



[2021] JMSC Civ 157

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2014HCV01465**

<b>BETWEEN</b>	<b>SHANIEL GAYLE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DERVEN HENTLEY PATRICK</b>	<b>DEFENDANT</b>

**IN OPEN COURT**

Ms. Monique Thomas instructed by Bignall Law for the Claimant

Mr Clifton Campbell instructed by Archer, Cummings and Associate for the Defendant

Heard: June 22<sup>nd</sup>, 2021 and September 24<sup>th</sup>, 2021

**Negligence – Collision between pedestrian and motor vehicle – contributory negligence – duty of care – standard of care – liability – quantum of damages**

**HUTCHINSON, J**

**INTRODUCTION**

[1] The matter before the Court finds its genesis in a collision which occurred sometime in the night of the 17<sup>th</sup> of March 2013. The collision occurred at Jobs Lane, Spanish Town between Ms Gayle, who was then a minor and a motor vehicle which was being driven by Mr Patrick. The case for Ms Gayle alleges that the collision occurred as a result of the negligence of Mr Patrick in the operation of his motor vehicle along the said roadway. On the 26<sup>th</sup> of March 2014, this action was filed on behalf of the Claimant in which she seeks damages for negligence in respect of injuries and loss which she said were suffered by her. On the 17<sup>th</sup> of August 2018, an amended particulars of claim was filed in which it was indicated

that reliance was also being placed on the doctrine of *res ipsa loquitur*. The amendment included particulars of additional injuries sustained and medical reports in support thereof.

[2] A defence was filed on behalf of Mr Patrick on the 9<sup>th</sup> of March 2015 in which he denied being negligent. He also indicated that the collision had occurred as a result of the failure of Ms Gayle to keep a proper lookout, he also alleged that she stepped into the path of his vehicle. On the 6<sup>th</sup> of September 2018, an amended defence was filed on behalf of Mr Patrick in which he took issue with the applicability of *Res Ipsa Loquitur*.

[3] From the evidence provided it is clear that the following facts are not in dispute between the parties;

- a. the Claimant had been posing for pictures at the time of the collision between her and the Defendant's motor vehicle.
- b. She was standing in the road in the company of another person at the relevant time.
- c. She was knocked to the ground as a result of the collision and;
- d. She was transported by the Defendant to the Spanish Town Hospital.

## **ISSUES**

[4] In addition to the question of the credibility of the respective parties, the issues which have arisen for determination by this Court are as follows;

- i. Did the Defendant owe a duty of care to the Claimant?
- ii. Was there a breach of this duty which resulted in the collision and injury to the Claimant?
- iii. Was there contributory negligence on the part of the Claimant?

- iv. Does Res Ipsa Loquitur apply?
- v. The quantum of damages, if any, to be awarded to the Claimant.

### **CLAIMANT'S ACCOUNT**

- [5] The evidence in chief of Ms Gayle was outlined in her witness statement, which was amplified with permission to a limited extent, after which she was cross examined. It was her evidence that about 8:30 that night she left her home and walked along Jobs Lane en route to a party which was being held by a friend. On her way there, she stopped to speak to another friend and then she began to take photographs. She described the roadway as narrow and lonely and stated that it didn't have much traffic. She also said that it was lit enough to see which she later explained meant it had streetlights as well as lighting from houses.
- [6] She stated that while taking the photos she was on the ride side of the road facing the oncoming traffic when she was hit from behind by the motor vehicle which was being driven by the Defendant, which she insisted was on the wrong side of the road. Ms Gayle stated that as a result of being hit she fell to the ground and lost consciousness and only regained same at the Spanish Town Hospital. She gave an account of having been hospitalised for 3 days with bruises and a head injury but in cross examination, having been shown the report from the hospital, she accepted that she had only been hospitalised for 24 hours.
- [7] She stated that as a result of her injuries she suffered migraines as well as a sharp pain in her ear which still affects her. As a result of the headaches and ongoing issues with her hearing she was seen by Dr Liburd on whose report she relies. She was also referred to an ear specialist. She complained of a hearing deficit which has resulted in persons having to shout in order for her to hear them.
- [8] Ms Gayle was cross examined and in her response to questions about her movements that evening she stated that she was actually leaving the location of the party at 9:30 pm. She denied that it was ever her intention to attend the party

and stated that she didn't really know who was putting on the event. She also testified that she had only attended that location in order to get a ride from someone to go elsewhere. She insisted that there was no light on Mr Patrick's vehicle, neither was there any sound of a horn or an engine preceding her being knocked to the ground. She denied that she was in the middle of the road and took a step backward into the path of the vehicle and she maintained that she had been paying attention to the road even while posing for pictures.

### **Medical Reports**

- [9] There were two medical reports which formed a part of the agreed documents in this matter. The first was that of Dr Jody-Ann Woolery who treated Ms Gayle at the Spanish Town Hospital. Her findings on examination of Ms Gayle was that there were multiple abrasions to her right cheek, a 5mm abrasion to the right ear lobe and abrasions to the left forearm. No fractures were noted to the skull and there was a normal range of motion of all her limbs. Her diagnosis was a mild head injury secondary to the motor vehicle accident (MVA).
- [10] The second report dated September 6<sup>th</sup>, 2014 was prepared by Dr Geoffrey Liburd who saw the Claimant over a year after the accident on the 22<sup>nd</sup> of August 2014. In his report, Dr Liburd stated that the Claimant consulted him for an assessment of persistent headaches and slightly decreased hearing in her right ear which she reported as having started after her involvement in a MVA. He noted that Ms Gayle reported that she had experienced bleeding from the ear at the time of the incident, a situation which I noted was not stated in the report from Dr Woolery. He stated that Ms Gayle complained of recurring headaches and dizziness. She also expressed a concern that she did not hear well at times from her right ear.
- [11] On physical examination of Ms Gayle he observed that her general physical findings were normal. This was also true of her mental status and no memory impairment was seen. He noted that his findings on examination of the Claimant's right eighth cranial nerve was consistent with subtle right sided sensorineural

hearing loss. Dr Liburd acknowledged that the report from Dr Woolery stated that skull x-rays were done and no fractures seen but noted that the x-ray report and film were not available to him for examination. His diagnosis was mild post concussive syndrome and right sensorineural hearing loss possibly due to a basal skull fracture.

- [12] The prognosis was that the majority of individuals with this diagnosis would see it being resolved within 3 months, it was noted however that some individuals' symptoms may take up to a year after injury to be resolved, whereas others had symptoms for an extended period. The doctor observed that given the fact that Ms Gayle had reported suffering from headaches and dizziness less frequently, she was expected to have a good outcome.
- [13] In response to a question from the defendant's counsel as to his ability to diagnose Ms Gayle with a basal skull fracture in spite of not having had sight of her x-rays Dr Liburd stated that such a diagnosis was not based exclusively on the findings of an x-ray but was based on a combination of history, examination findings and investigations. In respect of his diagnosis of the Claimant suffering from post-concussive syndrome he explained that her report of headaches and dizziness in the context of her medical history were in his view consistent with this conclusion.

## **DEFENDANT'S ACCOUNT**

- [14] Mr Patrick also provided a statement which stood as his evidence in chief after which he was cross examined extensively by Ms Thomas. It was his evidence that on the 17<sup>th</sup> of March 2013 at approximately 11:30 pm he was driving his Nissan Frontier motor truck registered 0578 GJ along the Spanish Town bypass after which he turned onto Jobs Lane. He described the road as straight, asphalted and dry and stated that he was travelling at a speed not exceeding 25 miles per hour.
- [15] On reaching a section of the roadway he had to slow down in order to cross over a drain when he saw two persons in the road. He recounted turning on his high beam as he was concerned about being held up in that neighbourhood. He then

realised that it was two females, one of whom was in the road while the other was on the side of the road. Based on the position of the females he surmised that he would be able to safely pass as their positions did not impede his vehicle.

- [16]** He stated that he was in the process of doing so when the female who was in the roadway with her back to his vehicle stepped backward bringing her into the path of his vehicle. He said that she collided with the right front fender after which she fell to the ground. On seeing her fall he stopped the vehicle, which was left hand drive and opened his door. He stated that the left side of his vehicle was so close to the left curb wall that the door hit the sidewalk when he did so. He was assisted in placing the Claimant into his vehicle after which he transported her to the Spanish Town Hospital. He recalled that on his way to the hospital Ms Gayle began crying and told him that she had been taking photographs and had not seen his vehicle until after she had taken a photograph. He said the he ensured that the Claimant was receiving treatment after which he attended the police station and made a report.
- [17]** He noted that neither the Claimant nor her friend blamed him for the collision that night and stated that he had seen and interacted with her after this incident and observed that she appeared not to have any issues. He outlined that damage was done to his vehicle as a result of this collision specifically to the right front fender, the bumper was shifted and the right front small headlamp fell out. He denied colliding into Ms Gayle and stated that the collision was caused by her own negligence that night.
- [18]** In cross examination he stated that when he first saw the females they were about 44 yards from him and the Claimant was in a crouching position in the roadway facing her friend who was over to the right side of the road. He later explained that the crouching position he described appeared to be a pose. He acknowledged that he did not blow his horn and stated that he thought it was more effective to put on his high beam. He said he had been driving for 35 to 40 years at the time of the accident and did not think he needed to blow his horn as in his judgment there was

sufficient space for him to pass. He said that all his headlamps were on as well as his high beam and he assumed that the females had seen same but decided not to move out of the roadway so he decided to drive around them.

- [19] He stated that he had been flicking the headlamps at the females as he approached but they still did not move. It was suggested to him that he had not mentioned doing so in his statement and he said he had mentioned it to his lawyer. He was shown his statement and accepted that this detail was not recorded there. He denied the suggestion that he had been speeding at the time of the collision and he insisted that the Claimant had been in the middle of the road. It was also suggested to him that he had lost control of the vehicle and ended up on the opposite side of the road where he collided with Ms Gayle and he maintained that this did not occur. He was asked about his remark in the statement that Ms Gayle had scars prior to the accident and he explained that he referred to the markings as scars but he now understand them to be called tattoos.

### **Credibility of the Parties**

- [20] In respect of the issue of the credibility of the parties, I considered the guidance provided in the decision of ***Alvan Hutchinson v Imperial Optical Limited and Hugh Foreman*** C L H035/1999 in which was cited by Ms Thomas. In that decision the issue of credibility was examined by McDonald-Bishop J, as she then was, who made the following pronouncement;

*“It is the Claimant who must satisfy the Court on a balance of probabilities that he has proven the allegation of negligence against the Defendant. It has to determine which of the accounts put forward by the Claimant and the Defendant is more believable. Credibility plays a pivotal role in this exercise, and the Court in assessing credibility will have due regard to the demeanour of the witnesses.”*

- [21] The relevant principles which were enunciated in the decisions of ***Richard Rowe v Joseph Lloyd Thompson*** [2017] JMSC Civ 90 and ***Cranmer King v Jamaica Public Service Limited & Leslie Bryan*** C L K 013/1984 (June 23, October 20, 1988, June 5, 1989 and April 3, 1990) were also considered.

- [22]** It was submitted by Ms. Thomas that the evidence of the Claimant should be accepted by the Court over that of Mr Patrick. In support of this position Counsel posited that the only area on which Ms Gayle's account had been successfully challenged was the period for which she had been admitted to the hospital. Ms Thomas submitted that this was a mere misstatement which was explained away by the fact that Ms Gayle had relied on what she had been told by her mother and this difference was not sufficient to call into question her credibility as a whole.
- [23]** She argued that in contrast the evidence of Mr Patrick was inconsistent in a number of respects. The first example cited in support of this argument was his response in cross examination that he did not actually see the Claimant step back. Ms Thomas submitted that this was diametrically opposed to what had been stated by him in his evidence in chief where he had recounted seeing the Claimant change position and step back. Counsel also contended that the first time that Mr Patrick made mention of flashing his lights was under cross examination, she also pointed to his concession that this detail did not appear in his statement.
- [24]** The final example highlighted in this regard was Mr Patrick's remark that although he had said that the Claimant had scars on her body before the accident he had since realised that they are actually called tattoos. Ms Thomas submitted that the sum total of these differences served to undermine the reliability of Mr Patrick's account and he ought not to be relied on as a witness of truth.
- [25]** In my examination of the Claimant's evidence, I observed that contrary to Ms. Thomas's assertions that she had only been inconsistent in one respect, Ms Gayle's account had a number of inconsistencies. Not only did she contradict the chronology of her movements at the time of the incident, but she also sought to deny that she was going to a party and insisted that she only went there to get a ride to go elsewhere.
- [26]** Additionally, although it was recorded in her statement that the party was being held by a friend she responded in cross examination that she did not know who

was hosting same. I also noted that although she provided no details in her statement of observing of the vehicle on its approach she insisted in cross examination that it had no lights illuminated and had been travelling on the wrong side of the road. There was no explanation provided by Ms Gayle in respect of these differences and I was left with some questions in respect of the reliability of her account.

**[27]** In respect of Mr Patrick, while I noted his evidence in respect of the ‘scars’ observed on the Claimant’s body, I did not form the view that he was seeking to resile from his earlier account. I found that he was straight forward and frank as he explained that while he had formed the view that the markings on the Claimant’s body were scars, he later learned that they were actually called tattoos. He also struck me as being honest in making this clarification. It was his evidence that he is a retired health worker and he was also elderly in appearance. As I assessed his evidence and examined his demeanour I was satisfied that his explanation was not only credible but also a reflection of how these markings were interpreted by him from his perspective.

**[28]** I also considered the Defendants concession that it was not outlined in his statement that he had ‘flashed his lights’ at the Claimant as he approached. He explained that he had in fact provided this detail to his attorney but it was only recorded that he saw the two persons in the road and put his light on high beam. I have considered the submission of Ms Thomas on this point as well as the explanation of Mr Patrick and the statement itself, while I accept that the statement only makes reference to putting on the high beam as opposed to flashing the light, I did not form the view that this was a discrepancy which went to the root of his credibility. The very act of putting on his high beam would in my view have had the same effect as the ‘flashing of the light’ that is, alerting the individuals in the road of the approach of an oncoming vehicle.

**[29]** In respect of the final portion of the Defendant’s evidence identified by Ms Thomas, I agree that by stating that he did not see when the Claimant step backwards, Mr

Patrick had departed from what was recorded in his statement where it was stated that while proceeding to pass her, she changed position and stepped backwards into the right front fender. In addressing this difference in his evidence Mr Patrick explained as follows;

*What I can say is that the front of my vehicle had already passed her and the only way she could have come into the side was if she had stepped back or changed position.*

[30] While it was significant that he conceded that he did not see the actual movement, what is clear is that he had seen the Claimant in the road as he proceeded to move around her and was in the process of doing so when she came into contact with the front of his vehicle. Whether this was because she moved or he was closer to her than he had realised, he is consistent that he had in fact been passing her at the time and had positioned his vehicle accordingly. While this manoeuvre left me with questions as to the soundness of his judgment in this regard, I did not form the view that it was sufficient to call his reliability as a whole into question.

### **Did the Defendant owe a duty of care to the Claimant?**

[31] In order to establish liability, the Claimant must prove that she was injured as a result of the defendants' negligence. In doing so she must establish that the defendant owed a duty of care to her and that there was a breach of that duty. It must also be proved that the said breach caused her to suffer injury and loss. This principle was expressed by Lord Atkin in ***Donoghue v. Stevenson [1932] A.C. 562***, in the following terms: -

*"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question".*

[32] The legal principles enunciated in that decision were applied by our Court of Appeal in **Glenford Anderson v. George Welch [2012] JMCA Civ.43** where Harris JA stated as follows;

*“It is well established by 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 the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty .....*”

[33] In **Donoghue v Stevenson** (supra), it was established that the care which should be taken is based on the foreseeability test and the standard of care is that of the ordinary reasonable man placed in the same circumstances as the defendant. In cases involving persons who are road users, whether pedestrians or motorists, the standard of care is that of the ordinary and reasonable road user.

[34] The legislative framework in relation to the existence of such a duty is found in the Road Traffic Act, Section 32 (1) of which imposes a general duty on all motorist to drive with due care and attention for all other road users and provides as follows:

*“if any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence”*

[35] Section 51 of this Act imposes specific duties on motorists and section 51(2) cautions every driver that they have a duty to take necessary action to avoid an accident where it states;

*“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.”*

[36] The common law duty of a driver of a motor vehicle to use proper care not to cause injury to other road users was recognised in **Bourhill v James Young 1941 S.C. 395**. In **Nance v British Columbia Electric Company Ltd [1951] AC 601** the

common law and statutory duty of drivers to exercise reasonable care while operating their vehicles on the road was also addressed. In the latter decision the Court made it clear that all road users, including pedestrians, owe a duty of care to other road users. This is seen at page 450 of the decision where Viscount Simon stated as follows;

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

[37] Applying these legal principles to the instant matter, it is clear that Mr Patrick as the driver of the Nissan Frontier motor vehicle was under a duty of care to other road users which included the Claimant. This duty required him to operate the motor vehicle in a manner that would not cause harm or create a risk of harm to others. The standard of care which would have been expected of him includes;

1. Driving with due care and attention.
2. Driving within the speed limits while taking into account the road conditions and vehicular and pedestrian traffic
3. Keeping a proper look out for other road users, including pedestrians
4. Honking his horn to alert other road users, to the presence or the approach of his vehicle;

**Was there a breach of this duty which resulted in the collision and injury to the Claimant?**

[38] The existence of this duty of care having been established, I then considered whether there had been a breach of this duty by Mr Patrick. It was the evidence of Ms Gayle that on the night in question she had been standing in the road but on the right side facing the oncoming traffic. Although it was suggested to Mr Patrick that he had lost control and ended up on the opposite side of the road where he collided with her, no such evidence was actually given. The extent of what she was

able to recount was that she was facing the direction of oncoming traffic when she was hit to the ground and lost consciousness.

**[39]** Ms Gayle's account was silent as to the manner of the Defendant's driving. Neither was she able to say whether he had in fact speeding. What she did say however was that she did not hear an engine or a horn and she saw no headlights even though she was watching the roadway. As far as her evidence goes, she asserts that there was a breach of this duty not because she can speak to Mr Patrick's manner of driving but because she says he ended up on the other side of the road where she had been standing.

**[40]** On Mr Patrick's account, he was able to see the Claimant from an estimated distance of 44 yards away. As he drew closer he was able to see that she was crouched in the road taking pictures with her side towards him. He said his headlamps were on and he also flashed his lights, even though he acknowledged that this detail did not appear in his statement. It is evident from his account that even if he 'flashed her' the Claimant did not move. He outlined that his next course of action was to drive around her by going further left in his lane. While there is a question as to the reasonableness of the Claimant's actions in posing for pictures in the road, Mr Patrick's response also raises questions in respect of the standard of care displayed by him.

**[41]** Although he gave evidence that his speed did not exceed 25 mph, he was still under a duty to drive with due care and this included the responsibility of blowing his horn to alert other road users as to his presence. Mr Patrick accepted that he did not blow his horn and he sought to explain this failure by saying that based on the nature of the community the possibility existed that a stone could have been thrown at his vehicle had he done so.

**[42]** In these circumstances, I am of the view that Mr Patrick displayed a lapse in good judgment, as the lack of response to the flashing headlamps on the part of the Claimant increased the importance of blowing his horn to alert her to the approach

of the vehicle regardless of the nature of the neighbourhood. What happened instead was not only did he assume that Ms Gayle should have seen the flash of his headlamps but he also took it for granted that she would remain static while he drove around her. It is my opinion that by taking the approach that he did, Mr Gayle committed a clear breach of his duty of care to the Claimant and this failure contributed to the collision which occurred.

**Was there contributory negligence on the part of the Claimant?**

[43] Although I arrived at this conclusion in respect of Mr Patrick's breach of his duty, the circumstances of this particular case required that consideration be given to whether there had been contributory negligence on the part of the Claimant. In examining this issue, I note that it is settled law that pedestrians also owe a duty of care to other road users. In ***Robert Franklin v Everton Walters et al [2021] JMSC Civ 36***, which was cited by Ms. Thomas, Hart-Hines J (Ag) noted that this standard of care includes;

1. Taking reasonable care for his own safety when on the road;
2. To avoid walking on the roadway with one's back to the traffic;
3. Using sidewalks or footpaths when there is one, and when there is none, walking on the right hand side of the road, facing oncoming vehicles;
4. To avoid walking into the roadway from in front, behind or in between stationary vehicles; and
5. Ensuring that one can see vehicles and be seen

[44] The Law on contributory negligence is found at Section 3(1) of the Law Reform (Contributory Negligence) Act (Jamaica.) and it reads:

*"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage*

*shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damages".*

- [45] In **Jones v Livox Quarries Ltd [1992] 2 Q.B. 608,615**, it was noted by Denning L.J. that a Claimant will be found guilty of contributory negligence if there is evidence that he did not act as a reasonable and prudent man in circumstances where he ought reasonably to have foreseen that by failing to act as a reasonable and prudent man, he might hurt himself, taking into account the possibility of others being careless. Where the Defendant raises contributory negligence the burden of proof on a balance of probability rests on him (see **Caswell v Powell Duffryn Associated Collieries Ltd. [1940] A.C. 1**).
- [46] In order to establish contributory negligence, the Defendant must prove on a balance of probability that the Claimant is partially to be blamed for her own injuries. That is, she failed to operate in a manner, acting as a wise and prudent road user, in order to avoid injury to herself. Once the Claimant is found to be contributory negligent, the award in damages should be reduced based on her percentage of contribution as determined by the court
- [47] It is the Claimant's evidence that on the night of question she was in the roadway posing for pictures. Although she insisted that she was facing oncoming traffic, it is evident that by engaging in such an activity while on the roadway Ms Gayle failed to take reasonable care for her safety. This conclusion finds support in the fact that although she insisted that she had been paying attention to the road, she saw no headlights neither did she hear an engine, even at the point when the vehicle was upon her. This oversight takes on particular significance given the fact that Ms Gayle was fully aware that this was a roadway which was traversed by vehicular traffic.
- [48] In light of the foregoing, I am satisfied that there was contributory negligence on the part of the Claimant. As such, I am persuaded on a balance of probability that the

liability for this collision rests on both parties. It is evident however that while they are both liable, the greater liability rests on Ms Gayle as by electing to pose for pictures in the road, she was distracted to the point that she was unable to even give an account as to how she was knocked to the ground. I am satisfied that the appropriate apportionment taking into account the circumstances of this case is in the range of 80% liability being borne by the Claimant and 20% by the Defendant and this apportionment would apply to the damages assessed.

### **Res Ipsa Loquitur**

[49] The issue of Res Ipsa Loquitur has also been raised on the part of the Claimant in her amended pleadings. While there were no submissions on the point, the application of this legal principle was examined by our Court of Appeal in the decision of **Coke v Rhooms etal [2014] JMCA Civ 54** where Brooks JA stated as follows;

*In Shtern v Villa Mora Cottages Ltd and Another [2012] JMCA Civ 20, Morrison JA, in his characteristically thorough style, assessed the application of the doctrine of res ipsa loquitur. In his judgment, with which the other members of the court agreed, he cited the leading cases on the doctrine and, at paragraph [57], summarised the relevant principles: “[57] Res ipsa loquitur therefore applies where (i) **the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Lindsell, [19th Ed], para. 8-152 provide an illustrative short-list from the decided cases: ‘bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns’); (ii) the thing that inflicted the damage was under the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place. As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on Henderson v Jenkins & Sons [[1970] RTR 70, 81 – 82], that ‘Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine’.**” (Emphasis supplied)*

[50] Having outlined the relevant considerations, His Lordship then went on to find as follows;

*It is fair to say, based on the highlighted portion of that extract, that the present case is not one where there is “no evidence as to why or how the [collision] took*

*place". Constable Coke both pleaded in his particulars of claim and testified as to what occurred. Res ipsa loquitur, therefore, does not apply in this case.*

[51] Applying these legal principles to the instant case, it is clear that there is in fact evidence, provided by Mr Patrick, as to how this collision occurred and as such this principle would not apply.

### **The quantum of damages, if any, to be awarded to the Parties**

#### **Special Damages**

[52] The issue of special damages did not appear to be controversial. In considering the appropriate sums to be awarded, I noted that there were some differences between what had been pleaded and what was eventually proved in evidence or by agreement. As such, I was satisfied that the appropriate sums to be awarded is \$72,000 the breakdown for which was outlined in the following the agreed documents as follows;

- i. Receipt issued by Spanish Town Hospital dated 9<sup>th</sup> October 2013 in sum of \$2000
- ii. Receipts issued by Dr Geoffrey Liburd on 22<sup>nd</sup> and 27<sup>th</sup> August 2014 in sums of \$10,000 and \$50,000.
- ii. Receipt issued by Dr Guyan Channer dated 28<sup>th</sup> August 2014 in the sum of \$10,000.

#### **General Damages**

[53] On the subject of the quantum of damages to be awarded for pain and suffering a number of authorities were cited by Ms Thomas as to what would be the appropriate award in light of the injuries sustained by Ms Gayle. In my outline of the respective cases of the Parties, I made specific reference to the injuries which were reported as having been sustained by Ms Gayle.

- [54] Upon examination of the medical reports provided, I noted that the contents were somewhat different in at least one important respect. Dr Woolery who treated the Claimant on the night of the incident only observed abrasions and reported that an x-ray done showed no skull fracture. However, the diagnosis of Dr Liburd who saw her over a year later was mild post concussive syndrome and right sensorineural hearing loss possibly due to a basal skull fracture. Dr Liburd acknowledged that the latter diagnosis was not based on an x-ray report but comprised of a combination of the history of the Claimant as report by her, examination findings to include those of Dr Woolery and investigations conducted by him.
- [55] Dr Liburd also offered the prognosis that the Claimant would have a good outcome as the frequency of the Claimant's headaches and dizziness had declined significantly. In my assessment of these reports, I carefully observed the Claimant as she provided her evidence and was cross examined. While I would not seek to provide a medical opinion on the Claimant's progress, I noted that she was able to hear and respond to questions from Counsel as well as the bench without any apparent difficulty. Although she had been referred to an ear specialist and gave evidence of being assessed by this individual, there was no report provided to assist the Court on the current state of her hearing. The sole evidence in this respect came from her where she stated that she has become use to her hearing deficit and manages as best as she can.
- [56] Ms Thomas provided two authorities the first of which was ***Henry Bryan v Noel HoShue etal*** which is reported at Volume 5 Khan pg 177. In that matter the Claimant sustained abrasions to the frontal scalp and suffered severe headaches, dizzy spells and excruciating pains in the back. He had no disability, the award given in September 1997 was \$350,000, using the CPI for June 2021 of 110.58, this sum updates to \$2,237,167.63. The second authority cited was ***Bernice Clarke v Clive Lewis CL2001/C234***, judgment delivered April 2003. In that matter, the Claimant complained of pain all over her body particularly in her head, eyes, shoulder and foot. She was subsequently diagnosed with mild cerebral

concussion. The award given for general damages was \$550,000 which updates to \$2,194,047.61 once the June 2021 CPI is applied.

**[57]** I have examined these authorities and acknowledge that the injuries suffered by Bernice Clarke were very similar to those of Ms Gayle. While I accept that the report of Dr Liburd outlined that the Claimant had suffered a basal skull fracture, which would be a more serious injury than that of Ms Clarke, I had questions as to the reliability of this diagnosis as it was not based on an updated x-ray and the x-ray which had been done when the Claimant was initially treated, showed no fractures. I accept however that she suffered a head injury and that this was wholly attributed to the collision. Accordingly, I am prepared to make an award in the sum of \$2.2 million which would be apportioned in keeping with the 80:20 ratio against the Claimant.

**[58]** In conclusion, my ruling is as follows, judgment for the Claimant, with contributory negligence assessed at 80:20. Special damages are awarded in the sum of \$72,000 with 3 % interest from the 17<sup>th</sup> of March 2013. The same rate of apportionment is to apply. General damages awarded in the sum of \$2,200,000 with 3 % interest applied from the 9<sup>th</sup> day of March 2015. This sum is also to be apportioned 80:20. The Defendant is also to pay the Claimant 20 percent of her cost.