over the years as the duties of employees have become more specialised and involved which has necessarily resulted in a greater deal of autonomy in the way duties are performed as can be seen by looking at professionals employed in the field of law or medicine. As a result the "control test" plays a less important feature of the determination. **See Gold v Essex County Council (1942) 2KB293**

[26] Hence in more recent times the test has been formulated for example, on the ability of an employer to specify where and when tasks be carried out and with whose tools and materials. Ready Mixed concrete (South East Ltd.) v Minister of Pensions and National Insurance (1968) 2QB 497. Nevertheless, regardless of which test is used, the facts do not disclose a relationship of employer and employee between Hojapi and the 1st defendant. However, it is clear that he was acting in the course of his employment.

[27] It is in so acting in his employment, that he has provided fodder for the Claimants to allege that the 2nd Defendant is vicariously liable and this is based on the premise that the 1st Defendant was the employee of the 2nd Defendant, Hojapi Ltd and or that it gave instructions to the Bob-Cat driver, not just as to what to do, but how to do it. I do not find the 2nd Defendant vicariously liable in this regard.

[28] However, the Claimants contend that even if the 1st defendant is found to be an independent contractor, Hojapi Ltd should be held liable under an exception to the general principle, that an employer is not usually liable for the negligence of an independent contractor.

[29] There have been several circumstances in which an employer has been held liable for the acts of independent contractors – So an employer may be held as joint tortfeasor if he commissions a tort – Ellis v Sheffield Gas Consumers Co. (1853) 2 E & B 767. He may also be liable where he is negligent in selecting a third party contactor – Pinn v Raw (1916) 32 TLR – There is no evidence of this in the case before the Court. In fact the only evidence on the point came from the 2nd Defendant and spoke of the fact that Mr Williams came highly recommended.

[30] The main exception to the general principle is where a non – delegable duty is imposed upon an employer either by statute or through common law, to prevent harm to others. The exception further to a statutory duty, is where a duty is imposed by statute, either to carry out work in a certain way, or to take due care in carrying out work, then this is non-delegable. See Gray v Pullen (1864) 5B & S 970.

[31] The exception further to common law is where a duty is imposed when an activity is being undertaken which is especially hazardous, and involves obvious risks of

damage. – See Honeyvill & Stern Limited and Larkin Brothers Ltd. (1934) 1KB191. In this case photographers negligently photographed the interval of a theatre. As a result of this negligence the building caught alight. The employers were held to be vicariously liable, as the dangerous methods of photography created a fire hazard.

[32] A further situation where an employer may be held vicariously liable for the negligence of an independent contractor is where work is being undertaken on or adjacent to a highway. In such a situation, a non-delegable duty is affixed to the employer at common-law, not to endanger any road users. Penny v Wimbledon Urban District Council [1982] 2 QB 212. [33] It has also been established at common law that an occupier is vicariously liable where a negligent independent contractor, allows fire to spread to neighbouring land – Johnson v BJW Property Developments Ltd (2002) {WHC 113}.

[33] It is in the exception, where the activities are inherently or intricately dangerous in the very performance of the work, that the judiciary is best positioned to affix liability to the employer, as he has in delegating work of this nature a responsibility to supervise and ensure that the work is being done to appropriate standards thereby reducing or eliminating the risks involved to members of the public.

[34] In applying these principles to the case before me, I find that the work required to be carried out by the Bob Cat driver involved the crossing of the main road, from right to left to access the 2nd Defendant's construction site. This however, was not extra-hazardous or intricately dangerous and would not involve harm to others if the requisite care was taken. Accordingly, I do not find that any of the exception applies and do not find the 2nd Defendant liable for the negligence of the 1st Defendant.

[35] There is of course, no contention, that at the material time, the 4th defendant was acting as servant and or agent of the 5th defendant. The vehicle was being used as a taxi and owned by the 5th defendant. He has not contested the vicarious nature of their relationship but instead has strenuously casts blame on the 1st and or 2nd Defendant. The finding of non- liability made by the Court against the 4th defendant must of necessity, result in a finding in favour of the 5th defendant.

Liability of t he 2nd & 3rd Defendant for independent Negligence

[36] In this situation Hojapi, had a site across the main road. The Bob cat was responsible for going to and from this site to facilitate the construction of the Hotel. In so doing there was an inherent risk to members of the public using the High-way. Hojapi must have known the nature of this task would cause some obstruction to the public and of course some danger, unless they employed methods to give due warning to the public. The evidence of their knowledge is easily gleaned by what was the apparent system in place for the conveying of the Bob cat across the main road.

[37] I find that the 2nd Defendant was responsible for the safe supervision of the Bobcat Tractor, whilst it was traversing the public road acting under instructions, directly or indirectly from the 2nd Defendant, to carry out duties related to the construction works at the material time.

[38] The Particulars of Negligence against the 2nd and 3rd Defendants are regarded by the Claimants as one which includes the negligence alleged against the 1st and 4th Defendants but in particular embodies assessments of negligence not made against the 1st and 4th Defendants, but against the 2nd Defendant Hojapi Ltd and the 3rd Defendant. These are:

(i) causing or permitting the said Bob cat machine to leave their custody care and control.

(ii) causing or permitting the said Bob cat tractor motor vehicle to leave its said custody care and control and collide with motor vehicle registration number 7451 ET.

(iii) causing or permitting the said Bob cat tractor motor vehicle to be operated and /driven on the said road when the said Bob cat tractor motor vehicle was neither licensed for the public road nor equipped for the public road.

(iv) entrusting the said Bob cat tractor motor vehicle to an incompetent person or to a person who drove same carelessly thereby causing the said collision.

(v) Failing to properly secure the said Bob cat tractor motor vehicle

(vi) failing to take reasonable care to ensure that the said Bob cat tractor machine while being operated off its compound was operated in such a careful way that it did not cause a collision such as the one in question.

These allegations are wide enough to include the 3rd Defendant's liability for the 1st Defendant's negligence (vicarious liability) as well as independent negligence of the 2nd Defendant. In this regard paragraph (vi) of these particulars is most pertinent.

[39] Both Claimants generalise this negligence as "The 2nd and 3rd Defendants as owners of the said Bob cat machine or as persons in charge of, and/or with custody and control of the said Bob cat machine caused and or permitted the said Bob cat machine to leave their compound and be operated upon the public road and in such a negligent manner that it caused a collision with motor vehicle registration number 745/ET.

[40] I have already found among other things that the 1st Defendant was negligent in driving the Bob Cat machine across the Pear Tree Bottom main road when it was "manifestly unsafe to do so". He was at least 50% blameworthy. In this regard, the 3rd Defendant Mr. Robert Williams as the employer of the 1st Defendant would be vicariously liable for his employee's negligence. However, there is in no evidence before me that Mr. Williams had any liability outside of being vicariously liable for his employee. This takes me to the 2nd Defendant.

[41] It is significant to note that the evidence of negligence is primarily gleaned from the 2nd Defendant's testimony. I found the Defendant's witness Mr. Gustavo Arryo to be a witness, interested in protecting his former employer yet forthcoming in some aspects of his evidence. This is usually where he appeared to be unaware of the implications thereof. He no longer works for the 2nd Defendant, but at the time of the accident he was the project manager, with senior (if not ultimate) responsibility for the construction works and safety issues, wherein the 1st Defendant was engaged at the material time. He admits that the Bob cat should have had a piloting vehicle and that "one of the engineers would normally pilot the machine...this was the normal procedure". In fact, he describes the procedure as being that when a Bob Cat machine

is requested, an engineer 'would come for it with a car'. This car would pilot and drive in front of the Bob cat machine. Although not all of these engineers are within the employ of the 2nd Defendant, any of them, could request the Bob Cat and the procedure would involve going for the machine and driver and piloting them across the road to the construction site.

[42] The evidence of the 2nd Defendant indicates on the one hand that there were engineers directly employed to Hojapi and some not; However, Mr Arryo does also state in evidence that all of the engineers are directly employed to Hojapi. This inconsistency is not material in deciding the issues before me. His evidence did not disclose any differentiation between the engineers and accepts general supervisory powers over all. In addition, there is no evidence that the engineer that would have been required to pilot the Bob cat was not directly employed by the 2nd Defendant.

[43] The 2nd Defendant's witness accepts that Hojapi was undertaking construction works and had responsibility for safety in relation to the carrying out of these works. Hence he spoke of safety meetings occurring at the hotel, which at times he attends. These safety meetings he said were once per month. There was a person employed by the name of Kurt in charge of machines and one (for whom no formal name appeared to have been known), whose nickname is 'Rasta", who was in charge of safety.

[44] It is my view that the 2nd Defendant did not take all the necessary steps to ensure that the Bob cat when being used was done in a careful manner. It is this lack of care, which was another substantial cause of the accident. They had a responsibility to pilot the Bob cat as part of their own safety procedure and this they had not done.

[45] I find that the safety procedure employed by them was loose and not as tight as Mr. Arryo would like us to believe. Mr. Arryo's evidence about 12 safety meetings per year was not reliable and appeared fabricated to suit his evidence as he went along. Based on the allegations this would have been significant information to be disclosed in his witness statement. He did not even know the correct name of the safety manager even though that person would have reported to him as the person who had overall control. He appeared uncertain as to whether the Bob cat had a pilot that day. He could

not say 'for sure' nor give a probability that it was likely to be so than not. He was after-all, the only witness for the 2nd Defendant and could not speak of this from his own knowledge.

[46] There appeared to be no safety record, which involved the signing in and out of the Bob cat to a particular engineer who could then be held accountable for the piloting or lack of piloting of the Bob cat. If there was such a record none was produced and it would be reasonable to draw the inference that none was produced as there was none. I was not satisfied on a balance of probabilities, that there was a strict procedure in place. I formed the view that whatever arrangements that were in place were ad-hoc and did not accord with a strict system of control, supervision and accountability as would be required in this situation to ensure strict adherence to the rules to reduce the risk of harm to other road users. This was indeed careless.

[47] In fact, his evidence under cross examination by the 5th Defendant that it would be a Hojapi engineer that would request the Bob-Cat and driver to go across the road is quite telling. He accepts that the Bob Cat and driver would do what was told by Hojapi Engineer and that the Bob Cat and driver would go along with the person who requested it. This indicates a significant level of control as to where the Bob Cat is used (even if not how to carry out the work) and the safety procedures that should be followed.

[48] The witness candidly admits that "... the engineer has responsibility to make sure that it (the Bob cat) is piloted. Each engineer has a car to ensure that they do that- Yes engineers are employed by Hojapi."

[49] Hojapi Ltd., failed to ensure that its safety system was such that engineers piloted the Bob cat across the main road at all times. This failure created a hazard. This hazard was a significant factor in the collision on that day. The piloting of the Bob Cat across the road would have assisted in alerting other road users and more importantly ensure that there was a clear passage for the Bob cat in its travel across the main road. This was particularly important in this case as the evidence indicates that there was a bend in the road close to the area of the accident. This traversing of the public road

involved a high degree of risk, which risk increased without a pilot vehicle. A purpose of the pilot vehicle is to ensure that the Bob Cat crosses the road safely; as well as to alert other road users of its presence on the road. The 2nd Defendant Hojapi Ltd, has admitted in evidence that it had the sole responsibility through its engineers to provide the Bob-Cat with this pilot. Traversing the main road was part of the work to be undertaken by the Bob Cat in complying with the instructions of the engineers acting as servants and or agents for the 2nd Defendant.

[50] The 2nd Defendant owed a duty of care to other road users. This duty was breached when they failed to ensure that the Bob-Cat was properly piloted or operated, when crossing the road. This breach of duty resulted in foreseeable harm/injury to the Claimants. I am cognisant of the fact that the relevant standard of proof is that based on the balance of probability. It is unlikely that this collision would have occurred if a pilot was in fact in place. This duty is not one that the 2nd Defendant can avoid by simply stating that the driver of the Bob-Cat was not an employee.

[51] The act of crossing the road, was integral to the work required to be performed and might not have been inherently dangerous, but was likely to result in damage if not done carefully. Therefore, there was a real likelihood, that it might cause harm to others unless precautions were taken by Hojapi itself, to prevent that harm. The 2nd Defendant would, in my view, in these circumstances, be independently liable for failing to ensure that these precautions were taken and so allowed the Bob cat to be driven on the public road in an unsafe manner, which resulted in a collision.

[52] I therefore find that inter alia, paragraph iv, referred to above, that the 2nd Defendant, failed 'to take reasonable care to ensure that the said Bob cat tractor machine while being operated off its compound was operated in such a careful way that it did not cause a collision such as the one in question' has been made out on the evidence.

Liability

I find the 2nd defendant liable in negligence.

Contributory negligence of the Claimants

[53] It was the evidence of the Claimants that they were not wearing a seat-belt. It is on this basis, that the pleadings were amended at trial to aver contributory negligence on their part. For a defence/counter-claim of contributory negligence to succeed, it must be shown that any failure on the part of the Claimants resulted in an increase in the injuries they received. That is, if any fault of the Claimants has contributed to the damage suffered, then damages are to be reduced to the extent that the Court thinks just and equitable; the question being not what caused the accident but what caused the damage. The Claimants evidence is that they were not wearing seatbelts. This is of particular relevance to Sharon Campbell, due to the greater extent of her damage.

[54] It is the case of both Claimants that the seat belts were defective and or not available. There is no evidence to the contrary. This I accept and as such do not attribute 'fault' to either of them as there is no evidence that they became aware of this prior to entering the vehicle. In any event this has to be viewed in the cultural context of Jamaica; the availability of taxis including those fitted with properly working seatbelts and whether there was any 'real choice' open to the Claimants. Even if they were at 'fault' in not wearing their seat-belts, I have no evidence before me from which I would conclude that this resulted in greater damage than would otherwise have been the case. As submitted by Counsel for the Claimants, 'the failure of not wearing a seat-belt is not of itself proof of negligence; it must be shown that the failure to wear the seatbelt caused and/or contributed to the injury'.

Damages

Ms. Jacqueline Wilson

Special Damages

[55] Ms. Wilson's evidence at trial amounted to a claim of $24,500 for medical expenses as a Quantum of special damages. The documents of proof were receipts attached to an "Intention to Tender Hearsay", which was filed on the June 8, 2009 and were subsequently tendered in evidence as exhibits 4-6. She also claimed $5,000.00

for transportation costs and $6,500 for loss of earnings for 1 week. No documentary proof was provided for any of the last 2 items. It is an apparent truth that the informality of some transactions might result in a lack of receipts as documentary proof.

[56] With respect to the transportation expenses the 2nd Defendant has taken no issue and therefore I have little difficulty in awarding this as a reasonable sum for transportation expenses even though no documentary proof has been provided as I accept the evidence on this. The 2nd Defendant has however, taken issue with this Claimant's claim for a loss of one week's earnings of $6,500.00. It is to be noted that the evidence of this Claimant is that she worked at the Hotel. This being the said hotel which Hojapi operated from and in conjunction with and which had been under construction. This was not challenged in cross-examination. The information as to whether she worked at the hotel and whether she had lost a week's salary was available to the 2nd defendant. It is my considered opinion that in the circumstances of this case, being away from work for one week due to the accident and losing a modest pay of $6,500.00 is a reasonable consequence, for which, although no documentary proof was provided, I will award to the Claimant.

General Damages

[57] Ms. Wilson tendered three medical reports. Exhibit 1 – is a report from Dr. Rohan Williams dated May 16, 2007. Exhibit 2 – is a report from Dr. Denton Barnes dated October 17, 2007. Exhibit 3 – is a report from Dr. Green of St. Ann's Bay hospital and dated May 28, 2007.

[58] It is not contested that the report of Dr. Green and Dr. Barnes speak to the complainant's presentation at the St. Ann's Bay Hospital; whilst that of Dr. Rohan Williams refers to the attendance of the Claimant upon her approximately two months after the accident.

[59] An examination of the medical report of Dr. Williams reveals that there are additional complaints, which were not disclosed in the other two reports, although these reports were in relation to an examination of Ms Wilson and which was earlier in time.

[60] The additional complaints were pain in the right thumb, neck and lower back pain and swelling in both legs. On examination, Dr. Williams found that she had a "swollen and tender right thumb; tenderness on palpation over the cervical and lumbro sacral spine in addition to the "swelling and the tenderness in the legs". It is for these reasons that the causal nexus between those injuries and the accident appear not to have been established.

[61] Although I agree with counsel for the Claimant that "injuries and/or their symptoms can be latent for days even weeks after an accident particularly soft tissue injuries for example, whiplash and or/muscle strains ..... as a result of muscle injury", it is not a leap I can make either by inference or otherwise without a factual substratum. The differences that are highlighted in Dr. Williams report must beg the question "from whence they came?" It is for the Doctor to establish this on the evidence, showing some nexus – or at the very least, the Claimant giving some explanation. She said in evidence that she had in fact told the attendant doctor at the hospital. Her witness statement indicates that she had been feeling these symptoms from the very beginning.

[62] I do not accept as counsel for the Claimant has submitted that the fact that there has been no objection to the "Notice of Intention to Tender" prevents a challenge to the contents of the report. The challenge to the report is not about admissibility but about the weight that the court should give it.

[63] This case is distinguishable from that of Cherry Dixon-Hall v Jamaica Grande Hotel. In that case, the additional complaints came about after a considerable period after the accident. Indeed Mrs Dixon Hall had seen the initial physician some 3 times and yet had given him none of the additional complaints that she subsequently gave to her physician in the United States. In addition, the main additional complaint was of her

lupus being triggered into frequent flares after the accident which appeared not only remote but also without evidential foundation to provide any link to the accident.

[64] In the case before me, the 1st physician was at the Hospital. To have visited a private doctor some 2 months later was not unreasonable; the pains she complained of were all in keeping with a motor vehicle accident and were not remote. The link was provided by her evidence (which I accept), that she immediately began feeling these pains, as well as, the buttressing report of her private doctor.

According to the evidence, Ms. Wilson was diagnosed as having

(i) blunt head trauma
(ii) contusion to both legs
(iii) sprained right thumb
(iv) mild whiplash injury
(5) contusion to lower back

Dr. Williams medical report referred to above is used in support of this conclusion.

[65] This leaves for consideration, the reports received from Dr. Denton Barnes and Dr. Greene – These reports speak of the Claimant's presentation to the St. Ann's Bay hospital on the day of the accident. It is reported that she presented with direct trauma to both legs and a frontal headache – She was diagnosed as having suffered soft tissue injuries to her lower limbs – consisting of

(i) swollen right leg anteriorly
(ii) Tenderness on palpation of the right leg anterior aspect
(iii) 4 x 4cm swelling with subcutaneous bleeding over the right pre-tibial region
(iv) swelling and tenderness to left leg anteriorily
(v) 4 x 4 cm swelling to the anterior aspect of the left leg with associated subcutaneous bleeding.

[66] These findings suggest injuries to the left and right leg. There is nothing in these reports that speak of pain in the back, neck or swelling to right hand. But all these are injuries consistent with a whiplash from a motor vehicle accident. She was not admitted to hospital and was expected to recover after about 6 weeks. Ms. Wilson had bleeding under the skin with associated swelling of 4 x 4 cm on right foot and on left foot in addition to what would have been associated pain. Her claim that this accident has had an impact on her sexual relations with her partner is not accepted as there is insufficient evidence upon which such a nexus can be drawn.

[67] The 2nd Defendant relied on the cases of (i) **Peter Marshall v Carlton Cole and Alvin Thorpe in which the claimant was diagnosed with moderate whiplash, sprain swollen and tender left wrist and hand as well as lower back pain and spasm. He was given an award which currently updates to $740,330. (ii) Lascelles Allen v Ameco Caribbean Incorporated and Peter Perry** delivered January 7, 2011. The claimant suffered injuries to his side, neck and back as a result of whiplash injury. He was made an award which now updates to $754,827.17 (iii) **Manley Nicolson v Ena Thomas and Glenmore Thomas. The claimant suffered unconsciousness, whiplash to neck with soft tissue injuries, cerebral concussion, mild limitation of movement of the cervical spine and tenderness. His award updates to $876,655.00.**

[68] The Claimant relies on **Peaches Burke v Dudley** et al Claim No. 2007 HCV 0038 delivered November 29, 2007 – The Claimant in this case sustained acute whiplash injury, back strain and soft tissue injury to her right shoulder – She was awarded $650,000.00 which today updates to $1,208,201.75. It is Counsel's submission that the Claimant in the instant case suffered more serious injuries and that in view of this Ms. Wilson should be awarded $1,400,000.00. However in Peaches Burke there was mild stiffness and reduced range of movement in addition to pain and injuries to her neck, shoulder and back.

[69] Having considered these cases I have come to the conclusion that none of them were particularly similar to the Claimant's. None of them had swelling with associated subcutaneous bleeding of 4x4 cm in size. This indicates more severe trauma to the affected areas than generalised "pain". In the circumstances, I make an award which takes this into account as well as the differences in the case of Peaches Burke.

[70] The sum of $ 1,000,000.00 is in my view reflective of these considerations.
I award $65,200.00 as special damages

Sharon Campbell

Special Damages

[71] Ms. Campbell has claimed $60,200.00 as medical expenses as part of her claim for special damages and an amount of $3,000,000.00 for general damages. She also claims transportation costs and loss of earnings for seven months. The 2nd defendant has no issue with an award of $5,000 for transportation even though it has not been proven by documentary evidence. However, it does issue with the claim for loss of earnings of 7 months as there has been no documentary proof of this. I agree with Counsel that in the circumstances, some such proof should be provided. Accordingly, I make no award for loss of earnings.

General Damages

[72] The claim for general damages is based on Ms. Campbell being diagnosed as having sustained the following injuries:

(i) 10cm x 2cm laceration to forehead
(ii) 10cm x 3cm laceration to the right side of her head and face
(iii) laceration to the upper eye lid
(iv) corneal laceration to the right eye

(v) Permanent residual scarring with intermittent pains in the region of the scars.

(vi) Hyper – pigmented scar in the region of the lacerations

(vii) Headaches and visual disturbances

These injuries were supported by medical reports, which were admitted at trial as Exhibit 7 – 10.

[73] Ms. Campbell relies on the case of **Jillian Cameron v Basil Wilson** page 239 - 240 of Harrison's as the Claimant in that case also had a severe scarring with loss of visual acuity. The award made at the time was $180,000.00 for general damages for pain and suffering and loss of amenities. The CPI at the time of award was 13-12. The present CPI is 211-9 the sum when indexed, yields $2,907.64.63

[74] It is the Claimant's submissions that not only are the injuries quite severe; the Claimant was a young lady of 36 years old at the time of the scarring; the scarring is to her face and quite serious.

[75] The 2nd Defendant does not dispute the fact that Ms. Campbell "sustained a fractured right orbit and lacerations to her face. She was also diagnosed with chronic headaches and visual disturbances secondary to trauma. She was left with permanent residual scarring".

[76] It is interesting to note that the cases they have submitted for the court's guidance are **Jamaica Telephone Company Limited v Barrymore Hill and Tisha Ann Daley** with an updated award of $4,882,404; **George Dawkins v Jamaica Railway Corporation** with an updated award of $2,261,532.00 and **Paul Bella Fanti v NHT and George Rainford and the Attorney General** with an updated award of $4,980,365.00. However, they argue the injuries received by Ms. Campbell were less serious than those received in the cases cited. Accordingly, they urge the court to make an award of a reasonable amount, which they consider to be $1,800,000.00.

[77] On the face of it, it would appear that the relevant medical certificates are those of Dr. Denton Barnes, dated August 8, 2007 and the report from St. Ann's Bay Hospital dated May 12, 2007 and were exhibits 6 and 8 at the trial respectively.

[78] Ms. Campbell saw Dr. C.V Srivardin almost 2 years after the accident on November 29, 2008 and his report of March 17, 2009 was tendered as exhibit 10.

[79] It could be said that the report appears to be "unhelpful" as to the injuries sustained by this Claimant on account of the collision. It reports the Claimant as complaining of headache and backache in November 2008. There is no report of any such complaint in the contemporaneous medical reports or in the Claimant's own evidence before the court. Dr Srivardin, then diagnosed her with chronic headache and visual disturbances secondary to trauma, but like the doctor whose evidence and opinion was rejected in Cherry Dixon Hall he gives no indication of the basis on which such diagnoses were made.

The Cherry Dixon Hall Case

[80] In Cherry Dixon Hall v Jamaica Grande Hotel Ltd. SCCA 26/2007 – delivered November 2008, an appeal was made against an assessment of General Damages of $650,000.00. This award was made on the February 13, 2007.

[81] The Appellant was in the main disgruntled with the little weight that the trial Judge had given, to the evidence of a Doctor Williams that had examined and treated her sometime after the accident, the subject of which was before the court.

[82] The Claimant had slipped on a wet floor at the Defendant's premises. She attended upon a doctor that said day and he gave her a medical certificate indicating that she had given a history of slipping on a wet floor and injuring her left elbow and right chest area – and pain in the related areas – This doctor referred her to Dr. Maita, a Consultant Radiologist who reported that x-rays of the chest and ribs revealed an un-displaced fracture of the right 7th rib. Based on this, Dr. Wright, in his report of June 7,

2003, diagnosed her with a fracture of the right 7th rib and soft tissue injury to her elbow with an expected recovery of within 2 months.

[83] The Appellant returned to her home in the U.S and was attended upon by Dr. Eric Williams who gave her 3 medical reports which were admitted in evidence – These reports spoke of sciatica and muscular injuries to her lower back and that she had, had months of physical therapy – she had been diagnosed with systemic lupus emthematosus "a deleterious disorder of the immune system" – and that since the accident she had several lupus flares and was now steroid dependent.

[84] The 2nd report spoke of a severe sprain to the wrist, which the Doctor opined was due to the fall. The 3rd report was said to be a clarification of his assessment of the Appellant. He said she suffered a severe wrist sprain that "has resulted in a reactive arthritis that will remain with her permanently and that in relation to the lupus flares "the clinical presentation supports a trigger and response relationship between the fall and the subsequent flares of Ms. Dixon's lupus".

[85] As the Appellant had at no time informed the 1st examiner Dr. Williams, whom she had seen three times, of the additional injuries referred to in Dr. William's report, the Court of Appeal found that the learned trial judge was right to have rejected that report but not only were these not mentioned to Dr. Wright, she gave no explanation as to why this was so. This led Panton J – President of the Court of Appeal to state that "It follows therefore that there is a yawning chasm between the fall the appellant sustained and the disability of which she now complains." (see paragraph 18). There was no link between the fall which was in May 2003 and her 1st lupus attack after the accident some six months later in November 2003.

[86] There are two main issues for my consideration; firstly, the extent and the nature of the injuries sustained by Ms. Campbell and secondly whether the injuries not referred to by the first attending physicians, are linked to the motor vehicle accident of the 5th January 2007. There is also a further issue as to whether Dr. C.V. Srivardhan has the competence to provide the opinion in his medical report.

[87] Ultimately, the question for the court, on a balance of probabilities, is whether Ms. Campbell suffered the injuries as claimed by her, as a result of the motor vehicle accident.

[88] I am required to take into account the whole of the evidence and in so doing, consider the weight to be given to the admitted medical reports and the opinions contained herein.

[89] It is open to me to accept or reject the opinion of any of the Doctors. "It is the expert duty to provide the court with the necessary material for testing the accuracy of their findings and conclusions" – paragraph 32 of Cherry Dixon Hall. Also see **Dawes v Edingburgh Magistrates** (1953) S.C. 34p. 40

[91] The fact that the Claimant did not inform Dr. Reddy of the additional complaint or that it was not in the report, does not mean that these injuries were not as a result of the accident. The court is cognisant of the fact that the Defendant can only be held liable for the Claimant's injuries, where the evidence shows that she had in fact sustained injuries as a direct result of its negligence.

[90] In examining the medical report of Dr. Barnes, which spoke to the day of the accident when the Claimant presented to the St. Ann's Bay hospital, she is described to have suffered injury to the face and right eye, with no loss of consciousness. On examination she was found to have:

(i) 10cm x 2cm laceration to the forehead
(ii) 10cm x 3cm laceration to right side of
(iii) head and face, extending from right temple
(iv) to right eyelid
(v) broken glass in the laceration which was removed
(vi) laceration to the right upper eyelid
(vii) no associated hyphenma
(viii) right pupil filled and no reactive to light

(ix) possible subluxated right lens

(x) carneal laceration to right eye

(xi) radiographs revealed fractured right orbit

[91] She was assessed as having "multiple facial lacerations with severe right eye injury and blow out fracture right orbit. These injuries can clearly be attributable to any visual disturbance, even 2 years later and perhaps even for an indefinite period and is not too remote nor lack the nexus as in the Cherry Dixon-Hall case. It would have been best for these visual disturbances, which appear vague in description, to have been properly investigated and findings made by an ophthalmologist with the necessary expertise. The findings in relation to the eye, requires a specialist trained in that area. Unlike the **Cherry Dixon Hall case** where it was said that as a general practitioner, Dr. Williams had the requisite training to deal with diseases of the human body; an eye doctor is a specialist, with specific training of which general practitioners have little, if any at all.

[92] However, this is not particularly material as the nature of the claimant's injury is in fact consistent with the report and the initial injuries and it would seem, directly attributable to the Defendant's negligence. It is significant to note that the Dr Barnes indicated that due to the "severity of the injury she was transferred to KPH-ophthalmology department. In light of the initial injuries, it is easy to accept the clear inference that some 2 yrs later, the complainant could have visual disturbance, as a consequence of this accident. In any event, Dr. C.V Srivardin's examination of this Claimant on November 29, 2008 and his report of March 17, 2009, which was tendered as exhibit 10 makes very little difference to the award by this Court to the Claimant. This is because her evidence as to 'fogginess' in her vision is accepted by me and is akin to 'visual disturbance' in its vaguest sense as described in the said report.

[93] The report of Dr. Guyan Arscott of February 28, 2007, speaks of having seen the Claimant. His examination revealed the following findings:

(i) Over the right forehead, there was a trap door type raised hypertrophic hyper-pigmented scar measuring approximately 15 cms

(ii) Over the right temple and outer angle of the right eye, there was a horse shoe shaped hypertrophic hyper-pigmented scar measuring approximately 9cms.

(iii) The aperture of her right eye was decreased compared to the left. The difference measuring approximately 0.8cms on the right compared to 1.2 cms on the left. There was a mild ectropian of the right upper eyelid tethering transverse scars in the right upper eyelid skin.

(iv) Over the right side of her nose, upper third, there was a 3 cms hyper-pigmented scar.

He assessed her as having "sustained significant facial injuries" and indicated that "all areas of scars will leave permanent residual scarring".

[94] Although he did say that a full assessment would be possible in about six months from the time of the injury, when a detailed assessment can be made with regards to corrective surgery, it is clear that at the time the injuries received by the Claimant were very significant. Surprisingly, although it was apparent at the trial that there was still some residual scarring, no claim was made for corrective surgery. I find that the severity of the injuries suffered by the Claimant were more akin to those received by the Claimant in the case of **Jillian Cameron v Basil Wilson (supra).** The eye injury was indeed severe and even if I were to place little weight on Dr. Svranam's report, I accept the evidence of the Claimant that she had been experiencing foggy vision since the accident.

Accordingly, I make an award of $3,000,000.00.

Special Damages are awarded at $65,200.00.

Further Issues

[95] On the 18th July I invited the parties to make submissions, before finalising my judgment, relating to the ancillary claim as to whether the Court can award judgment and costs in the main claim against the 1st Defendant/1st Ancillary Defendant and the 3rd Defendant/2nd Ancillary Defendant following an invitation from Counsel for the 2nd Defendant/Ancillary Claimant for the Court to do so. I have had submissions from Counsel for the 2nd and 5th Defendants, the latter was received on 22nd October and to date none has been received from the Claimants' Counsel and no explanation has been proffered. In view of the additional delay occasioned by this, I have proceeded to finalise the Judgment.

Can a court apportion liability to a party who is absent for the trial?

[96] Although the 1st and 2nd Ancillary Defendants were initially made parties to the main claim by the Claimants, they have not filed a defence to the action, nor did they attend, nor were they represented at the trial. No default judgment was obtained against them. The 2nd Defendant submits that in this scenario, the court is nevertheless empowered to make a finding as to liability as well as award judgment against a party who is absent from the trial.

[97] She contends that by virtue of CPR Rule 39.5, a court can proceed in the absence of a party and make a judgment against the absent party. She referred the Court to SCCA NO 59/2012 ***Montival Salmon v Florence Salmon*** [JMCA] JMCA App 6 and Rule 39.6. Rule 39.6 gives the absent party a remedy where the court grants a judgment in his absence.

[98] However, as submitted by Counsel for the 5th Defendant, this rule does not support the 2nd defendant's contention as the rule clearly requires that the Judge be satisfied that the absent party had been given notice of the Hearing, before he can proceed in the absence of the party to judgment. The case cited above also supports this proposition. No notice was given to the 1st and 3rd Defendants as to the trial date in this matter. In fact the giving of notice would have been immaterial as they had not taken part in case-management orders nor pre-trial review and importantly, the claimants would have had no notice of their defence.

[99] It is also my considered view and that taken by the 5th Defendant, that it is for the Claimant to elect whether it will proceed against any defendant party that has not filed an acknowledgment of service or a defence by applying for a default judgment and subsequent assessment of damages. In failing to do so, the Claimant has effectively abandoned the claim against them for the purposes of the trial; No case-management or pre-trial review orders could have been made against them and neither can a Judge at trial give judgment against or for them.

[100] I agree with Counsel for the 2nd defendant that "section 3 (2) of the ***Law Reform (Tort-Feasers) Act*** entitles a court to apportion liability between joint tort-feasers as it explicitly states that any tortfeaser can recover a contribution from any other tortfeaser who is, or would if sued have been, liable in respect of the same damages". However, it is as a result of this that the ancillary claim for contribution has been made. This is not for the main claim as the rules make it clear that any such claim should accord with rule 18 as an ancillary claim.

[101] Counsel further contends that ***CPR 18.11 (2)*** prescibes that where the Ancillary Defendant does not file a Defence he is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim. This I believe has been reflected in my judgment on the ancillary claim.

What Costs Orders are to be made in relation to the main claim?

[102] The 2nd Defendant submits that neither a *Bullock* order nor a *Sanderson* order as to costs is appropriate in this matter because the ultimate effect of both orders is that the unsuccessful defendant will be obliged to pay for the Claimants' costs as well as the successful defendant's costs. However, as endorsed by Counsel for 2nd Defendant, the question of costs is in the discretion of the court- "***s 47(1) of the Judicature (Supreme Court) Act***. CPR Rule 64.6(1) lays down the general proposition that the unsuccessful party ought to be ordered to pay the costs of the successful party. The court may however depart from that rule having regard to the factors listed in Rule 64.6 (4). In

particular the court must have regard to whether it was reasonable for a party to pursue a particular allegation or raise a particular issue. Of course, I would add that any such discretion must be exercised judicially.

[103] In departing from the general rule that costs follow the event, I have considered such things as the circumstances disclosed by the evidence in the main claim as to the respective culpability of the parties; whether it was reasonable for the claimants to have sued the defendants; the nature of the ancillary claim and how this can be used to as far as possible apportion costs and payable damages to reflect culpability as well as reasonableness. In doing so, the most important consideration is the reasonableness of the Claimants to sue the successful 5th Defendant. He was the owner of a vehicle in which they were travelling and which had an accident with the Bob cat in circumstances where the outcome as to liability was dependent on the findings of the trier of fact based on the evidence. It was clearly therefore, not only reasonable but also prudent, suitable and appropriate that they sued the 5th Defendant as owner of the vehicle and for whom the 4th Defendant, the driver of the said vehicle was acting as servant or agent.

[104] This Court's view of the 1st and 3rd Defendants' culpability is reflected in the award against them on the ancillary claim and the costs thereon. It is not the 1st and 3rd defendants that have pursued this matter to trial. The Claimants would not have incurred significant costs beyond filing the claim against them. I therefore do not agree that I should make a costs order for them to pay 50% of the Claimants' costs as they are not before the Court in the main claim, nor am I minded, for the aforesaid reasons, to make such an order on the ancillary claim as part of the costs payable to the ancillary claimant.

Ancillary Claim of the 2nd Defendant

[105] The 1st and second defendants have not taken part in this trial although findings have been made against them. They have not filed defences to the ancillary claim and are by virtue of rules 18.11 (1) and (2), deemed to admit the ancillary claim and are bound by any judgment or decision in the main

proceedings so far as it is relevant to any matter in the ancillary claim. I therefore find for the ancillary claimant on the ancillary claim against the 1st and 3rd defendants. Indemnity does not arise on the evidence before me.

[107] I however, make an order for 50% contribution to the Ancillary Claimant, from the 1st and 2nd ancillary defendants of the damages and interest awarded against the ancillary Claimant in the main claim. I will also make an order for costs as follows: Costs to the Ancillary Claimant against the 1st and 2nd Ancillary Defendants representing the costs of the ancillary proceedings; and the costs payable by the Ancillary Claimant /2nd Defendant to the 5th Defendant on the main claim; to be agreed or taxed; Costs to the 4th Ancillary Defendant/5th Defendant against the Ancillary Claimant; to be agreed or taxed.

ORDERS ON MAIN CLAIM

Judgment for Claimant Jacqueline Wilson against the 2nd Defendant

- **(i) Special Damages in the sum of $36,000.00 with interest at the rate of 3% from the 6th January 2007 to 1st July 2014.**
- **(ii) General Damages awarded in the sum of $1,000,000.00 with interest at the rate of 3% from the 13th August 2008 (the date when default judgement and notice of assessment deemed postal service as claim form and particulars irregularly served and default judgment set aside) to the 18th July 2014.**
- **(iii) Costs to the Claimant against the 2nd Defendant to be agreed or taxed.**
- **(iv) Costs to the 5th Defendant against the 2nd Defendant to be agreed or taxed**

Judgment for Claimant Sharon Campbell against the 2nd Defendant

(i) **Special damages awarded in the sum of $65,200.00 with interest at 3% from the 6th January 2007 to the 31st October 2014.**

(ii) **General Damages awarded in the sum of $3,000,000.00 with interest at 3% from the service of the proceedings 18th July 2014.**

(iii) **Costs to the Claimant against the 2nd Defendant to be agreed or taxed.**

(iv) **Costs to the 5th Defendant against the 2nd Defendant to be agreed or taxed**

Orders on the Ancillary Claim

(i) **50% contribution to the Ancillary Claimant, from the 1st and 2nd ancillary defendants of the damages and interest awarded against the ancillary Claimant in the main claim.**

(ii) **Costs to the Ancillary Claimant against the 1st and 2nd Ancillary Defendants representing the costs of the ancillary proceedings and the costs payable by the Ancillary Claimant /2nd Defendant to the 5th Defendant on the main claim; to be agreed or taxed.**

(iii) **Costs to the 4th Ancillary Defendant/5th Defendant against the Ancillary Claimant; to be agreed or taxed.**