[2017] JMSC Civ 149

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 03577

BETWEEN	**DAMELL BRAMWELL** (By next friend and father David Bramwell)	**CLAIMANT**
AND	**EVERTON MOWATT**	**1ST DEFENDANT**
AND	**HERBERT GAYLE**	**2ND DEFENDANT**
AND	**MELCON MORRISON**	**3RD DEFENDANT**
AND	**OREGEHUO WALKER**	**4TH DEFENDANT**
	AND	
BETWEEN	**EVERTON MOWATT**	**1ST ANCILLARY CLAIMANT**
AND	**HERBERT GAYLE**	**2ND ANCILLARY CLAIMANT**
AND	**MELCON MORRISON**	**1ST ANCILLARY DEFENDANT**
AND	**OREGEHUO WALKER**	**2ND ANCILLARY DEFENDANT**

Miss. Chantal Campbell instructed by Kinghorn & Kinghorn for the Claimant.

Ms. K. Michelle Reid instructed by Nunes, Scholefield, DeLeon & Co. for the 1st and 2ndDefendant.

CORAM: G. FRASER, J

HEARD: 23th & 24th January 2017, 8thMarch & 10th, 2017 and 26th October 2017

Negligence – Driver of car – Duty to passenger in car – Common Law and Statutory Duty of Care - Res Ipsa Loquitur - Contributory negligence –Apportionment of Liability between Defendants – Quantum of Damages

THE CLAIM

[1] The Claimant is Damell Bramwell who sues by his next friend and father David Bramwell for damages in respect of injuries and loss sustained by him, arising from a motor vehicle accident occurring on 18th January 2011. His claim filed on the 31st May 2011 in paragraph 6 avers that:

> " *the Claimant was lawfully travelling as a passenger in motor vehicle registration number PC 4608 along the Dunbarton Main Road, Discovery Bay in the parish of St. Ann, when the 1st and 3rd Defendants so negligently drove and/or operated and/or managed motor vehicle registration PC 4608, (the property of the 2nd Defendant) and motor vehicle registration number 5887 BZ (the property of the 4th Defendant), respectively, that they caused and/or permitted the said motor vehicles to come violently into collision with each other".*

At paragraph 2 of the Particulars of Claim, the Claimant further avers that

> *"Upon reaching the vicinity of Specie's Garage, the 1st Defendant attempted to overtake motor vehicle registration number 5887BZ driven by 3rd Defendant. The 3rd Defendant in attempting to prevent the 1st Defendant from overtaking caused the 1st Defendant to collide into the rear of motor vehicle registration number 5887 BZ, then lost control and hit into a utility pole and then overturned"*.

[2] The 1st and 3rd Defendants are sued because they were the drivers of the respective motor vehicles and the 2nd and 4th Defendants are joined in the claim for reason that the Claimant alleges their liability as the masters and or principals of both drivers. The Claimant is also seeking to ground his claim on the doctrine of *res ispa loquitur* and has specifically pleaded this thereby putting all the Defendants on notice that this is one of the plinths on which the Claim is grounded.

THE DEFENCE

[3] The 1st and 2nd Defendants have denied any negligence on the part of the 1st Defendant and have denied that he has in any way shape or form contributed to the

accident. The 1st and 2nd Defendants both aver that it is the 3rd Defendant who is the sole cause of the collision and therefore solely responsible for the Claimants injuries, loss and damages if any. The 1st and 2nd defendants do not admit to any injury sustained by the Claimant and have put him to strict proof of any injury.

[4] Ms. Reid on behalf of the 1st and 2nd Defendants, in her submissions to the Court has advocated that the 1st Defendant in fact had adopted the particulars of negligence pleaded by the Claimant against the 3rd Defendant and that the Claimant had not filed any Reply to this defence *"and therefore the factual allegations raised by the 1st and 2nd Defendants on their pleadings have remained unchallenged by the Claimant".*

[5] In relation to the 3rd and 4th Defendants they were not participants in this trial. There is however the Ancillary Claim commenced by the 1st and 2nd Defendants against them for loss and damage suffered as a result of the collision occurring on the18th January 2011. The Ancillary Claimants are also asking for contribution and or indemnity in respect of the Claim. The 4th Defendant had initially filed a Defence to the Claim but his statement of case was subsequently struck out by order of the Court on the 7th May 2015 at the Pre-trial Review. Consequential orders were also made that the 1st & 2nd Defendants/Ancillary Claimants were entitled to an indemnity and or contribution against the 4th Defendant; and further that relative to the Ancillary Claim an assessment of damages against the 4th Defendant was to be made at time of trial.

[6] In the Ancillary Claim made by Mr. Gayle the 2nd Defendant, he seeks to be indemnified by the 3rd and 4th Defendants in the event that he or the 1st Defendant are held liable in whole or part for the damages sought by the Claimant. He makes this Ancillary Claim on the basis that if any injury loss or damage was sustained by the Claimant then it was as a result of the 3rd Defendant's negligence. Furthermore as a result of the collision Mr. Gayle is saying his motor vehicle was damaged and he is seeking compensation in the amount of $120,000 as special damages.

UNDISPUTED FACTS AND ADMISSIONS BY THE PARTIES

[7] Counsel Miss Campbell, who appears for the Claimant, has succinctly and correctly in my view identified the facts which are either admitted or remain uncontested by the parties to the suit. I have reproduced and augmented these as follows:

i. On the 18th January 2011, there was a collision between motor vehicle registered PC 4608 and motor vehicle registered 5887 BZ on the Dunbarton Main Road in St. Ann.

ii. The 1st Defendant, Everton Mowatt was the driver of motor vehicle registered PC 4608. The 2nd Defendant, Herbert Gayle was the owner of the said motor vehicle and the employer of the 1st Defendant.

iii. The 3rd Defendant, Melcon Morrison was the driver of the motor vehicle registered 5887 BZ and the 4th Defendant Oregehuo Walker was the owner.

iv. The Claimant who was seated in the middle of the rear passenger seat was lawfully a passenger in the motor vehicle being driven by Everton Mowatt.

v. Both drivers were travelling in the same direction. That is, in the direction of Discovery Bay proceeding from Brown's Town.

vi. The 1st Defendant was in the process of overtaking when the collision between motor vehicle registered PC 4608 and motor vehicle 5887 BZ occurred.

vii. The collision took place in the vicinity of Specie's garage.

viii. There was a pothole on the left side of the road headed towards Discovery Bay. This pothole was also in the vicinity of Specie's garage.

ix. Following the impact with both motor vehicles, the motor vehicle driven by the 1st Defendant veered to the left hand side of the road, collided into a light post, rolled over and came to a stop on its roof.

x. The Claimant at the material time was an infant for purposes of this Claim.

ISSUES

Credibility and Inconsistency

[8] A preliminary issue was raised by counsel for the 1st and 2nd Defendants as to the inconsistency between the pleadings of the Claimant versus his evidence during the trial. During cross examination, the young Claimant vehemently denied that he had ever

said that "... the 3rd Defendant was attempting to prevent the 1st Defendant from overtaking [which] caused the 1st Defendant to collide..." Counsel Mrs. Reid has asked me to treat the latter as a matter of the witness' credit worthiness and to say in this regard I do not find him to be credible, and that this witness is not to be believed at all. In the next breath however she is asking me to accept that this is what in fact happened and to accept the 1st Defendant's version which coincides with this aspect of the Claimant's averments.

[9] In assessing this issue I would firstly indicate that an inconsistency between pleadings and evidence can be regarded by the Court as a fundamentally serious issue. As was adumbrated in the case of ***Dare v Pulham*** (1982) 148 CLR 658 at 664;

> *"Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it … they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial … and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court".*

[10] It is settled law that pleadings and particulars are not evidence, however as I understand the law, the filing of pleadings and particulars are intended to define and narrow the issues to be tried and enable the parties to know what evidence it will be necessary to have available, and to avoid taking up time with questions that are not in dispute. Moreover they prevent the injustice that may occur when a party is taken by surprise; as also are expected to save expense by keeping the conduct of the case within due bounds. It is my view that whatever has been expressly admitted in the pleadings requires no further proof and any admission made in pleadings binds a party making that admission.

[11] Having indicated that in principle an inconsistency can be serious and can undermine the credibility and reliability of a witness and his case; I would however point out that the averments in the Claimant's pleadings, that "...the 3rd Defendant was attempting to prevent the 1st Defendant from overtaking [which] caused the 1st Defendant to collide..." is no more than an opinion of another person's state of mind.

Any opinion expressed by an unqualified witness as to another person's state of mind is purely speculative, and therefore can play no part in the determination of the issues before this Court. While the Court can accept evidence that a particular thing was done it is quite a stretch to accept an unqualified witness' opinion as to why it was done, especially where this would involve a determination of the thought process of another person who has not revealed the same.

[12] My task for present purposes, subject to the issue off credibility, is therefore to assess the evidence of the two (2) witnesses of fact and to determine the following issues:

1. Whether the Claimant Damell Bramwell suffered injuries as a result of him being a passenger in a motor vehicle being driven by the 1st Defendant and which vehicle was involved in a collision with another motor vehicle driven by the 3rd Defendant.
2. If yes; what is the extent of those injuries sustained by the Claimant?
3. Thirdly and most importantly were either of the two (2) driver's negligent in their conduct and operation of their respective motor vehicles? and
4. Lastly, are either of the drivers consequentially liable for Master Bramwell's injuries; and resulting loss and damage?

THE LAW

Negligence

[13] It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a Claimant by a Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty. It is also well settled that where a Claimant alleges that he has suffered damages resulting from an object or thing under the Defendant's care or control, a burden of proof is cast on the Claimant.

[14] The burden of proof in a claim for damages for negligence rests primarily on the claimant, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of

some duty owed by the defendant to the claimant, some breach of that duty, and an injury to the claimant between which a causal connection must be established. Therefore, it is not insufficient for the claimant to prove injury without proving a breach of duty, nor injury which may or may not be caused by a breach of duty. (see ***Ng Chun Pui and Ng Wang King v Lee Chuen Tat and Another,*** [1988] R.T.R. 298 (PC). As regards the standard of proof in a negligence claim, there is no question that this is on a balance of probabilities.

[15] Liability will be ascribed to the defendant whose negligent act is the sole effective cause of the claimant's injury or if such negligent act is so connected to it to be a cause materially contributing to it. The negligent act as a cause of a claimant's injury may arise out of a chain of events leading to liability on the part of a defendant but the claimant must so prove. Proof that a claimant's injury was caused by the defendant's negligence raises a presumption of the defendant's liability. The claimant is nonetheless obliged to satisfy the court that his or her injury was caused by the defendant's negligence, or that for want of care, the Defendant's negligence substantially accounted for the injury.

Duty of care for motorist

[16] At common law a motorist owes a duty of care to all other users of the road to the extent that while driving he is expected to take care, and avoid damage and or injury to persons that are reasonably within his contemplation. In this trial there is no contest that such a duty exists. This duty includes and extends to pedestrians, passengers within motor vehicles and other drivers. A determination as to whether or not such duty is discharged will involve an examination of all the factual circumstances of each case and must involve but is not limited to an examination of factors such as:

- The speed at which the motorist was travelling; and whether he was observing any statutory limits
- The nature of the location
- The usage of the road/contemplation of other road users, etc.

[17] In addition to the common law obligations of motorist there is too, the parallel statutory duty to exercise reasonable care while operating their motor vehicles on the

road. I am therefore mindful of the provisions of ***sections 51, 57 and 95*** of the ***Road Traffic Act,*** which to my mind cast a statutory obligation on motorist not only to ensure the safety of fellow road users by exercising due care and attention but also obliges all motorist to take steps to avoid collisions. The aforementioned sections provide as follows:

> *Section 51 - (1) The driver of a motor vehicle shall observe the following rules- a motor vehicle*
>
> ***(a)*** *meeting or being overtaken by other traffic shall be kept to the near side of the road. When overtaking other traffic the vehicle shall be kept on the right or off-side of such other traffic:*
>
> ***(b)*** *being overtaken by other traffic shall be driven so as to allow such other traffic to pass;*
>
> ***(c)*** *shall not be driven alongside of, or overlapping, or so as to overtake other traffic proceeding in the same direction if by so doing it obstructs any traffic proceeding in the opposite direction;*
>
> *51 (2) Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.*
>
> *57(1) The driver of a motor vehicle constructed to be steered on the right or off-side thereof, shall, before commencing to turn to, or change direction towards, the right, give the appropriate signal so as to indicate that direction.*
>
> *95(1) The Island Traffic Authority shall prepare a code (in this Act referred to as the "Road Code") comprising such directions as appear to the Authority to be proper for the guidance of persons using roads, and may from time to time revise the Road Code by revoking, varying, amending or adding to the provisions thereof in such manner as the Authority may think fit.*
>
> *(3) The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to*

establish or to negative any liability which is in question in those proceedings.

[18] Additional practical guidance is provided to drivers in Part 2 of the ***Road Traffic Code*** made pursuant to section 95 of the ***Road Traffic Act which*** stipulates that:

> Driving Along
>
> *6. Before you slow down, stop, turn or change lanes, check your rear view mirror, signal your intention either by hand or indicator light signals and make sure you can do so without inconvenience to others. Never make a sudden or "last minute" turn; it is very dangerous.*

Res ipsa loquitur

[19] There is a class of cases where, as the Latin maxim says 'the thing speaks for itself' – ***res ipsa loquitur***; and the happening of the accident is in itself evidence of negligence. Although this has been called a doctrine, it is in reality a rule of evidence and states no principle of law, therefore if relied upon by a Claimant it must be specifically pleaded. As was stated by Morris LJ; in the clinical negligence case of ***Roe v Ministry of Health*** *[1954] 2 QB 66 at 67*:

> "This convenient and succinct formula possesses no magic qualities; nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin."

[20] The doctrine applies when the cause of the occurrence is not known and the relevant equipment or activity was under the sole control of the Defendant (***Bennett v Chemical Construction (GB) Ltd*** *[1971] 1 WLR 1571)***.** It may be in such a case that the claimant may not be able to prove the specific act or omission of the Defendant, but if on the evidence it is more likely than not that its effective cause was the Defendant then if there is no plausible explanation indicating an absence of fault, the claim will succeed. The general state of the law as to the proof of negligence when the issue of *res ipsa loquitur* arises was eminently enunciated by Lord Griffiths in ***Ng Chun Pui and Ng Wang King v Lee Chuen Tat and Another,*** Privy Council Appeal No 1/1988 delivered on 24 May 1988, when he said at pages 3 and 4:

> *"The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred…it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established."*

[21] If a Claimant seeks to rely on the maxim, in such a case it is incumbent on him to prove:

1. the happening of some unexplained occurrence;
2. that the unexplained occurrence would not have happened in the ordinary course of things without negligence on the part of somebody other than the claimant; and
3. the circumstances point to the negligence being that of the defendant rather than anybody else.

[22] If the Claimant manages to establish the three (3) ingredients above then the Defendant would be obliged by evidence to establish that he or she is not responsible. The defendant may give an explanation not involving negligence or one which can positively disprove negligence or can establish complete evidence of the facts which offers an explanation of what occurred and that is inconsistent with his or her being at fault. In the case of ***Scott v London and St. Katherine Docks Co***. (1865) 3 H & C 596, where the claimant, a customs officer, was injured by bags of sugar which fell from a crane, Erle CJ said:

> *"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of*

> *things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."*

[23] Where the Claimant successfully alleges ***res ipsa loquitur*** its effect is to furnish evidence of negligence on which a court is free to find for the claimant (see ***Ballard v North British Rly Co*** 1923 SC (HL) 43 at 54). If the Defendant shows how the accident happened, and that his account is consistent with the absence of negligence on his part, he will displace the effect of the maxim and not be liable *(see* ***Colvilles Ltd v Devine*** [1969] 2 All ER 53, [1969] 1 WLR 475, HL). Proof that there was no negligence by him or those for whom he is responsible will also absolve him from liability (se ***Woods v Duncan*** [1946] AC 401, [1946] 1 All ER 420n, HL; ***Walsh v Holst & Co Ltd*** [1958] 3 All ER 33, [1958] 1 WLR 800, CA; ***Swan v Salisbury Construction Co Ltd*** [1966] 2 All ER 138, [1966] 1 WLR 204, PC).

[24] It seems however that the maxim does not reverse the burden of proof, the Defendant need not prove how and why the accident happened it is sufficient if he satisfies the Court that he personally was not negligent or at fault. The court must still decide, in the light of the strength of the inference of negligence raised by the maxim in the particular case, whether the Defendant has sufficiently rebutted that inference *(see* ***Ng Chun Pui v Lee Chuen Tat*** [1988] RTR 298, PC; C.F. ***Henderson v Henry E Jenkins & Sons*** [1970] AC 282, [1969] 3 All ER 756, HL; ***Ward v Tesco Stores Ltd*** [1976] 1 All ER 219, [1976] 1 WLR 810, CA.).

[25] The principle only applies where the full cause of the occurrence is unknown, and that is not the situation in the instant case. If the full facts leading to the accident can be shown, the doctrine then has no application and “the Claimant is left as he began, namely, that he has to show negligence” (per Lord Dunedin in ***Ballard v North British Rly Co*** *1923 SC (HL) 43 at 54)*. In this case the Claimant was able to relate the details of the incident leading up to the collision and even beyond. In the circumstances the instant Claimant is in the said position as identified by Lord Porter in ***Bolton v Stone***

[1951] 1 All E.R. 1078 at 1080. I entirely agree with his enunciation and would adopt his words as follows:

> *"Nor am I assisted by any reliance upon the doctrine of `res ipsa loquitur'. Where the circumstances giving rise to the cause of the accident are unknown that doctrine may be of great assistance, but where, as in the present case, all the facts are known, it cannot have any application. It is known exactly how the accident happened and it is unnecessary to ask whether this accident would have happened had there been no negligence; the only question is, "do the facts or omissions which are known and which led up to the injury amount to negligence."*

[26] It is my view that the collision itself does not point to negligent management as the explanation more likely than any other, and therefore the maxim does not begin to apply and this Court still has to decide, on the proven facts, whether the 1st and 3rd Defendants were negligent. I bear in mind however that where the evidence relating to negligence is particularly within the control of the defendant, little affirmative evidence may be required from the claimant to establish a prima facie case which it will then be for the defendant to rebut.

THE EVIDENCE AND ANALYSIS

[27] In a nutshell the evidence reveals that on the 18th January 2011 there was a collision between the motor vehicles driven by the 1st and 3rd Defendants. The 1st Defendant lost control of the Toyota Corolla PC 4608 wherein the Claimant was a passenger and it impacted a utility post overturned and came to rest on its roof. These aspects of the evidence are common to both sides and are not in dispute. What is disputed are a few particulars as to the actions of the 1st Defendant leading up to the impact between both vehicles. Therefore I agree with Counsel Ms. Reid that the instant case is one essentially related to resolving questions of fact.

[28] I have read and listened to the evidence of the four (4) witnesses and I have had regard to their demeanour. In relation to Mr. David Bramwell he was not present at the time of the collision and his evidence does not assist this court in resolving the issues of

liability which are in contention. In relation to Mr. Herbert Gayle the 2nd Defendant and owner of the vehicle bearing registration plates ***PC4608,*** I perceive that his evidence was concerned mainly with the issue of quantum of damages to be assessed in relation to the ancillary claim brought against the Ancillary Defendants, Morrison and Walker. He too was not present at the material time and therefore cannot speak to the driving conduct of either the 1st or 3rd Defendants.

[29] I appreciate that my central task in this case is to ascertain liability and that this is inextricably bound up with the underlying issue of credibility and that the witnesses whose testimony will inform the Court's decision as to the issue of negligence are Dammel Bramwell and Everton Mowatt. Counsel Mrs. Reid has extolled the honesty and candour of the 1st Defendant and has urged this Court to accept his version of the events. Ms Campbell on the other hand has submitted that the Claimant's evidence is as simple as it is credible.

[30] Whose evidence should the Court accept, the Claimant's or the 1st Defendant's? There is no independent evidence in this case and I must therefore assess the evidence of these two (2) witnesses with care to determine if either of them is to be believed. At this time I make the general observation that both these witnesses' testimony was less than stellar; when they were cross examined it was apparent that both were not being totally frank with the Court and the evidence of each was to various extents shrouded by half answers with evasiveness and prevarication.

[31] The Claimant blames the 1st and 3rd Defendants and the 1st Defendant blames the 3rd Defendant. Nevertheless I keep at the forefront of my mind that he who alleges must prove, and even if I do not believe totally the 1st Defendant to be an altogether credible witness, where the claim is concerned it still lies on the Claimant to prove negligence on his part.

[32] At the outset I will indicate that I accept the evidence of the Claimant that he had suffered some injury in the collision. I also indicate that no blameworthiness can attach

to the Claimant in the circumstances because he was a mere back seat passenger in the vehicle driven by the 1st Defendant and did nothing to influence the driving conduct of the two drivers involved.

[33] There was some contest and resistance by the Defendants as to the extent of the injuries the Claimant alleged that he suffered as also in relation to the expenses incurred in his medical treatment. Initially there was also some objection relative to the various medical reports submitted on behalf of the Claimant but as the trial progressed two (2) medical reports of Dr. Kevin Rowe dated the 18th January 2011 and 10th May 2015 were agreed and tendered into the evidence; the latter report was tendered after portions of it was struck out.

[34] The evidence of the Claimant as it relates to his pain and suffering in the aftermath of the collision; was not in my view shaken by cross examination which was skilfully executed by able Counsel Ms. Reid. There is however no medical evidence supporting the Claimant's evidence that he had suffered head aches or lower back pains in the aftermath of the collision, neither has the Claimant provided any such evidence to support his assertion that up to time of his oral evidence he was still experiencing pain as a consequence of the collision. I have therefore rejected his bald and belated assertions in that regard.

[35] The treatment and expenses incurred by the Claimant as a result of the collision to my mind are not unwarranted or excessive and the medical reports indicate that the injuries are consistent with the mechanisms of the accident. The Claimant was diagnosed as having suffered blunt trauma with soft tissue injury to the shoulder and muscular spasm to the upper back. The pain experienced by the young Claimant would however have resolved itself in short order. According to Dr. Rowe by the 21st January 2011 the Claimant reported that the pain in his shoulder and back had begun to subside.

[36] On the issue of the Claimant's injuries I therefore find as a matter of fact that:

- Damell Bramwell on the 18th January 2011 was a passenger in the motor vehicle bearing registration plates lettered and numbered ***PC 4608***, the property of the 2nd Defendant and driven by the 1st Defendant.
- That there was an impact between the above vehicle and another vehicle bearing registration plates numbered and lettered **5887 BZ**, the property of the 4th Defendant and driven by the 3rd Defendant at all material times.
- That as a result of the impact the vehicle in which the Claimant was travelling hit a light post, rolled over and came to a standstill in an upended position.
- The Claimant as a result was shaken up, dizzy and started feeling pain in his hand. Later that night he experienced more pain to the hand and further pain in the shoulder and back region.
- The Claimant sought and obtained medical treatment for his injuries and pain and he therefore consequently suffered pain, loss and damages as a result of the collision between these two vehicles.

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WHO IS LIABLE

[37] The Claimant is asking for an award of $1.3 million in general damages and the sum of $27,800 in special damages. Having determined that the Claimant was injured as a result of the collision between the 1st and 3rd Defendants it now falls on me to determine which of the two drivers is at fault if either or both. A decision in this regard will decide who will pay damages and who will pay costs.

[38] I firstly look at the evidence as it pertains to the driving behaviour of Mr. Morrison, the 3rd named Defendant. Both eye witnesses, who are the Claimant and the 1st Defendant respectively, agree to a great extent about the 3rd Defendant's driving conduct or misconduct. The Claimant's evidence was that, *"...while Mr. Mowatt [the 1st Defendant] was overtaking the red Corolla it drifted into the right lane. The collision occurred when the red Corolla went into Mr. Mowatt's driving path"*. The Claimant also

agreed under cross examination that the driver of the red Corolla gave no indication he was going to veer onto the right side of the road.

[39] The Claimant's evidence does not allege that either of the two drivers were exceeding the speed limit. Indeed there is no evidence that either driver was speeding. Ms. Campbell has urged on this Court that the 1st Defendant must have increased his speed at some point to be able to catch up to and attempt to pass the 3rd Defendant and that is a logical inference.

[40] This however does not mean that the 1st Defendant had exceeded the speed limit, the Claimant has led no evidence as to what was the speed limit on that stretch of road and therefore there is no basis for this Court to make a finding of speeding on the part of the two (2) drivers. On the contrary the undisputed evidence of the 1st Defendant is that he was travelling at about 50 KMPH at the material time and the red Corolla was travelling at about the same speed and he had observed the brake lights on the 3rd Defendant's car from which it could be inferred that the other driver had decreased his speed. I accept that these were the circumstances that existed at the material time and therefore agree with Ms. Reid that speeding is not a factor to be considered by this Court as regards the determination of negligence.

[41] The First Defendant's evidence is along similar lines as the testimony of the Claimant, he too testified that as *he "was overtaking the vehicle...registered **5887 BZ** the driver suddenly and without any warning swerved ...to the right and into my driving path".* The significant difference between the evidence of these two (2) witnesses in relation to this aspect of the incident is when in the course of the overtaking the collision occurred, who impacted whom and why the 3rd Defendant acted as he did in drifting to the right. In relation to this latter issue I have already indicated that such opinions as expressed by any of the two witnesses in relation to the 3rd Defendant's state of mind is nothing more than pure speculation and will be disregarded.

[42] In determining liability the court ought to have regard to the physical evidence that is led in the trial as indicated in the authority of ***Calvin Grant v David Pareedon et al***. SCCA No. 91/87, delivered on the 4th of October 1988. In that case the Court of Appeal commended the approach of Theobalds, J. regarding the careful consideration of physical evidence as eminently reasonable and logical. At page 3 of the said judgment, the reasoning of the trial judge with which I have adopted, was reproduced as follows: –

> *"Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth."*

Unfortunately there was no independent evidence let in this case that can assist this Court and so I have to choose between the competing evidence of two witnesses as the events are related by them.

[43] On the Claimant's evidence the overtaking was done in the vicinity of Specie's garage and with this the 1st Defendant agrees. Both witnesses also agree that on the left side of the road is a ditch and on the right an embankment. The Claimant however has provided no other evidence as to the condition of the road, the weather condition prevailing at the time or indeed the traffic pattern. All this information is supplied by the 1st Defendant and I accept it as it is undisputed. The 1st Defendant describes that particular portion of the Dunbarton Main where the collision occurred as dry, asphalted and relatively straight for a distance of some 110 -120 metres and he describes the weather condition as sunny.

[44] The 1st Defendant testified that on deciding to overtake the red Corolla he had put on his indicator and tooted his horn. The Claimant disputes the blowing of the horn but agrees that the 1st Defendant did indeed put on his indicator. I accept that a driver who would have put on his indicator would probably have also tooted his horn and so the 1st Defendant's evidence is preferred on this point.
Another point of dispute was as to who impacted whom? Both witnesses disagree on this point and even as to the damage occasioned to the respective vehicles. The Claimant disagreed that it was the red Corolla that hit the vehicle of the 1st Defendant, notwithstanding his agreement that it was the red Corolla that came into the path of the 1st Defendant. The Claimant also testified that the left rear lights were broken on the 3rd Defendant's vehicle this was denied by the 1st Defendant.

[45] There is no independent evidence as to this, such as a police accident report or assessor's report; so the Court is left to determine as between the evidence of the two witnesses as to fact. According to the 1st Defendant the point of impact on the red Corolla was the right rear wheel arch and on the 1st Defendant's vehicle it was the front left fender and this is the evidence I have accepted. My understanding of the evidence as to the interplay between the two vehicles is, the vehicle driven by the 1st Defendant would have been closing in on the red Corolla being driven by the 3rd Defendant which was already ahead, so even if it was the 3rd Defendant that came into his path, logically it would be the 1st Defendant's vehicle that impacted the red Corolla. Nonetheless the 1st Defendant insists that it was the red Corolla that collided into him; this to my mind defies common sense.

[46] The 1st Defendant also insisted that on impact the red Corolla pushed his motor vehicle further to the right, and when crossed examined about the distance he was pushed he said *"about five (5) inches, about half the length of the Bible"* in court, this Court noted that the entire length of the Bible is about seven (7) inches. In contrast the Claimant said there was no pushing by the red Corolla because on impact the 1st Defendant swerved to the left side of the road and hit a light post and then flipped twice.

[47] Initially the 1st Defendant in his witness statement had said it was *"after the vehicles broke contact I lost control of my vehicle"* in his oral testimony and in contrast he said that he could do nothing to prevent a collision as he had lost control of his vehicle *"when the red motor vehicle swerved into the path of my motor vehicle".* This seems to suggest that he lost control upon impact. When he was further cross-examined more inconsistencies arose. He explained how he was being pushed by the red car to the right he said he had been holding onto his steering wheel, trying to steer to the left in an effort not to mount the embankment situated on the right side of the road. He testified that he had in fact collided into the embankment but conceded under further cross examination that he had made no mention of this in his witness statement.

[48] The Defendant also testified that after impact his vehicle was going forward and the red motor vehicle was also going forward, in my view this makes a lie of his earlier evidence that he was being pushed to the right by the red Corolla. I do not accept the 1st Defendant's evidence in this regard as credible.

[49] In relation to the presence of the pothole, the 1st Defendant in his witness statement had given a narrative as to his actions following the collision, here he said *"I walked down to the point along the roadway that the driver of the motor vehicle registered 5887 BZ swerved the vehicle to the right before colliding into my vehicle. When I got to that section of the road I saw that there was a large pothole on the left side of the roadway".* The impression he conveys by this statement is that it was only in the aftermath of the collision he became aware of the presence of the pothole. In contradiction to this evidence and in answer to Ms. Campbell he admitted that he knew of the presence of the pothole before the accident and knew it was there before and whilst driving.

[50] The 1st Defendant further testified that he was of the view that the other driver tried to prevent him from overtaking and that is why he swerved into his path, yet responded in cross-examination that he does not know if the other driver was swerving

from the pothole when he swerved into his driving path, significantly the 1st Defendant responded to the Claimant's lawyer that, *"the pothole is right where the cars impacted each other"*. This is another instant where the 1st Defendant has proven to be neither consistent nor credible.

[51] Based on the forgoing evidence of the Claimant and 1st Defendant, I accept that the 3rd Defendant did not keep to his near side of the road when he was being overtaken by the 1st Defendant but rather drifted to the right side of the road and into the path of the overtaking vehicle. I also accept that the 3rd Defendant gave no physical or mechanical signal or indication of his intention to switch lanes, but did so suddenly and without warning. Having accepted that the 3rd Defendant had drifted into the right lane while he was being overtaken by the 1st Defendant, does this constitute a breach of ***Road Traffic Act*** and also negligence on his part?

[52] Calling to mind the provisions of section 51 (1) (b) of the ***Road Traffic Act***; that is to say the 3rd Defendant failed to keep to the near side (his left) while he was being overtaken and did not as he was required by section 57(1) give appropriate or any warnings or signals that he was about to switch lanes; I would therefore answer the first part of the question in the affirmative. Additionally the 3rd Defendant did not exercise the due care and attention as is expected of a motorist in his situation. I therefore find that the 3rd Defendant was reckless and negligent in his actions and I make the further finding that his driving conduct was causative of the collision and liability will attach.

[53] I go on now to ask myself another question, is the 3rd Defendant though, the sole cause of the collision and therefore one hundred percent (100%) liable for the harm and damage thereby resulting? In answering this question I now embark upon an examination of the 1st Defendant's driving conduct at the material time and to determine whether he is totally exonerated of any wrong doing or whether he too was in some measure also negligent on the day in question.

[54] At first blush it would appear that the 1st Defendant had indeed observed the dictates of the ***Road Traffic Act*** in signalling his intention to overtake and keeping to the right side of the vehicle he was overtaking. Admittedly the roadway in the vicinity of Specie's Garage is straight and visibility would have indicated there was no traffic coming in the opposite direction; so overtaking then would not by itself have been negligent conduct on the part of the 1st Defendant. Did he however properly assess the risks of overtaking at that particular time?

[55] The 1st Defendant admittedly had full knowledge of the condition of the road in that vicinity and particularly the fact that there was this pothole situated on the driving path in the left lane. Based on his description of the pothole as a "dugout" it appears that this was a pothole of considerable size. The 1st Defendant also testified as to the restrictive aspect of the roadway in the vicinity of Specie;s Garage. I say restrictive because he describes a roadway about 15 feet in width which is bounded by a ditch on the left and an embankment or incline on the right. He nonetheless took a decision to overtake just then and apparently deemed it safe to do so, but was it? Would the reasonable motorist have done so?

[56] The 1st Defendant by his own admission is very familiar with the Dunbarton Main Road including that stretch of roadway where the collision occurred. He had been a chauffeur plying that particular route for some 7 -8 years before the 11th January 2011. He had particular knowledge about the state of the road and that a pothole was situated in the vicinity of Specie's garage. The relative size of the vehicles versus the width of the road with an admittedly 5 inches of space between two vehicles, left little or no room for error, and the 1st Defendant ought to have appreciated this. These are the particular circumstances from which I will determine whether the 1st Defendant was negligent or otherwise.

[57] What is instructive in all the authorities as to whether or not a particular Defendant is negligent will turn on the particular circumstances of each case. In this case the decisive factor is whether the 1st Defendant had made a proper assessment of

the risks involved in overtaking when he did. Did he, or ought he to have anticipated the movement of the 3rd Defendant relative to the known pothole that was on the left side of the road? The 3rd Defendant coming upon the pothole was faced with two choices he could have continued on the left side of the road and slowly navigated the pothole or he could swerve to the right lane and avoid it altogether; he chose the latter. Ought such conduct, as executed by the 3rd Defendant ought reasonably to have been contemplated by the 1st Defendant? I say yes.

[58] It is true that the other driver, the 3rd Defendant was not himself observing the duty of care cast upon him as a driver or even observing the statutory provisions, but this in no way *"exonerate[s] the driver of any other motor vehicle..."* (in this case the 1st Defendant) of the duty imposed on him by section 51(2) of the Road Traffic Act. The 1st Defendant was very much aware of the state of the road and the pothole located in both his and the 3rd Defendant's left lane. He was very much aware that he and the other driver were approaching that pothole in the vicinity of Specie's garage. He was very much aware that the other driver would be compelled to navigate that pothole but nonetheless it was at that inopportune time he commenced his manoeuvre and attempted to overtake.

[59] Taking all of the 1st Defendant's own evidence into account and having within my contemplation his statutory duty of care; which requires him amongst other things to take proper care, keep a proper lookout and "...*to take such action as may be necessary to avoid an accident..."* I am of the view that he was not exhibiting the requisite care and skill required of him in all the circumstances of this case. I find that the action of the 3rd Defendant to swerve right was well within the 1st Defendant's contemplation and he did not alert his mind to this or he did, but made a miscalculation of those risks and therefore a decision to overtake at that particular time and section of the road way was not the actions of a reasonable and prudent driver.

[60] The 1st Defendant said he had not thought to apply his brakes as he had lost control of his vehicle upon impact. He agrees he never stopped, never swerved and

never applied his brakes. It is my view that with knowledge of all the circumstances as it was; the 1st Defendant was not taking proper care but was negligent and neither did he do what was within his powers to take steps to avoid a collision. In which event, there is room for consideration that contributory negligence arises as between the 1st and 3rd Defendants.

FINDING OF FACTS

[61] On the issue of liability I make the following findings:

- I find that the collision of the motor cars resulted from negligence on the part of both drivers.
- I find that the 3rd Defendant recklessly changed lanes by suddenly and without warning switched lanes without first providing any warning and/or indication to the 1st Defendant.
- That the 3rd Defendant was reckless because he failed to keep to his near side when being overtaken by another vehicle. He therefore was not exercising due care and attention, nor observing the statutory requirements for motorist in his circumstances.
- That the 1st Defendant was not keeping a proper lookout and failed to properly assess the risk of attempting to overtake another motorist in circumstances where he was aware of the presence of a pothole on the left side of the road and therefore ought to have anticipated that the 3rd Defendant could have suddenly switched lanes to avoid the known pothole situated on the left side of the road and in his driving path.
- That the circumstance with which the 1st Defendant was presented, in my opinion he did not take all reasonable and prudent steps to avoid a collision.
- I find that both drivers were negligent in not demonstrating due care and attention and discharging their obligations to other users of the road. That in the absence of evidence that one was more to blame than the other, liability should be apportioned equally. In such circumstances this Court will apply the legal

principle eschewed in ***Baker v Market Harbour Co-op. Society Ltd***[1]and that blame should be apportioned equally.

ASSESSMENT OF DAMAGES

General Damages

[62] The claimant is seeking to obtain some satisfaction against the Defendants for his injury. A non-pecuniary award is supposed to compensate the claimant for having to experience symptoms caused by the accident, example his experiencing pain. Non-pecuniary damages, sometimes described as "general damages", are so called because they involve an imprecise assessment of how much money is appropriate to compensate for a loss, and are therefore unlike "pecuniary" damages which can be more accurately calculated. The sheer difficulty task facing the Court is the fact that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering into monetary terms.

[63] Assessment of an award for non-pecuniary damages depends not only on the nature of the injury but also on the impact the injury has on the claimant and therefore it is impossible to develop a tariff of how much should be awarded for each type of injury; because different claimants will be affected differently by similar injuries. Previous decided cases are therefore only a guide to be used in establishing a general range, and the actual damages to be awarded in a particular case will depend on the circumstances of that case. Some of the factors I have considered in making this assessment for non-pecuniary damage are:

1. age of the plaintiff;
2. nature of the injury; and
3. severity and duration of pain.

[64] Counsel Mrs. Reid referred to a number of case including three (3) precedents dating between the years 1995 – 1997, these are ***Tamah South v***

[1] [1953] 1WLR 15.

George Ergos (1997); ***George Wint v Vincent Goloub*** (1995); ***Boysie Ormsby v James Bonfield & Conrad Young*** (1996) and Counsel Ms. Campbell referred to ***Douglas v Warp & Anors.*** (1994). I take the view that precedents cited from the 1990s being more than 20 years old and the awards made in those claims are as far as I can perceive, out of congruence with the trend of awards made in more recent times, in relation to these types of personal injury cases. I have therefore taken the view that those precedents are no longer appropriate and therefore decline to rely upon them. I also am mindful of the Court of Appeals admonition that Judges are to strive for uniformity as best as possible in like circumstances and that, consistent awards are necessary to inspire confidence in the justice system.

[65] Counsel Miss Campbell on behalf of the Claimant seeks to rely upon the following five (5) cases as appropriate comparisons as to the quantum of damages to be awarded to the Claimant.

- In case of ***Wayne Hutchinson v Cyril Robinson –*** Claim No. 2010 HCV 00293; that claimant was involved in a motor vehicle collision and complained of injury to his right shoulder, right foot and lower back and bruising to the foot. The diagnosis was muscular-ligament strain to the lumbar spine and right shoulder, bruising and trauma to the foot. That Claimant was treated with anti-inflammatory and pain medication and advised to rest. His case was reviewed two (2) weeks later by which time his condition had improved and complete recovery was expected in 8-10 weeks. An award was made to Mr. Hutchinson in the sum of $1,500,000 on 19th June 2012.
- In ***Dalton Barrett v Poncianna Brown and Leroy Bartley –*** Khan vol 6, pages 104 & 105***.*** The Claimant as a result of motor vehicle accident and being assaulted thereafter had suffered pain to lower back, left shoulder and wrist as also contusions to the lip, lower back and left shoulder. He was diagnosed with mechanical lower back pains and mild cervical strain. His recovery period extended for almost one year and he had to undergo

physiotherapy and lifestyle modifications as part of his treatment. In November 2006 he was awarded a sum of $750,000 in general damages.

- ***Horace Williams v Knoeckley Buckley and Anor***. - Claim No. 2009 HCV 00247. This Claimant was also the victim of a motor vehicle accident and presented with moderate pain to his lower back, a result of strain to the ligaments of the lumbar vertebra. He was treated with analgesics and muscle relaxant and estimated recovery period was estimated to be 8 – 10 weeks. An award for general damages was made in the sum of 750,000 on 18th December 2009.
- ***Kenroy Higgins v Ralston Ebanks and Delroy Buckridge*** – Claim No. 2007 HCV 00442. The Claimant was a back seat passenger involved in a motor vehicle collision. He suffered resulting pain to neck and right shoulder as also a loss of consciousness. He was diagnosed with lower back strain and thoracic spine with moderate spasms, strain to right shoulder and cerebral concussion. He was granted 4 weeks sick leave treated with analgesics, muscle relaxants and topical Voltaren. He was advised to wear a back brace and undergo physiotherapy. He was awarded $1,300,000 in general damages on 8th July 2009.

[66] The three (3) precedents proffered by Ms. Reid which I consider to be useful and which Counsel submitted would be more appropriate in all the circumstances are as follows:

- **Lacquan Harvey (bnf Ann-Marie Nelson) v Phillip Mighty,** Claim No. 2010 HCV 05684. In this suit the Claimant suffered headaches, moderate and lower back pain. Also suffered from severe tenderness to the chest and had multiple glass splinters removed from that area. Treated with oral and topical medication. The resolution of his injuries was a slow process and was finally discharged after 18 weeks with no residual damage. For his pain and suffering and loss of amenities he was awarded the sum of $463,680 on 25th October 2013.

- In the cases ***Derrick Munroe v Gordon Robertson [2015] JMCA Civ 38.*** Mr. Munroe had complained of pain in the sternal region of his chest and lower back. The medical evidence submitted on his behalf indicated tenderness in the region of the left costochondral joints with increased tenderness during respiration and all chest movements and tenderness in the lumbar region in all ranges of motion. The Claimant fully recovered after a one (1) year period. An award of $300,000 was initially made on assessment in June 2009 and was affirmed on an Appeal.
- ***Derrick Crump v Andrea Bruce*** **[2016] JMSC Civ 71;** Following a collision between two (2) motor cars a claim and counterclaim was filed by the two drivers/owners of the motors cars involved. The claim was resolved in favour of the Defendant. The Defendant said he had felt pain across his right shoulder and head and was treated at hospital. The medical evidence disclosed that the Defendant suffered mild tenderness over his right anterior shoulder and upper arm, was treated with analgesics and sent home. An award made on 6th May 2016 *relative* to his pain and suffering was in the sum of $250,000.

[67] I also appreciate that although the injuries suffered by the Claimants in the above precedents are somewhat analogous none are on all fours with the present claim. After reviewing all the precedents It is my opinion that the injuries as suffered by this Claimant are most closely analogous to that suffered by the Claimant in ***Wayne Hutchinson*** and the Defendant in ***Derrick Crump v Andrea Bruce,*** that is to say muscular pain mainly to upper back and shoulder with no resulting permanent disability, but with some differences. I therefore regard these precedents as appropriate.

[68] The significant differences that I noted between the present Claimant and the two comparative precedents above is that the Claimant Mr. Wayne Hutchinson had sustained additional injuries to his foot and Mr. Bruce had abrasions in addition to the aches he suffered, therefore their pain and suffering would have been greater than the

present Claimant's. I also take into account that Mr. Hutchinson's recovery period was eight to ten (8 – 10) weeks but there is no evidence provided by the present Claimant as to his recovery period or period of discharge, I would however deem the recovery period to have been no more than 2 weeks having regard to the report of Dr. Rowe, that by day the Claimant's pain had started to subside. In that event this Claimant's recovery period was a considerably shorter period.

[69] I have also noted that the awards made to Claimants in the several precedents submitted by both Counsel are as varied as the hues of crayons in a box. The precedents proffered by Miss Campbell tend to be at the high end of the scale whereas those relied upon by Mrs. Reid are at the lower end. For my part I am mindful of the admonitions of the Court of Appeal to achieve consistency in the making of awards, but I cannot reconcile the significant differences in the precedents. I believe therefore that an average of the awards made in the 2 precedents (***Hutchinson and Andrea Bruce)*** would be a fair way of assessing the award to be made to the instant Claimant and thereafter to make a downward adjustment of 15% to account for the less severe injuries and shorter period of recovery he endured.

[70] On my calculations and utilizing the latest available August 2017 CPI of 243.4, the award in the case of ***Hutchinson*** updates to $2,271,935 and for ***Bruce*** to $265,721, the average of both awards is $1,268,828. I further adjust that figure downward by fifteen percent (15%) and award the sum of $ 1,078,503.80 to the Claimant as general damages.

Special Damages

[71] Special damages compensate the claimant for the quantifiable monetary losses suffered by him. It is trite law also that Special Damages must be specifically alleged in the pleadings and must be proven. In this Claims the items under this heading are:

- Decarteret Medical Centre (doctor's visit) $6,800
- Island Radiology $6,000

• Transportation expenses	$15,000
TOTAL	$27,800

[72] Four (4) receipts from the Decarteret Medical Centre and Island Radiology were tendered in support of the Claimant for special damages, but no receipts were submitted in relation to the transportation claim which expense is somewhat disputed by the Defendants. Inasmuch as the Defendants do not object to this claim in principle they object to the quantum alleged. Notwithstanding that these travelling expenses have been specifically pleaded, such expenditure is not supported by receipts and therefore the Court must determine if they ought to be awarded.

[73] The father who is the next friend of the Claimant has given cogent and detailed evidence of how the transportation costs were incurred. He testified that he had taken the Claimant via the bus from Alexandria to Brown's Town for medical treatment by Dr. Rowe on two (2) occasions at a total cost of $4,000; from Bening to Brown's Town on either four (4) or five (5) occasions at a total of either $6,000 or $7,500. He had also testified that on the day of the accident, he had expended $900 to charter a vehicle to transport the Claimant from Brown's Town to the St. Ann's Bay Hospital. He further testified that the trip to the Radiologist was from Brown's Town to Ocho Rios and was at a cost of $700 round trip; and the several visits made to Dr. McGill was at a total cost of $4,000.

[74] It was conceded by the Defendants that transportation costs would have been incurred, and that the sum of $5,000 and no more is recoverable in this regard. Having regard to the evidence of the witness David Bramwell, I am satisfied on a balance of probabilities that the sum of $15,600 was incurred and will be awarded accordingly.

COSTS

[75] In addition to damages, the successful party is entitled to be awarded his reasonable legal costs that he incurred during the case, this is the rule in this jurisdiction, and such costs are awarded at the discretion of the Court. Counsel Ms.

Reid has submitted *"that any costs recoverable ought to be in keeping with that recoverable in the Resident Magistrate's Court".* Counsel has not however expounded as to the reason for said submission. I however discern that Counsel's submission was predicated upon the provisions of sections 71,131 and 132 of the ***Judicature (Parish Courts) Act (formerly Judicature (Resident Magistrates) Act;*** and in anticipation of the general damages that she opined that the Claimant ought to be awarded, which she submitted should be $250,000. Such an award would have fallen way below the threshold monetary jurisdiction of the now Parish Court Judge (formerly Resident Magistrate).

[76] I do not believe that it would be just to accede to Counsel's request on the basis that:

I. The Claim was filed in 2011 long before the monetary jurisdiction of the Parish Court was increased. The jurisdiction of that Court up until January 15th 2013 was a maximum of $250,000 versus the now significant increase to $1,000,000.

II. The anticipated award as hoped for by the Claimant when the suit was initiated would have been in excess of $1,000,000 and therefore the Resident Magistrate's Court would have been an inappropriate jurisdiction to file the claim at that time.

III. The award that the Claimant has now obtained still exceeds the monetary jurisdiction of the Parish court.

[77] I am of the view that the issues arising in this case are straightforward; there is no evidence of any extensive or technical preparations by either Counsel and accordingly any cost awarded should reflect this position. I accordingly award the costs of $50,000.

THE ANCILLARY CLAIM

[78] Judgement has already been given in favour of the Ancillary Claimants on their claim and all that this Court is tasked with, is to determine the quantum of damages as proven on the evidence presented.

[79] The evidence of the Ancillary Claimant/2nd Defendant is short and in essence he indicates that he had expended $120,000 in repairing his motor vehicle and wishes to be reimbursed by the 4th Defendant. He also asked the Court to say that he is entitled to an indemnity and or contribution against the 4th Defendant relative to the Claim. I accept that if a motor vehicle is involved in a collision such as is described by the Claimant and 1st Defendant it is by no means improbable that there will be some physical damage to the said motor vehicles.

[80] In relation to the 2nd Defendant/Ancillary Claimant's damaged motor vehicle and the claim for damages this falls within the realm of special damages and must not only be specifically pleaded but also proven. There is no documentary evidence such as receipts, invoices or assessors report presented to the Court as to the extent of damage or cost of repairs, the only evidence led by the 2nd Defendant/Ancillary Claimant is a bald assertion as to what he spent on repairs. He said he purchased parts but did not itemize the parts that he said he purchased so as to lend some measure of credence to his claim.

[81] The Ancillary Claimant alleges that he had obtained documents evidencing the cost of repairs but said documents are now lost. Even if that is the case it would not have been difficult or onerous to have obtained verification, he could with reasonable effort get copies of lost receipts or some indication in writing from the seller of the parts. In my view this falls short of the proof expected of a Claimant, albeit it is proof on a balance of probabilities that is required.

[82] I nonetheless have given consideration to whether an award of nominal damages would be appropriate in the circumstances, since the fact of loss has been established by parole evidence and it is only the amount of the loss that has not been proven by documentary evidence.

[83] I have given consideration to such an award in light of the Court of Appeal's decision in ***George Rowe v Robin Rowe*** [2014] JMCA Civ. 46, delivered on 5th December 2014. The Court of Appeal in that case had pointed out that the general principle regarding damages is that, it is intended to be compensatory but nominal damages does not fulfil the same expectations. This principle was expounded in the case of ***Stoke-on-Trent City Council v W & J Wass Ltd*** [1988] 3 All ER 394. In that case, Nourse LJ at pages 397-8 of the report said that:

> *"The general rule is that a successful plaintiff in an action in tort recovers damages equivalent to the loss which he has suffered, no more and no less. If he has suffered no loss, the most he can recover are nominal damages..."*

[84] Brooks, JA. Delivering the judgement of the Court then went on to point out that the concept of nominal damage is well established in the common law but the awards made in relation to that principle are varied and in some cases quite high. He also acknowledged that the concept of nominal damages exist in this jurisdiction and has been awarded regularly. The learned Judge of Appeal pointed out that; *"locally, the awards for nominal damages have varied significantly as well"*. At paragraph 62 he admonished that:

> *"Trial judges must be mindful, however, that if they are of the view that only nominal damages are merited, there should be compliance with the principle explained in The Mediana".*

[85] The Earl of Halsbury, LC had explained the concept of nominal damages from as far back as 1900. He did so in The ***Owners of the Steamship 'Mediana" v The Owners, Master and Crew of the Lightship "Comet" - The Mediana*** [1900] AC 113. At page 116, the learned Lord Chancellor pointed out that nominal damage:

> *"Is a technical phrase which means that you have negative anything like real damage but you are affirming by your nominal damages that there is an infraction of a legal right, which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed..."*

[86] Brooks, JA. in the ***Rowe*** case (albeit a decision of the Court of Appeal on a separate and distinct cause of action), having considering a long line of local authorities sets out the principle on making an award of nominal damages, which I am prepared to follow. In short nominal damages cannot equate compensatory damages. The Judge of Appeal made an award of $50,000.00 as nominal damages, which he deemed an appropriate award. I would in the circumstances of this case follow suit and make a like award.

DISPOSITION

With Respect to the Claim:

[87] Damages are assessed jointly and severally against the Defendants and the Court hereby orders as follows:

The 1st and 2nd Defendants 50% and the 3rd and 4th Defendants 50%

1. General Damages in the sum of $1,078,503.80 with interest of 3% from 22nd August 2011 until 26th October 2017
2. Special Damages in the sum of $15,600 with interest of 3% from 18th January 2011 until 26th October 2017
3. Costs in the sum of $50,000

With respect to the Ancillary Claim

1. The 1st and 2nd Defendants/Ancillary Claimants are entitled to a contribution against the 4th Defendant
2. In lieu of the Special damages claimed the amount of $50,000 is awarded as nominal damages
3. Cost is awarded in the sum of $50,000.