IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2008HCV05180

BETWEEN	**CRAIG MARTIN**	**CLAIMANT**
	(B.N.F. Carmen Brown)	
AND	**JOHN ARCHER**	**DEFENDANT**

Mrs. Tameka Jordon, Ms. Tamara Malcolm and Nicholas McNeil-Manley

instructed by Jacqueline Samuels-Brown, Q. C. for the claimant

Mrs. Suzette Campbell instructed by Campbell & Campbell for the defendant

Heard: December 2, 2010 & December 19, 2011

Negligence – motor vehicle accident – child victim - 13 year old boy injured in motor vehicle collision while crossing the road - standard of care required of defendant - whether breach of duty of care by defendant- whether defendant liable

Civil Procedure- defendant's failure to properly set out case in defence - facts not pleaded contained in witness statement - whether defendant ought to be permitted to rely on facts not pleaded - CPR, r. 10.5 & 10.7

McDONALD-BISHOP, J

[1] The claimant, now sixteen years old, has brought this claim by his mother and next friend, Carmen Brown, against Mr. John Archer, the defendant, for damages for negligence. The claim arose out of a motor vehicle collision that occurred on 21 August 2007 along the Porus Main Road in the parish of Manchester between the claimant and a motor vehicle driven by the defendant.

[2] The claimant's contention is that the defendant drove his motor vehicle in a negligent manner causing it to collide in him while he was in the process of lawfully crossing the Porus main road resulting in injuries, damages and losses. By his Particulars of Negligence he alleges several bases on which he is contending the defendant acted negligently.

[3] The defendant has, however, denied the claimant's averment of negligence and is contending, instead, that the accident was caused and/or contributed to by the negligence of the claimant. The defendant's allegations of negligence are also particularized in his defence as filed.

[4] The pleadings reveal that there is no dispute that the claimant was hit by the defendant's motor vehicle on the date in question. The dispute concerns the circumstances in which the collision occurred and who is to be blamed for the collision. Both parties have advanced different versions of the event leading up to the collision, aspects of which will now be examined.

The claimant's version

[5] The claimant gave evidence on his own behalf and sought to rely on the evidence of his grandmother, Ms. Mavis Brown, as to how the collision occurred. His evidence on this aspect of the case may be summarized as follows. He was travelling along the Porus main road in a market truck coming from Spaldings direction and heading for Kingston. He was in the company of his grandmother, grand-uncle and other persons on the truck. Upon reaching Porus, the truck stopped to allow the passengers a rest break. The truck pulled over to the side of the road. When the truck stopped, he alighted from the vehicle with the help of his grand-uncle. His grandmother and grand-uncle also alighted from the truck. His grandmother went to use the restroom and instructed him to wait for her at the side of the truck. His grand-uncle left the truck and went across the road to purchase food for them.

[6] His grandmother returned from the restroom and joined him at the side of the truck. He saw his grand-uncle returning from the shop and he wanted to go across the road to meet him. His grandmother told him to wait. Both he and his grandmother looked up and down the road to ensure that it was safe for him to cross. He did not see any vehicle coming and his grandmother told him to cross the road.

[7] He commenced crossing the road and as he reached the middle of the road, he suddenly felt a forceful and painful impact to the side of his body. He landed on the other side of the road where his grand-uncle was by the shop. He was taken up by his grandmother and another lady. He was in a lot of pain and he realized that he was hit by a van. The driver of the van came out the van and took him with his grandmother to the Porus Police Station and later to the Mandeville Hospital. He received treatment at the hospital.

[8] Under cross-examination, the claimant stated, among other things, that the truck had moved completely from the side of the road and had gone into the parking area of a plaza. No part of it was on the surface of the road, he said. He said there was no other vehicle parked along the roadway and he denied that he was at a van speaking to someone with his back turned to the road prior to the collision. He said he did not hear any horn from the defendant's vehicle. He denied that he ran into the path of the defendant's motor vehicle suddenly and without warning thereby causing the accident. In short, he denied all material aspects of the defendant's case that was put to him.

The claimant's witness

[9] The claimant's witness, his grandmother, testified that she cannot read but that she gave a witness statement that was read over to her and to which she had affixed her mark as an indication that it was true and correct. Her witness statement stood as her evidence-in-chief. In that evidence, Ms. Brown recited, in almost identical terms to the claimant's witness statement, how the accident occurred. In essence, she said that she went to the restroom and returned to where the claimant was standing beside the truck at the side of the road. He wanted to go across the road to go to meet his grand-

uncle. She said before allowing him to cross, she looked up and down the road and she saw no vehicle coming. She then advised him to cross.

[10] Upon her instruction, the claimant began walking across the road and she was still looking at the road. Just as the claimant was almost finished crossing the road, the defendant's vehicle suddenly came and hit him. The defendant's vehicle was going fast. The claimant dropped on that side of the road and on the side walk. She ran across the road and with the help of a lady she picked him up. She was making noise as she was frightened. The claimant was crying and screaming for pain. The defendant came over and she asked him why he hit down her grandson. The defendant then took them to the police station and then to the hospital.

[11] Ms. Brown was subject to cross-examination during the course of which her evidence radically departed from her evidence-in-chief. Under cross-examination, she stated, in relation to this aspect of the case, that she was not present at the time the accident occurred. She said she left the claimant at the side of the truck and went to use the restroom. She told him "to stand right there." On her return, she heard persons crying out that the defendant's vehicle had hit the claimant. She stated that by that time, the accident had already happened. She, therefore, could not speak to how the claimant got hit. She denied that after the collision she was scolding the claimant for going across the road.

The defendant's version

[12] The defendant gave evidence on his own behalf. In summary, it goes like this: He was travelling alone along the Porus main road coming from Mandeville and going towards May Pen. He was travelling at about 35-40 km/ph. There was no vehicle directly in front of him. On the opposite side of the road (that being to his right) there was a market truck with produce and people inside of it. There was also a market truck on his side of the road. There was a small pick- up van in front of the market truck on his side of the road.

[13] He saw the claimant standing by the right door of the pick- up speaking with someone who was sitting in the driver's seat. He tooted his horn and as he was about to pass the pick – up, the claimant suddenly turned and ran across the road into the path of his vehicle. Upon seeing the claimant running in the path of his vehicle, he pressed his brakes and swerved to the right side of the road to avoid colliding with the claimant. The claimant, however, collided with the left front bumper and bonnet of his vehicle. His vehicle came to an immediate stop upon the collision.

[14] The claimant fell directly in front of his vehicle, then he got up and continued running to the opposite side of the road. When the claimant got to the other side, he fell again as he attempted to step onto the edge of the sidewalk. The defendant said he got out of the vehicle that had stopped at the point of impact. His vehicle, by then, was slightly over the white line on the side for vehicles coming in the opposite direction. He went over to the claimant. The claimant's grandmother then appeared and started hitting the claimant and scolding him for getting out the truck. He assisted them to the police station and then to the hospital. His vehicle was not damaged.

[15] Upon being cross-examined, the defendant disclosed that he was almost eighty years old and the holder of a driver's licence for over forty years. He knew very well the section of the road where the collision occurred. When he saw the truck, it had stopped on the side of the road and was not over in the plaza. It was parked at the point where one would approach the plaza. He said he saw the truck before he saw the pick-up. He saw the pick up a matter of seconds after seeing the truck. When he saw the claimant by the pick up, the claimant's back was to the road. At the time, he was driving at 30-45 km/ph. He maintained that speed although he saw the claimant up to the time the claimant ran into his path. He denied going faster than 30-45 km/ph and that the claimant, at the time he collided in the vehicle, was running across the road and not walking as was suggested to him.

[16] He maintained that he took precautionary steps to avoid the accident. He also indicated that that he knows children can be easily distracted; that they are playful and

that if he sees them on the side of a street, he must take extra care. He also knows it is advisable to cut speed on seeing pedestrians. He explained further that on the day in question, he tooted his horn, as he would customarily do whenever he sees parked vehicles he was passing along the roadway. He would do so as greeting and also as a warning in case anyone was minded to push open a door or hastily disembark from a vehicle.

whether defendant should be permitted to rely on facts not pleaded

[17] It is clear beyond question that there is no convergence between the parties' accounts as to how the accident occurred. The question of liability, therefore, arises for determination. Before proceeding to examine the areas of factual dispute that warrant consideration in addressing the issue of liability, I deem it necessary to address at this juncture an aspect of law that has been raised on the claimant's submissions in relation to the case for the defence. This is imperative because the issue raised touches and concerns the defendant's evidence and the extent to which the court should take it into account in arriving at its decision.

[18] It has been submitted on behalf of the claimant (in written submissions filed pursuant to orders on pre-trial review) that the defendant ought not to be permitted to rely on the version of the accident he advanced in his witness statement as those are facts not set out in his defence. This is based on the observation that in paragraph 3 of the defence, there is what is said to be "a bare denial of negligence by the defendant or an indirect concession of negligence" when he said "the accident was caused or contributed to by the negligence of the claimant." According to the submission, the claimant objects to the defendant's reliance on paragraph 4-7 of his witness statement on the basis that those paragraphs contained assertions that are central to the defence but which are being made at the "11th hour" thereby putting the claimant at a disadvantage. As such, the defendant ought not to be allowed to rely on those assertions.

[19] The legal basis for this submission lies in the provisions of rule 10 of the Civil Procedure Rules, 2002 (the CPR). This rule establishes the general regulatory regime for the preparation and filing of a defence to a claim. It sets out the duty of the defendant in setting out his case and how, among other things, denial to a claim or particulars of claim should be framed. In this regard, and in so far as is immediately relevant, r. 10. 5 (4) stipulates:

> *Where the defendant denies any allegation in the claim form or particulars of claim:-*
>
> > *(a) The defendant must state the reason for doing so; and*
> >
> > *(b) if the defendant intends to prove a different version of events from that given by the claimant.*
>
> *The defendant's own version must be set out in the defence.*

[20] Rule 10.5 (5) further provides that where the defendant denies any allegation in the claim or particulars of claim and put forward a different version of events, he must state the reason for resisting the allegation.

[21] Rule 10.7, on which the claimant's objection is advanced, then provides:

> *The defendant may not rely on any allegation or factual argument which is not set out in his defence but which could have been set out there, unless the court gives permission.*

[22] The essence of the submission, therefore, is that the defence, being a bare denial of negligence, stands in violation of r. 10.5 and as such, the defendant ought not to be allowed to rely on factual contentions set out in his statement that were not pleaded pursuant to r. 10.7

[23] An examination of the defence does reveal that the defence is not fully set out in the manner contemplated by r. 10.5. The style of pleading is more in keeping with the way a defence was pleaded under the former procedural regime. The claimant's averments were simply denied and then it was alleged that the accident was caused by the claimant (wholly or partly) with the particulars of the allegation of negligence set

out. There was no account of the accident that was set out or narrated that would indicate the exact version of the events that was being advanced in keeping with what was eventually asserted in the witness statement.

[24] The observation made by counsel on behalf of the claimant is, therefore, not without merit. Defendants must set out the version of the facts they would be advancing and on which they would be relying at trial when they deny the claimant's averments. The days of simply saying the averments are denied are long gone. Defendants must seek to fulfill the requirements of the rules in setting out of the defence or failure to do so could prove fatal to their case down the road.

[25] However, having taken the submission into account in the light of all the pleadings and the circumstances of the case, I find that I would not accede to the request to prevent the defendant from relying on the facts contained in his witness statement. To do so would not be in keeping with the overriding objective and the dictates of justice. I say so for the following reasons. It is seen upon an examination of the defence that although there was a statement of denial of the averments of the claimant that has the trappings of a bare denial, the defence went a bit further to allege that it was the claimant who was negligent. From this, it could be inferred that the reason for the denial is that the defendant is saying that it was the claimant who had caused the accident by his own negligence or contributed to it. Not only did it allege negligence but it went further to set out the factual bases for such allegation in the Particulars of Negligence. The specified facts set out in the defendant's Particulars of Negligence have served to give an indication of the case being advanced by the defendant even though they did not form part of a narrated version of events.

[26] The gravamen of the claim is that the claimant was hit whilst he was in the process of crossing the road and after he had taken all lawful steps to do so. The facts, as pleaded by the defence, when taken together, are saying that the claimant failed to keep a proper look out thereby failing to see the defendant's vehicle and that he ran

into the path of the defendant's vehicle when it was manifestly unsafe for him to do so. This, to me, is the crux of the defence and that was indicated on the pleadings.

[27] When one looks at the paragraphs in question in the the witness statement, it is clear that the defendant has mentioned facts not stated in the pleadings. Although these facts were omitted from the pleadings, I form the view from an overall consideration of the defence as pleaded, that in substance and effect, what the defendant was saying in response to the claim was clear so as to alert the claimant of the case that he would face at trial. The defence, as pleaded, had signaled to the claimant in express and unambiguous terms what the defence is and would be saying on the critical issues.

[28] In my humble estimation, the claimant had sufficient information to put him on notice as to what the defendant was coming to say on the critical issue as to how the collision occurred. Apart from the pleadings, upon the exchange of witness statements, it would have been brought home to the claimant, in even greater detail, what it was that the defendant would be contending. So from before the trial, the claimant would have known what the defence is saying. There was no ambush, so to speak, of the claimant by new information provided by the defendant at trial so as to take the claimant by surprise at what was referred to as the "11th hour."

[29] Even more importantly, I note in this regard that at trial, an application was made on behalf of the claimant, which was granted by the court, for amplification of the evidence contained in his witness statement pursuant to the CPR r. 29-9 (1) (c). This allowed the claimant to give evidence to respond to the same assertions complained about in the defendant's witness statement. The claimant in his amplified evidence denied the defendant's assertions in the impugned paragraphs. After that was done, there was no objection taken on behalf of the claimant to the defendant's witness statement standing in its entirety as his evidence- in -chief and the defendant was properly cross-examined on his evidence.

[30] In the end, even though the matters might not have been pleaded, the claimant got an opportunity to respond to them thereby presenting for the consideration of the court, his response to the case put forward by the defence. He was therefore not prejudiced, embarrassed or affected in any adverse way in putting forward his claim. While it is, indeed, true that the defendant had failed to comply fully with r. 10.5 in setting out his defence, I have not seen anything that has prejudiced, or could say to have prejudiced, the claimant in the presentation of his case. In the light of all the circumstances, I form the view that in keeping with the overriding objective, the objection taken on behalf of the claimant in this regard ought not to be sustained. The defendant is, therefore, permitted to rely on the matters contained in paragraphs 4-7 of his witness statement. Accordingly, I have considered such evidence as part of the case, in seeking to determine who bears the incidence of liability.

LIABILITY

The issues

[31] Having examined closely each party's case, I have found that there are several broad areas of factual dispute that have been thrown up as the material ones for contemplation on the question of liability. They may be summarized thus:

(a) Whether at the time of the collision, the claimant was assisted by his grandmother in crossing the road.

(b) Whether the claimant was walking or running across the road when he was hit by the defendant.

(c) Whether the claimant had almost completed crossing the road when he was hit.

(d) Whether the defendant was speeding excessively thereby resulting in the accident.

(e) Whether the defendant failed to see the claimant in time.

(f) Whether the defendant failed to take action to avoid the accident.

[32] In terms of issues of law that have arisen, these may be posed thus:

(a) Whether the defendant failed in his duty of care towards the claimant as a child using the road thereby resulting in damages and injuries as claimed.

(b) Whether the defendant was negligent in all the circumstances of the case

(c) Whether, if the defendant is liable, there was contributory negligence on the part of the claimant.

THE APPLICABLE LEGAL PRINCIPLES

[33] It is well settled that in every claim in negligence, for the claimant to succeed it must be established on the evidence, to the satisfaction of the court, on a balance of probability, that the defendant owed to the claimant a duty of care at the material time; that there had been a breach of that duty; and that damage to the claimant resulted from the breach.

[34] In examining the issue of negligence in the context of this case that involves a motor vehicle collision, it may be stated as an apt starting point that a driver of a vehicle on a road does owe a duty of care to other road users (including pedestrians) and occupiers of premises abutting the road way to avoid a collision with them or their property. It goes without question then that the defendant, being the motorist in the instant case, owed a duty of care to the claimant while he used the road at the material time.

[35] The question now is the standard of care that was required of the defendant in the exercise of his duty of care. It is now firmly established that the standard of care required by law from the driver of a motor vehicle on a road is to drive with reasonable care, which, in effect, is the care expected of a reasonable man. In **Boss v. Litton** [1832] 5 C &P 407, it was stated that " *all persons, paralytic as well as others, have a right to walk on the road and are entitled to the exercise of reasonable care on the part of persons driving carriages upon it.*"

[36] Gilbert Kodilinye, in his text **Commonwealth Caribbean Tort Law** 3rd edition, after drawing on some relevant principles deduced from established authorities, noted at page 95:

> *"The driver of a vehicle on the road is under a duty to take proper care not to cause damage to other road users (including drivers and passengers in other vehicles, cyclists and pedestrians) or to the property of others. In order to fulfill this duty, he should for example keep a proper lookout; observe traffic rules and signals; avoid excessive speed and avoid driving under the influence of alcohol or drugs. It is a question of fact in each case as to whether the defendant has observed the standard of care required of him in the particular circumstances."*

[37] For the principles enunciated by the learned author, see, for instance, the following cases cited by him: **Bourhill v Young** [1943] A.C. 92; **Almon v.Jones** (1974) 12 JLR 1474; **James v. Seivwright** (1971)12 JLR; **Owens v. Brimwell** [1976] 3 All ER. 765 and **Tidy v. Battman** [1934] 1 KB 319 at 322.)

[38] The Road Traffic Act, s. 51 (2) also provides:

> *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.*

[39] It is recognized, however, that while the standard of care in any given case involving motor vehicle collision is the exercise of reasonable care, circumstances do alter cases, and so, in a given set of circumstances, the standard of care required may be more than is usually required. As **Charlesworth and Percy on Negligence**, 7th edition, explains in this regard at page 373 paragraph. 6-01:

> *"For example, "the standard of care required from a motorist is to drive with reasonable care, but, if he approaches a pedestrian crossing, he must take much more care than usual."*
>
> (See **Bailey v. Geddes** [1938] 1 K.B. 156 as cited.)

[40] The same learned authors have pointed out, within this context, that the standard of care in any given case is based on the conditions being normal. On the other hand, if any of the persons involved in the occurrence is disabled in any way, or from age and youth, is not within the description of normal persons, and that condition is known to the person performing the act, then a different standard of care is exacted from him. The degree of care required in any given case will depend, of course, on the circumstances of the case and the parties involved and so there are, indeed, circumstances where greater precaution on the part of the person doing the act may be required in the light of such special circumstances.

[41] In the case of young children, in particular, it has long been established that by virtue of age, sufficiency of understanding, intelligence, maturity and reasoning, the law does expect and accept a lower standard of care from them for their own safety. It is from this that the principle has developed that a child, even if acting carelessly and without regard for his own safety, may, nevertheless, be found not to be negligent or blameworthy for any damage caused to him as a result. Ms. Malcolm, submitting on behalf of the claimant, correctly pointed out with reference to several authorities that the law treats with a child pedestrian differently from it does an adult.

[42] She draws strength for her submissions from, *inter alia*, a statement found in **Halsbury's Laws of England**, volume 28, 3rd edition at paragraph 98 which reads:

> *"A distinction must be drawn between children and adults, for an act which would constitute contributory negligence on the part of an adult may fail to do so in the case of a child or young person the reason being that a child cannot be expected to be as careful for his own safety as an adult. Where a child is of such an age as to be naturally ignorant of danger and or to be unable to fend for himself at all, he cannot be said to be guilty of contributory negligence with regard to matter beyond his appreciation, but quite young children are held responsible for not exercising that care which may reasonably be expected of them. Where a child in doing an act which contributed to the accident was only following the instincts natural to his age and the circumstances, he is not guilty of contributory negligence, but the taking of reasonable precautions by the defendant to protect a child against his own propensities may afford evidence that the defendant was not negligent and is therefore not liable...the question whether a child is of sufficient age and intelligence to realise and appreciate the*

risk he runs so as to be capable of being guilty of contributory negligence is a question of fact for a jury."

[43] She also relied on dicta from several cases to include **Mullin v Richards** [1998] 1 All ER 920; **Gough v Thorne** [1966] 3 All ER 389 and **Malcolm Moody (by next friend Colene Moody) v Andrea Stephenson and Audrey Gaynor** suit no. CL. M 332 OF 2000 delivered May, 28, 2004 (unreported) and argued that based on the authorities, even if a child is being somewhat careless in his use of the roadway, the law does not *ipso facto* place any legal responsibility on him for injury he suffers when a motor vehicle collides in him. This is because once it is established that the driver was aware of the child's presence, then that driver, must establish that he took all due care and precautions to avoid the collision. Otherwise, as a matter of law, he will be deemed negligent.

[44] In **Gough v Thorne** , Lord Denning MR, in rejecting the contention that a 13 ½ year old girl victim in a motor vehicle accident was contributory negligent, stated:

> *"A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances...*a ***child has not the road sense or the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy."*** *(Emphasis mine.)*

[45] Miss Campbell, in her submissions on behalf of the defendant, contended that while a special duty is owed by a motorist to children using the road, the duty is, however, owed by the motorist where it can be shown that he saw the minor and /or had reasonable opportunity of seeing the minor or knowing of his presence. Where the adult motorist has taken reasonable precaution to protect the child against his own propensities, that may be evidence that the motorist was not negligent and, therefore, not liable. For her argument, she placed reliance on **Davies v. Journeaux** (1976) Road Traffic Reports 111 and **Earl Allen and Conley Suddeal v Lascelles Watt** [1990] 27 JLR 134.

[46] In **Earl Allen and Conley Suddeal,** Rowe, P speaking on the issue in our Court of Appeal examined the dicta of the courts in **Davies v. Journeaux (CIT)** and **Moore (an infant) v. Poyner** (1976) RTR 127, and after so doing made the important point that a motorist is not an insurer for an infant claimant and is therefore required to pay compensatory damages whenever an infant is injured in a motor vehicle accident on the road.

[47] This view found tends to find support in a passage from **Charlesworth and Percy on Negligence** at page 157 paragraph 3-30. There it is stated, albeit in relation to contributory negligence, that where a child is negligent, in the sense that by exercise of reasonable care, he could have either prevented the accident or have avoided the damage in question, he cannot recover full compensation. According to the learned authors:

> *"In considering what is "reasonable care" the age of the child must be taken into account. Infancy as such, is not a "status conferring right" so that the test of what is contributory negligence is the same in the case of a child as in the case of an adult, modified only to the extent that the degree of care to be expected must be proportioned to the age of the child."*

[48] The learned authors then went on to say at page 158 paragraph 3-30:

> *"There is no age below which, as a matter of law, it can be said that a child is incapable of contributory negligence. Expressions can be found referring to children "too young to be capable of contributory negligence" or "of such a tender age as to be regarded in law as incapable of contributory negligence" However, these must be taken to be referring to children found, on the facts of the particular case, to have been so young that contributory negligence could not be attributed to them."*

[49] From a review of several authorities, it is seen that there is obviously no absolute or strict liability on the part of motorists involved in collision with a child pedestrian. Neither can it be said that there is a presumption of law that a motorist is, prima facie, negligent unless the contrary is proved by him. The fact is that he owes a duty of care to children pedestrians to exercise reasonable care for their safety while using the road.

The degree of care required to discharge this duty may be greater than the norm depending on the circumstances of the case, which includes the age and understanding of the child. Once it is shown on the evidence that the defendant motorist has discharged his duty to the extent required by law and in the light of what is demanded of him in the particular circumstances of the case, then, he may escape liability. There is thus no rule of law of general application that a child can never be held blameworthy or that a defendant motorist must be liable.

[50] Indeed, the possibility of blameworthiness being attached to a child was recognized by Lord Denning himself in **Gough v. Thorne** at page 399 when in stating that a young child cannot be guilty of contributory negligence, he, nevertheless, went on to state the position in respect of an older child. He stated (and I paraphrase) that an older child may be guilty of contributory negligence but that depends on the circumstances. According to him, a judge should only find a child guilty of contributory negligence, if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety, and, then, he or she is only to be found guilty if blame should be attached to him or her. The child is not to be found contributory negligent unless he or she is blameworthy.

[51] In **Earl Allen & Conley Suddeal**, Rowe P, instructed: "

> *"In this branch of the law, it is important to have knowledge of the child whose conduct is called in question so as to be able to assess or measure the degree or responsibility which can be attributed to that particular child, rather than to children of that age as a general class."*

[52] It follows, then, on the strength of the authorities, that there is no rule of law that although the defendant owes a duty of care to the claimant as a child, that that, without more, makes him liable for the accident. There is also nothing to preclude the claimant, being as he was 13 at the time, from being the one to be blamed either wholly or in part. The case law is replete with decisions in which defendants have been found not liable in cases involving children of even much younger age than this claimant. The fundamental question, therefore, is whether the defendant in the position

of a driver of the motor vehicle on the Porus main road at the material time had taken reasonable care and the necessary precautions warranted by the circumstances, including the special attributes of the claimant, to discharge the duty of care he owed to the claimant.

ANALYSIS

[53] It is within the legal framework provided by the various authorities as discussed and against the background of the illuminating submissions of counsel on both sides that the facts of this case have been considered. I have recognized from the substance of the parties' cases that the crucial question of liability rests on the credibility and cogency of their respective cases. It means that the resolution of the issue, to a large extent, revolves around the credibility of the parties themselves (and the claimant's witnesses). As such, the demeanour of each witness was of great significance to me during the conduct of the trial.

[54] While all the evidence given by both sides have been duly considered (in so far as the rules of evidence do allow and barring portions struck out as inadmissible), I do not propose for present purposes to repeat every aspect of the evidence given by both sides. I have highlighted the prominent features of the case that I have considered germane to the resolution of the issue at hand, that is, on the question as to whether the defendant should be held liable for the collision. I have also closely considered too those aspects of the case that touch and concern the collateral issue of credibility.

[55] There is no dispute that the roadway on which the accident occurred was a built up area along the Porus main road. It is also not disputed that it occurred along a straight stretch of asphalted road with two lanes going in opposite directions divided by a white line in the middle. There is no dispute too that at the time of the accident, the visibility was good as it was in the afternoon and there is no evidence of rain or any feature to impede the ability of any of the parties to see. It is, therefore, the significant areas of dispute on the facts that will now be explored.

Whether the claimant's grandmother was present at the time of the collision

[56] The claimant, in his evidence contained in his witness statement, stated that his grandmother was present at the time of the accident. He stated that both he and his grandmother looked up and down the road and that having seen nothing coming, his grandmother told him he could cross. On his grandmother's instruction, he proceeded to cross the road. This aspect of the claimant's case as to the presence of his grandmother and the role she played in his crossing of the road was never pleaded by the claimant.

[57] Be that as it may, the claimant's assertion as to the presence and role of his grandmother at the material time was supported by the grandmother in the witness statement that was allowed to stand as her evidence-in-chief. His grandmother, however, contradicted herself in cross-examination indicating that she was not near the claimant when the incident occurred. This resulted not only in an internal contradiction in the grandmother's testimony (an inconsistency) but also a discrepancy between the grandmother's evidence and the claimant. I find that the inconsistency and discrepancy is serious and material. It is not a slight one. It goes to the heart of the claimant's case. No explanation has been proffered on the claimant's case for this serious inconsistency and discrepancy. This is taken into account in my determination of the issues in dispute.

[58] I am mindful that it is open to me, as the tribunal of fact, to prefer one witness over another and may, therefore, accept one over the other on a given point. In this case, I am being asked to accept the claimant's version of the events but I see no good reason advanced for me to do so in the light of no explanation that has been advanced for the conflict in the grandmother's testimony and between hers and the claimant's. As it stands, the claimant is advancing two versions of the same event, and the court cannot rely on both as they are diametrically opposed.

[59] I have seen and observed the claimant's grandmother, and I am doubtful as to whether what is contained in her witness statement is a true representation of what she saw. The spontaneity and apparent sincerity with which she responded to the questions asked of her in cross-examination propelled me to believe that the truth is that she was

not present at the accident. I am strongly led to this view, however, not so much so because of the evidence of the grandmother on cross-examination but moreso, on the evidence of the defendant.

[60] The defendant stated that the grandmother came after the collision occurred. The defendant's version, in effect, is that no adult was assisting the claimant at the time he attempted to cross. He attempted to do so on his own volition. Given the internal conflict in the claimant's case, which cuts to the core, I find that I believe the defendant that the grandmother was not there. This would be in keeping with the grandmother's evidence on cross-examination that she appeared at the point of collision after the claimant was hit. Accordingly, I reject the evidence of the grandmother and the claimant that his grandmother was present and that she assisted and instructed him to cross the road at the time of the collision.

[61] Ms. Malcolm, however, in recognizing the conflict on the claimant's case, had this to say:

> *"The claimant had called as his witness his grandmother who contradicted his evidence that she put him across the road. In any event, the Defendant challenged this evidence insisting that the child went across the road of his own volition. The court is entitled to reject this aspect of the Claimant's evidence. Nevertheless, it is submitted that, as a matter of law whichever view the court takes of the evidence, the Defendant motorist must take responsibility for the Claimant's injuries. The case mentioned earlier of* ***Gough v. Thorne [1966] 3 A.E.R.*** *addresses such a consideration. In that case the Claimant was 13 ½ years old, and at the time of the incident had been assisted in crossing the street by her older brothers and further beckoned by a driver [an adult] to cross the street when a Motor Vehicle collided with her causing injury. The Court on appeal found the Defendant not contributory negligent having regard to her age and experience.* "

[62] I am afraid that resolving the issue is not as simple as Ms. Malcolm would want it to be. The point on which there is a controversy in the evidence of the claimant and his witness goes to the heart of the case. The case was put up on the premise that the crossing of the road by the defendant was supervised by the grandmother who, herself, took the necessary precaution in allowing him to cross. As Mrs. Campbell puts it, "the

crossing of the road was a joint enterprise." The question then arises, if the grandmother was not there and witnessed the collision, why then is the evidence put forward from both of them that she was present and actively participated? This must cause any tribunal of fact to be suspicious of their veracity. The question logically arises as to whether the differences in the evidence of the claimant and his witness are as a result of an "honest mistake" or a "deliberate invention".

[63] In the light of the defendant's evidence and the fact that he is supported by the grandmother's evidence given on cross-examination that she was not present, I form the view that the claimant's version that the grandmother was there and assisted him, is a "deliberate invention" rather than an "honest mistake." This, therefore, inevitably, affects the claimant's credibility when he said that his grandmother assisted him to look and to cross the road when it was safe to do so. **Gough's** case cannot assist the claimant any at all on this limb. This is so because on the facts that I find to be proved to my satisfaction, there was no third party involvement in the crossing of the street in the instant case as in **Gough's** case. I reject the contention, therefore, that on whatever view is taken of the evidence in the light of the contradictions in the claimant's case, that the defendant is, nevertheless, liable.

Whether the claimant took all necessary precautions before crossing and was hit while walking towards the other side of the road

[64] Having found, as a matter of fact, that the claimant crossed on his own volition, the question that follows is whether, as he said, he took all precautions by looking in both directions before proceeding towards the road and was hit when he was mid-way across. The resolution of this, of course, turns on the credibility of the parties. The question arises as to whether the claimant may be believed on this aspect of his case.

[65] The claimant's credibility on this issue, I must say, has been adversely affected by the conflict already noted in his case. The claimant said he looked but he saw nothing in proximity to where he was crossing. This is a straight stretch of road and the defendant's vehicle did not enter the main road from any minor road close to the

claimant. He approached from the Mandeville direction along the straight stretch of road. It means that the defendant's vehicle must have been in close proximity to the claimant while he crossed the street for the collision to have occurred. Both parties must have been moving towards each other in very close proximity for there to be a collision in time and space. I find from this fact that the claimant must have failed to see the vehicle because he did not look at all or he failed to look properly.

[66] The defendant's evidence is that the claimant had his back to the road and his side to the oncoming vehicle. The defendant gave no evidence that he saw the claimant looked in his direction. His evidence is that the claimant turned and ran into the path of his vehicle as he was about to pass him. The failure of the claimant to see the defendant's vehicle does strengthen the defendant's assertion that the claimant, without looking, unexpectedly, and without warning, ran into the path of the vehicle just as the vehicle was about to pass where he was standing.

[67] I find it difficult to accept the claimant's account as being a truthful one that he had reached mid-way in the road when he was hit. The defendant said the claimant collided in the left side of the front bumper and bonnet. This would be consistent with the claimant approaching from the left of the motor vehicle. The defendant's evidence also is that he swerved to avoid the collision and that when he did so the vehicle come to a rest a little over the white line on the other side of the road going towards Mandeville. This remained unchallenged. A swerve to the right would be, more likely than not, a movement away from the claimant. It follows that the claimant, in all probability, would have been approaching from the left of the vehicle. If this is accepted as true, it means the claimant could not have already reached the white line when he was hit.

[68] The claimant, on the other hand, said that that it was the right side of the vehicle that hit him. He did not speak to where the vehicle came to a stop. I must confess that based on the number of things the claimant could not recall and the erosion of his credibility by the contradictory evidence of his witness, I do entertain an

appreciable degree of unease to accept his version over the defendant's as to the section of the vehicle that hit him and where he was at the time.

[69] Indeed, there are other matters that arise on his evidence that served to invoke my reluctance to rely on is evidence as being reliable in this regard. For example, he indicated that the market truck was parked in the plaza and was totally off the road at the time but his grandmother and the defendant both placed the truck alongside the roadway and not inside the plaza area. He had also indicated that the defendant's vehicle was going in the opposite direction at the time of the collision when the evidence, as I have accepted it to be, is that the defendant was heading in the same direction as the market truck. Furthermore, his evidence- in - chief was that he did not see the vehicle before it hit him and that it was after he felt the impact and had already fallen to the ground that he saw the vehicle. In cross-examination, however, he then said that he did not see the vehicle before it hit him but he saw it when it him. This is an inconsistency that arises on his case for which no explanation has been advanced. In such circumstances, I do not know which version of the claimant's case to accept and so, on a preponderance of the probabilities, I find the defendant's evidence more acceptable.

[70] Having considered all the evidence on this aspect of the case, I do believe the defendant, on a balance of the probabilities, that he saw the claimant prior to the collision with his back to the roadway and his side to the approaching vehicle. I believe, and find as a fact, that the claimant made a sudden and unexpected movement from the side of the roadway into the path of the defendant's motor vehicle. I find that he did, in fact, run into the left front section of the defendant's vehicle. I find that he was, in fact, running across the road when he was hit as the defendant said and that he had not reached mid-way across the road at the time he was hit. I believe that the claimant did not make a proper look before crossing the road as he is contending. He failed to keep a proper look out.

Whether the defendant failed to see the claimant in sufficient time and failed to observe him crossing the road

[71] It is also alleged that the defendant is liable in negligence for failing to see the claimant in time and for failing to observe him crossing the road so as to avoid colliding with him. Having examined the parties' evidence, I find that there is no evidence that could support a reasonable finding that the defendant failed to see the claimant in time. The defendant said that after passing the pedestrian crossing he saw the market truck and that seconds after he passed the market truck, he saw the claimant. The claimant was standing beside the van speaking to someone in the van on the driver's side. He said his view was not obstructed as he approached. The defendant saw when the claimant suddenly ran into the road.

[72] The fact that the defendant did not avoid the collision does not carry with it a reasonable and inescapable inference that he failed to see the claimant in time. It could be explained on the basis, which is evident in the case, that the defendant was not afforded adequate time to respond to the risk of collision posed by the unexpected action of the claimant. I do not find that the defendant is negligent for failing to see the claimant in time.

Whether the defendant drove recklessly, dangerously and at an excessive speed thereby causing the collision

[73] One other plank of the claimant's allegation of negligence that now arises for consideration is whether the defendant was driving dangerously, recklessly and at an excessive speed when the claimant was hit. In considering this contention, it is noted that the claimant's evidence is that he did not see the motor vehicle before he was hit. He does not attempt, therefore, to indicate any speed at which the defendant's vehicle would have been travelling or the manner of the defendant's driving.

[74] His grandmother, in her witness statement, stated that after she instructed the claimant to cross the road, she saw the vehicle coming fast. This evidence has been

contradicted by her evidence on cross-examination when she stated she was not present at the time of the accident but had gone to the restroom. I have already indicated my treatment of this conflict and having found that she was not present at the material time, I have no other alternative but to reject her evidence that she saw the defendant's vehicle travelling fast. It means that there is no direct evidence coming from the claimant's case as to the speed at which, or the manner in which, the defendant was driving at the material time.

[75] It is on the defendant's case that there is evidence as to the speed at which the motor vehicle was travelling. The defendant maintained that he was going about 30-45 km/ph. This would be within the legal limit usually prescribed for built up area. Ms. Malcolm has, however, argued that the severity of the Claimant's injuries speaks to the speed at which the defendant would have had to be travelling at the time of the collision.

[76] The nature of injuries sustained by a victim in a motor vehicle accident may sometimes give an indication of the likely speed at which the vehicle in question was going at the time of collision. In this case, the significant injury sustained by the claimant was a broken right hand for which he was not admitted in hospital. There is nothing on the nature and extent of the injury sustained that would convey a sign of the defendant driving at an excessive speed or in a manner dangerous and reckless. There is nothing therefore on the facts as proved from which an inference may reasonably be drawn, in the absence of direct evidence, that the defendant was driving recklessly, dangerously and at an excessive speed.

[77] I will go further to point out that the defendant's unchallenged evidence is that when he applied his brakes, he stopped immediately. There is nothing to say, credibly, that he came to a halt only after he had hit the claimant and had driven a little further distance away. There is nothing to say that the claimant was carried for a distance by the van away from the point of impact that could suggest an element of speed or recklessness in the manner of driving.

[78] Ms. Malcolm had gone further to contend that even if I accept that the defendant was travelling at the speed he said that he was, he would nevertheless be negligent based on the fact that the area in which he was travelling was a built up area and given what the defendant himself said was the position of the claimant before the collision. There is always a danger, she argued, of pedestrians running out from behind parked vehicles, and so there was a need for special precaution on the part of the claimant. She maintained that "the defendant having so carefully taken note of all his surroundings (as he has stated) and having taken note of what he said was the claimant's position, could not have considered that it was safe in all the circumstances to proceed at the speed he was travelling. For that reason, he was going at an excessive speed.

[79] She relied on the decision and reasoning of Jones, J in **Malcolm Moody** to argue that what is excessive in any given case depends on the surrounding circumstances at the material time. In **Malcolm Moodie,** the defendant driver was found negligent even though on her unchallenged evidence she stated that she was travelling at 20 mph as she approached the infant who was playing with other children along the side of the road. The learned judge found that even at 20 mph, the defendant should have slowed down even more or should have even stopped the car because the young children were playing and running on the road. The speed at which the defendant was going was, therefore, regarded as excessive in the circumstances. Ms. Malcolm's argument is that given the circumstances in this case, the defendant, by not reducing his speed on seeing the claimant at the side of the road, was going too fast. For that reason, he is liable in negligence.

[80] In considering this contention on behalf of the claimant, I must first state that based on what I accept on the evidence as true, the circumstances of this case are distinguishable from those that obtained in **Malcolm Moodie.** This is so not only on the basis of the difference in the age and experience of the claimant's involved but also based on the differences in the circumstances that prevailed before the collision. In Moodie's case, children were running and playing along the roadway. The defendant

had ample time to see them and to appreciate the risk of them entering the roadway. In this case, the claimant was seen with his back to the roadway in a conversation with an adult. His side was to the approaching vehicle and there is no evidence that he looked in the direction of the defendant's thereby showing an interest in the road and in any approaching vehicle. He was not at play or frolicking around; he was not facing the roadway so as to evince an attention to use the roadway; he was not attempting to cross and he was not positioned so as to convey an impression that he would cross or might cross the road in the defendant's path. There was thus no indication that there was a real risk of such a child in that position running out into the street. This was also not a very young child at the time from the photograph tendered in evidence as exhibit 4.

[81] The defendant could not have anticipated, in the circumstances that existed at the time, that the claimant of the age and level of maturity he was, would, without warning or reason, run across the road into the path of his vehicle. He did not see the claimant from a distance attempting to cross the road and was therefore presented with a 'child in flight' situation with enough opportunity to take action such as reducing speed. The defendant's case, that I accept as true, is that it was when he was about to pass the claimant that the claimant suddenly turned and unexpectedly ran into the path of the vehicle. There was not enough space in terms of time between when the claimant was seen manifesting an intention to cross the road and the collision.

[82] This issue of speed was the subject of consideration by Rowe, P in **Earl Allen and Conley Suddeal.** In that case, the evidence was given that the infant claimant had run in the roadway when the vehicle was about 33ft away. The Court, having looked on other evidence, rejected that evidence and found that the child must have been at least 100 ft. away when he was seen. An important thing that the President noted, that I find useful in this case, was that if the child was 33ft away from the bus when he ran into the road as the witness was suggesting, then "the speed of the vehicle could be immaterial as for all practical purposes, the driver would have had no chance of avoiding the accident."

[83] I refer to that comment (albeit that it was obiter) to say that in this case, the claimant ran into the road as the claimant was about to pass. There is no evidence of the claimant being seen from any appreciable distance attempting to cross the road as in in **Earl Allen and Conley Suddeal.** I find that given the distance from the defendant's vehicle at which the claimant proceeded to cross the road, that the defendant was presented with no opportunity to avoid the impact. For those reasons, I conclude that the speed at which the defendant was going is rendered irrelevant and, in any event, could not be said to have been excessive in the circumstances.

[84] I hold that there is nothing on which I find it comfortable to conclude that the failure on the part of the defendant to reduce his speed further than he was already travelling, upon proceeding towards the claimant, meant that he was travelling at an excessive speed in the circumstances. I do not find that he failed to take necessary precaution in the circumstances. I find it equally difficult to conclude that he was driving recklessly or dangerously in the circumstances or that he is negligent for failing to stop or swerving upon seeing the claimant.

Whether defendant negligent for failing to give adequate warning of his approach and for failure to take action to avoid the collision

[85] The next issue that arises for contemplation is whether the defendant failed to give adequate warning of his approach and to take steps to avoid the collision. The defendant has given evidence that upon approaching the area and seeing the vehicles parked along the side of the road, he tooted his horn. He said he did not toot it specifically at the claimant but as a way of general warning to everyone in the vicinity. The claimant said he heard no horn. In the light of the claimant's unreliability on several matters, and his clear inattentiveness at the material time, he could well be speaking the truth that he did not hear any horn. The fact that he heard no horn, though, does not necessarily mean the defendant did not toot his horn. Having seen the defendant and noting his age (almost 80) and overall demeanour in court, he strikes me as a

senior citizen who would not only drive within the speed limit but would also blow his horn as he said he customarily would do. I find no good reason to disbelieve him.

[86] But even if I were to give the benefit to the claimant and say that the defendant did not blow his horn or alert him of his presence, I do not believe such an omission would render the defendant liable, without more. As indicated before, the claimant manifested no intention to use the roadway or acted in a manner that would suggest to oncoming motorists that he posed a risk of collision. The defendant was not reasonably presented with the threat or danger of a "young child in flight" for precautionary measures beyond those that he took prior to the collision to be taken. The defendant was already travelling at a relatively slow speed based on his unchallenged evidence.

[87] In **Davies v Journeaux**, case cited on behalf of the defendant, the infant plaintiff who was then 11 ½ years old was seen by the defendant's passenger standing on the sidewalk but not by the defendant. She was seen by the passenger a split second or so before the defendant saw her dashed across the road in the path of his motor vehicle. He applied his brakes but collided in her injuring her. The defendant had an excellent driving record. He was found liable at first instance. This was overturned on appeal. Edmund Davies, LJ, in delivering the lead judgment of the court, disagreed with the learned trial judge on the duty of a driver to sound his horn when he sees a pedestrian on a sidewalk. The learned judge, in holding the defendant not liable in negligence, made a comment that serves to express my own views perfectly: He said (at page 116):

> *"I would accordingly be for reversing this judgment, which seems to me to impose upon a motorist the duty of sounding a horn virtually whenever they see a pedestrian on the adjoining pavement and this regardless of whether the pedestrian is manifesting any intention of leaving that pavement and dashing across into the path of the oncoming car, which the pedestrian could not have failed to see had he or she looked."*

[88] In that case, notwithstanding the age of the plaintiff to be 11 ½ years old, the defendant was held not liable. I think it would be rather impracticable and would be placing an onerous burden on the defendant to say that he should have reduced his

speed even slower than he was already going and to toot his horn to alert the claimant (although he said he tooted his horn as a general warning) when there was nothing in the circumstances as he perceived them to be from which he could reasonably have anticipated and/or foreseen that the claimant would step into the path of his motor vehicle. The need for the motorist to take precaution above the norm must be evident from the prevailing circumstances.

[89] In **Moore (an infant) v. Poyner** (as briefed in **Earl Allen and Conley Suddeal**) a six year old boy, reportedly, ran from an entrance concealed by a parked coach into the roadway and into the path of an oncoming motor car. The car was being driven at the maximum speed permissible in the neighbourhood, being 30 mph. The driver conceded that he knew the area well, that he could have expected children to run into the road but that he saw no one on the road. He did not reduce his speed in passing the coach nor did he sound his horn. The UK Court of Appeal held that the maximum legal limit was safe in all the circumstances and that the defendant was not negligent in not reducing his speed or to have sounded his horn. Buckley L.J stated:

> *"I think that one must test his duty of care not by reference to what the plaintiff did but by what sort of conduct by any child, at any moment in time, the defendant ought reasonably to have anticipated, and to consider what course of action he would have had to take if he was going to make quite certain that no accident would occur."*

It was held that the defendant had no real opportunity to avoid the accident and so he was held not liable.

[90] The cases do demonstrate that ultimately the real question in cases of this nature, where negligence is alleged against a motorist, is whether the particular motorist had failed to discharge his duty of care by exercising reasonable care in avoiding the collision as the circumstances of the case do necessitate. Once the evidence shows that the particular motorist has done so, then the age of the claimant in question does not matter.

[91] In this case, I have seen the defendant I have taken into account his age and his experience as a driver of over forty years. I have assessed his demeanour. I have taken into account all that have been urged on me on behalf of the claimant in relation to the defendant's case, but I find that I have no reason to doubt the defendant's version of events. I find that he tooted his horn in approaching the vicinity where the collision occurred and so did not fail to warn of his approach. The defendant also said he swerved to the right in an attempt to get away from the claimant and that he applied his brakes bringing the vehicle to a halt; I believe him. I find that he did take reasonable steps to avoid the collision but that it happened anyway.

FINDINGS

[92] In the end, when the claimant's allegations of negligence, as set out in his Particulars of Negligence, are considered, I find no credible and cogent evidence that would properly ground a finding of negligence against the defendant.

[93] On the other side of the coin, I have observed the demeanour of the claimant while he testified, and have assessed the overall presentation of his case and, regrettably, I must say he did not present an impressive case nor an impressive demeanour. Indeed, I find that the conflict between his testimony and that of his grandmother cuts through the very heart of the case he seeks to present.

[94] Counsel for the claimant seemed to have recognized that the claimant might not have measured up as an impressive witness in the court's assessment of the way he gave his evidence and so she submitted:

> *"The court saw and heard the claimant as he gave evidence. Any weaknesses which the Court perceived in this regard, is in our submission, consistent with his young age and underscores the reason the law places a special responsibilities on adults for the safety of children using the road."*

[95] I must say, though, with all due respect to counsel's commendable submissions, that at the time the claimant gave his testimony before me, he was sixteen years old

and not thirteen as he was at the time of the accident. He is a high school student. Indeed, within a year or so he would be at the age that would render him eligible for admittance to a major university. This is to say that the claimant is not a child of tender years for the law to excuse him for everything on the grounds of infancy. I cannot excuse his shortcomings that have been noted simply on account of age. Like any adult witness, his credibility and reliability are in issue just the same. I cannot, therefore, say he ought to be believed or that he is incapable of blameworthy conduct just because he is young.

[96] As a sixteen year old high school boy, he is taken, in the absence of evidence to the contrary, to be of normal development, sufficient intelligence and understanding, commensurate with his age, to be able to discern right from wrong and truth from lies. He is, therefore, assessed according to his age and what is expected from normal children at that age.

[97] Ms. Malcolm has also said that despite the state of the contradiction in the claimant's case and whatever view I might take of his evidence, the defendant must take responsibility for the claimant's injuries. This I find difficult to accept. I am guided by the words of Rowe, P in **Earl Allen & Conley Suddeal**, that a motorist is not an insurer for an infant claimant and should, therefore, be required, without more, to pay compensatory damages whenever an infant is injured in a motor vehicle accident on the road. The defendant must be proved to be negligent before liability can be affixed to him.

[98] At the time of the accident, the claimant was thirteen years old. There is no evidence that this claimant, at the time, was below average intelligence and development. His mother, Carmen Brown, gave evidence that from he was four years old, she taught him how to cross the main roads. The claimant himself spoke to walking to and from school and crossing main roads from he was a younger child. There is evidence here that this claimant, at the time of the accident, was exposed to the precautions that should be taken while using the road. He is thus taken as being a

teenager who was aware of the dangers of not paying attention on the road. As such, the standard of care necessary to discharge the duty of care owed to him would be less than that necessary to discharge the duty owed to a child of tender years with less exposure, and a less developed reasoning ability and judgment.

[99] I find that in all the circumstances, the claimant's sudden and unexpected action provided the defendant with no real and reasonable opportunity to stop in time and to avoid the accident. When all things are considered, the defendant cannot be held liable in negligence as alleged or at all. I find that the claim against him must, inevitably fail.

JUDGMENT

[100] Accordingly, judgment is entered for the defendant with costs to be agreed or taxed.