



[2022] JMSC Civ 221

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

**IN CIVIL DIVISION**

**CLAIM NO. SU2019CV03959**

**BETWEEN**

**CLIFTON WILLIAMS**

**CLAIMANT**

**AND**

**ANTHONY BROWN**

**1<sup>ST</sup> DEFENDANT**

**AMBUCARE COMPANY LIMITED**

**2<sup>ND</sup> DEFENDANT**

**IN OPEN COURT**

**Mr. Richard Hemmings instructed by Sylvester Hemmings for the Claimant**

**Mrs. Suzette Radlein instructed by ICWI for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**Heard: October 24<sup>th</sup>, 2022 and December 19<sup>th</sup>, 2022**

**Personal injury - Motor vehicle accident -Negligence-Duty of care owed by drivers of emergency vehicles- duty of care on pedestrian at a crossing- contributory negligence.**

**T. HUTCHINSON SHELLY, J**

## **BACKGROUND**

**[1]** On the 10th of October 2013 there was a motor vehicle accident which involved an ambulance owned by the 2nd Defendant, which was being driven by Mr. Anthony Brown the 1st defendant and the Claimant Mr. Clifton Williams. The accident occurred along the Constant Spring Road in the vicinity of the clock and

Tastee Patty outlet in that area. The point of impact was by the traffic lights and pedestrian crossing. The Claimant sustained a number of injuries and on the 7th of October 2019, his attorney filed a claim against both defendants in which he sought damages to include special damages to cover the cost of his medical expenses and general damages for his pain and suffering and loss of amenities.

**[2]** In his Particulars of Claim, Mr Williams outlined the particulars of negligence on the part of the 1st defendant, who he alleged was the servant and/or agent of the second defendant, as follows:

- Carelessly, dangerously and negligently navigated the roadway at Half Way Tree
- Failing to keep any or any proper look out
- Driving at a speed which was excessive in the circumstances
- Failing to take into account, sufficiently or at all, the presence of other road users including the Claimant
- Failing by the use of steering or by the application of brakes or otherwise to stop slow down swerve or in any other manner avoid the said accident

**[3]** The Particulars of personal injuries were outlined as follows:

- 2% whole person impairment, whiplash
- Laceration to scalp, soft tissue injury to left hip and neck
- Chronic symptomatic lumbar spondylosis
- Soft tissue injury to the right shoulder

**[4]** The Claimant relied on two medical certificates, the first issued by the South East Regional Health Authority (SERHA) under which the Kingston Public Hospital falls

and the second prepared by Dr. Melton Douglas, a Consultant Orthopaedic Surgeon who examined him on the 29th of November 2017. It is this 2nd report which outlines the majority of the injuries stated above and provides the whole person impairment stated.

**[5]** In a Defence filed on behalf of both defendants, it was admitted that at the relevant time the 1st defendant was acting as the agent and/or servant of the second defendant, which is a company duly registered under the laws of Jamaica. It was also denied that the first defendant was negligent. The Defendants asserted that the 1st defendant had been proceeding along the Half Way Tree Road end route to the Kingston Public Hospital with full warning signals as the horn was blaring and sirens flashing. They posited that on approaching the vicinity of the Half Way Tree Clock Tower, police officers in that location signalled to the driver to proceed and he was doing so when the Claimant ran into the path of the ambulance causing the collision. The Defendants also maintained that *res ipsa loquitur* did not arise neither was it applicable.

**[6]** The matter was tried on the 24th of October 2022 and a total of three witnesses gave evidence. The first witness was the Claimant and he was the sole witness for his case. His witness statement which was dated and filed on the 24th of June 2022 was allowed to stand as his evidence in chief, there was no amplification of any of the paragraphs of his account. He was later cross examined. The defence presented evidence from two witnesses, the first being Mr. Brown himself. The second defence witness was Mr. Rohan Douglas, an emergency medical technician. The following documents were placed before the court as agreed documents and given exhibit numbers;

- Exhibit 1- the medical report of Dr. Melton Douglas dated June 21, 2019
- Exhibit 2 - the questions sent to Dr. Melton Douglas and responses provided dated the 18th of July 2022
- Exhibit 3 - a receipt for the medical report from the Kingston Public Hospital in the sum of \$1000

- Exhibit 4 - copy receipt issued for payment for police report in the sum of \$3000
- Exhibit 5 - proof of payment for x-rays at Apex in the sum of \$4500
- Exhibit 6 - proof of payment for medical report prepared by Dr Melton Douglas in the sum of \$80,000
- Exhibit 7- a total of 12 photographs showing the location of the accident

## **THE ISSUES**

**[7]** The issues which arise for determination in this claims are as follows;

- (i) Did the defendant owe a duty of care to the Claimant?
- (ii) Did the defendant breach his duty of care to the Claimant?
- (iii) Was the collision caused by the defendant's breach of his duty of care?
- (iv) Did the Claimant suffer injuries and damages as result of the defendant's breach of his duty of care?
- (v) Was there contributory negligence on the part of the defendant or did the Claimant fail to take reasonable steps to avoid or minimize injuries to himself?
- (vi) What is the quantum of damages, if any, which should be assessed?

## **THE CLAIMANT'S ACCOUNT**

**[8]** In his evidence in chief, Mr. Williams stated that sometime on the 10th of October 2013 he was crossing the pedestrian crossing when the 1st defendant '*carelessly, dangerously and negligently drove the ambulance registered CCJ7715 hitting him and causing him bodily injury*'. He also stated that to the best of his knowledge, information and belief a police officer who had been present on the scene directing traffic had signalled to the 1st Defendant to slow down and allow him to '*safely*

*cross the pedestrian crossing*' but the defendant had failed to do so and collided with him.

- [9] Mr. Williams was cross examined and in the course of his cross-examination he outlined that when this incident occurred 'night was just coming down'. He explained that he had been crossing on the pedestrian light from the Tastee side of the roadway with 'two food' in his hands, when the ambulance came down with no lights. He agreed that the pedestrian crossing is at an intersection which is governed by traffic lights and that the crossing took him from the Tastee side of the intersection over to the clock. Mr. Williams acknowledged that there were four lanes which led up to the pedestrian crossing and ended just before the stop line where the vehicles would come to a stop on a red light. He was shown Exhibit 7 and agreed that they showed the relevant area.
- [10] Mr. Williams was asked if there were vehicles travelling along the Constant Spring Road when he came out of the restaurant and he stated that there were no vehicles moving at this time. He then stated that vehicles were in fact travelling along the roadway when he came out. He said the vehicles were going through the light and he stood there and waited. He was asked if when he came out of the restaurant, he could see the colour of the light facing the vehicles on Constant Spring Road and he said that it was a red light. He was asked if he saw the ambulance and he denied seeing or hearing it. It was suggested to him that the ambulance was in the second lane travelling from Tastee to the clock when he came out of the restaurant and he disagreed. He insisted that when he left the restaurant, he waited on the walk light.
- [11] Mr. Williams said that after the vehicles passed by the red light came on. He recalled that other persons had been waiting at the light with him and also crossed behind him. He was again asked about the colour of the light while he waited and he replied that the light was purple then stated that it was green. He estimated that he waited about a minute before the light changed and he started crossing. He was asked whether there were police officers present and he stated that an officer

was present on the side where the clock is located but that officer just stood there and was not engaged in directing traffic.

[12] In explaining the sequence of events which resulted in the collision, Mr. Williams stated that the red light came on and he started crossing on the walk light. He said that he was in the last lane making his way across to the clock, when the ambulance drove down and hit him. He then stated that he was in the third lane when he first saw the ambulance and was adamant that it had no lights or siren. Mr. Williams was asked whether his focus had been on the walk light or on the vehicles and he responded that he had been concentrating on the former. It was suggested to him that he was not on the pedestrian crossing when he was hit and he disagreed. He also denied that he ran out in front of the pedestrian crossing in order to 'beat the ambulance.

[13] Paragraph 5 of his statement was shown to him where it was stated, 'the police had signalled to the defendant to slow down and allow for him to safely cross and the 1st Defendant had failed to do so'. Mr. Williams denied that he had ever said this and stated that it was not true as the officer only stood there. He also asserted that it was not true that the police had signalled the ambulance to go through the intersection.

[14] It was suggested to Mr Williams that the ambulance was not travelling fast as it had just moved off from a stationary position and he disagreed. He also refuted the suggestions that he had failed to yield to the ambulance and that the Police Officer had instructed the pedestrians not to cross the road. He vehemently denied that he was the cause of the collision.

## **THE DEFENDANTS' ACCOUNT**

[15] The witness statement of Mr. Anthony Brown which was filed on the 30th of June 2022 was allowed to stand as his evidence- in- chief. In his account, he outlined that on the 10th of October 2013, he had received a request for an ambulance at Whitehall Terrace in Kingston and responded along with Rohan Douglas. They

arrived at their location at 6 pm, collected the patient and proceeded down Constant Spring Road towards Half Way Tree. He said that at the intersection of Constant Spring Road, Half Way Tree Road and Hope Road he arrived at the traffic lights. Mr. Brown added that it was a Thursday evening and the roadway approaching the lights was busy.

**[16]** Mr. Brown testified that from the time he left the location at Whitehall Terrace, the siren was on and the lights were flashing. He stated that on approaching the traffic lights, he observed police officers to the left of the roadway, at that point the light was green and cars were proceeding through it. Mr. Brown recounted that he had been driving in the second lane from the right side of the road. He said that as he got closer to the light, it changed to red and he applied his brakes and came to a stop at the stop line. He recalled that at this point, a female officer stepped into the roadway and indicated to the pedestrians at the crossing that they should wait and allow him to proceed. He said as he began to move the Claimant suddenly ran from the right side of the road with two boxes of food in his hand. Mr. Brown stated that although he immediately applied his brakes, he was not able to avoid the impact with him. He insisted that the Claimant was not on the pedestrian crossing when he dashed out in front of him but on the roadway.

**[17]** Mr. Brown told the Court that with the assistance of Mr. Douglas, the Claimant was placed on a backboard, then put inside the ambulance after which he was transported to the Kingston Public Hospital. He denied that he was at fault and contended that it was the Claimant who had failed to obey the instruction of the police officer as well as the flashing lights and siren.

**[18]** Mr. Brown was cross examined and indicated that he no longer worked with the 2nd Defendant as they had downsized during Covid. It was suggested to him that his lights and siren were not on and he disagreed. He informed the Court that he had seen Mr. Williams before the collision one car lane away on the Taste side of the road. He stated that when he first saw Mr. Williams he was over to the lane to his right. Mr. Brown also explained that it was the front of the ambulance which

connected with Mr. Williams. He insisted that he had been instructed to go around by the officer and that there was no traffic moving at the time. Mr. Brown also stated that the incident occurred sometime between 6:15 and 6:30.

**[19]** Mr. Brown could not recall the speed at which he had been travelling and stated that he had just moved off from the stop line. He did not agree however that he had been speeding when the collision occurred. It was suggested to him that as an emergency vehicle driver he had to be careful as to the speed at which he was driving and he agreed, he disagreed however that his speed was not a moderate one.

**[20]** Mr. Brown was asked if he had looked before proceeding and he responded that *'it was visible so he moved'*, he then stated that he *'took the instructions of the officer with visible precautions'*. He maintained that at the relevant time they were operating in emergency mode as a patient was on board and in those circumstances he was required to have his lights and siren on. Mr. Brown acknowledged that, at that hour the area was very busy with several pedestrians and he would have had to be cautious. He maintained that from a visible point the police had cleared the intersection, there were no pedestrians and that was when he proceeded.

**[21]** The second witness called by the Defence was Mr. Rohan Douglas. Mr. Douglas' witness statement was allowed to stand as his evidence-in-chief. In the statement, he explained that in October 2013, he was employed to the second defendant as an emergency medical technician. He said that at about 5:30 pm, he along with the 1st defendant responded to an emergency at 17 Whitehall Terrace, they collected the patient and her relative and headed in the direction of Half Way Tree.

**[22]** He stated that he was seated on the jump seat in the cabin and from that position he was able to see through the windscreen to the road ahead. He outlined that as they travelled along Constant Spring Road towards the light it changed to red and the driver slowed down then came to a stop immediately before the stop line. Mr.



Douglas recounted that to the left of the clock there were about 3 to 4 police officers and one of the officers signalled to the pedestrians to wait before beckoning to the ambulance to proceed (sic). It was Mr. Douglas's evidence that while they were travelling, the ambulance lights were flashing and the siren was blaring. He said that after the driver received the signal from the police officer he heard an impact and the ambulance stopped. He alighted from the vehicle and saw the Claimant lying on his back on the road. He confirmed the account of Mr. Brown that they attended to the Claimant after which he was placed in the back of the ambulance and transported to the hospital.

**[23]** In cross-examination, Mr. Douglas reiterated that he was in the back of the ambulance when the accident occurred. He maintained that he was able to see what was happening in front of him from this position and explained that this was possible as there was a centre piece between the driver and passenger seat. He demonstrated the position in which he would have been seated and said he was sitting sideways, on the jump seat with the patient lying across in front of him and every now and then he would look through the centre. He clarified that although he was facing the patient, he could see through the centre when he looked to his right. He also indicated that inside the cabin was fully lit.

**[24]** Mr. Douglas indicated that the patient they had been transporting was an elderly lady in her 70s who was showing signs of decreased responsiveness due to her sugar level falling and her situation was considered critical. He was asked if he was able to see when the vehicle impacted the pedestrian and responded that he had not as at the time of the collision, his focus was on the patient. He explained that he was alerted to what actually happened when Mr. Brown told him something. In respect of the speed at which they had been travelling at the time of the incident, Mr. Douglas stated that to his knowledge the vehicle had almost stopped as it had literally slowed down.

## SUMMARY OF SUBMISSIONS

### Claimant submissions

- [25] In submissions filed on behalf of the Claimant, Mr. Hemmings sought to address any discrepancies which he stated may appear to exist on the face of Mr. Williams' evidence. He contended that Mr. Williams had not changed his account but merely clarified same. Counsel submitted that although the police were present, Mr. Williams was seeking to make it clear to the court that it was a pedestrian light which informed him that it was safe to cross. In asking the Court to view the differences as not material to the credibility of the Claimant, Mr. Hemmings relied on the authority of *Errol McDonald v Zoukie Trucking 2009HCV01372*. In that case, the Court had found that for the purpose of determining liability it was immaterial that the Claimant had given different accounts in his witness statement and viva voce evidence as to which foot had been on the pedestrian crossing at the time of the collision.
- [26] Mr. Hemmings submitted that it was not in dispute that at the time of the collision, the light was on red and the Claimant was on the pedestrian crossing. Counsel also highlighted the 1st defendant's concession that he could not recall the speed at which he was travelling at the relevant time. He argued that the 1st defendant had admitted that at the time of the accident he did not see the claimant before he began crossing. In respect of the witness Rohan Douglas, Mr. Hemmings asserted that his account did not provide much assistance as he was not able to see what had occurred at the time of the collision.
- [27] Counsel made reference to a number of provisions of the Road Traffic Act which included section 26(1), section 27(1), section 30(1), section 58, section 95(1) and (3), section 96(1) and (4). These provisions addressed a number of areas to include the rate of speed at which a vehicle should be travelling, driving with due care and attention and the requirement of all road users to observe the Road code and traffic signals.

**[28]** Counsel also made reference to the Road Traffic Regulations. While the regulations cited and included in his submissions were extracted from the May 2022 amendment which may not yet be applicable and certainly post-dates this incident, a number of the references were relevant. Mr. Hemmings highlighted section 201 which addresses traffic lights, specifically section 201 (2) which reads as follows;

*"Signals given by a constable directing traffic take precedence over those conveyed by a traffic sign"*

**[29]** Counsel cited section 210 of the regulations which addresses the duty of a driver to exercise care even where he has a right of way. Reference was also made to section 282 on the right of passage of emergency vehicles. Mr. Hemmings submitted that the provisions of the Island Traffic Authority Road Code 1987 also provides useful assistance as it outlines the fact that all persons have a right to use the road for the purpose of passage and should be careful, cautious and courteous at all times.

**[30]** The duties of a motorist towards other road users was also highlighted at section 33 which provides:

*"at a pedestrian crossing controlled by light signals stop at the stop line when the red light signal is red and move only when the amber light begins to flash"*

**[31]** Counsel submitted that in light of the statutory framework, a motorist on the roadway has a higher duty of care than a pedestrian. He argued that this was especially the case when travelling in certain areas such as a pedestrian crossing. Mr. Hemmings conceded that the instructions of a police officer would take precedence over the traffic lights but insisted that the Court should take note of the fact that section 23 of the Road Traffic Regulations 2022 only penalises motorists for failing to give way to an emergency vehicle and was silent in respect of pedestrians thereby implying that there is a greater duty on motorists.

[32] Mr. Hemmings took issue with the registration of the 2<sup>nd</sup> defendant, a point which was not raised in the course of cross-examination and argued that there is no evidence before the court to prove that the ambulance in question had been appointed by the minister for use as an emergency vehicle at the time of the accident. The decision of ***Adele Stern v Villa Mora cottages Ltd etal 2012 JMCA Civ 20*** was cited, in which the court examined the existence of a duty of care, its breach and the issue of damages flowing from the breach. Counsel also made reference to the decision of ***Lorna Hayles v AG [2020] JMSC Civ 39***, where Fraser J made it clear that emergency vehicles on emergency missions owe the same duty of care as all other road users. In addressing this point, his Lordship stated;

*[48] These principles are also consistent with the decision in Marshall v Osmond [1983] QB 1074, that the standard of care of the driver of an emergency vehicle is to drive with such care and skill as is reasonable in all the circumstances. Such a driver owes a duty of care to a claimant notwithstanding the fact that he is responding to an emergency. Similarly, the case of MacLeod (a protected party suing by his litigation friend Barbara MacLeod) v Metropolitan Police Commissioner [2015] All ER (D) 98 established that emergency vehicles on emergency missions owe the same duty of care as all other road users.*

*[52] It should be noted that the emergency vehicle regulations in Jamaica do not address the duties of the drivers of emergency vehicles but they specifically outline the circumstances in which the specific duty of other drivers arise in relation to emergency vehicles. This however does not negate the duty of care to other road users owed by the drivers of emergency vehicles in Jamaica, based on the RTA and the common law.*

[33] In respect of the Claimant's evidence that he did not see any lights or hear the siren, Counsel made reference to ***Damian Wilson v Christopher Dunn etal 2014 JMSC Civ 257*** in which the Claimant had given similar evidence. Mr. Hemmings asked the Court to note that in spite of this admission, the Court found that the defendant (ambulance driver) was liable for negligence, reliance was placed on the dicta of Batts J at paragraph 25 of the judgment, where he stated;

*The issue which arises is whether there is a breach of duty of care by the 1st Defendant. I hold that he acted reasonably and as any reasonably prudent driver would. He satisfied himself no vehicle was oncoming. He*

*had earlier satisfied himself no one was behind and that vehicles behind were passing to his left. It was reasonable to assume that any other vehicle would follow suit. The accident was in my view entirely caused by the negligence of the 3rd Defendant who failed to operate his vehicle in a safe manner. A vehicle ahead positioned as if to turn right with indicator on, ought to be passed on its left or not at all. It is an act of negligence to proceed in the reckless expectation that other vehicles will give way stop or move out of the way, merely because one has a light on. In fact and as I have found there was no flasher light on the vehicle. Whether or not one was on makes no difference to my decision. This is because a flashing light would not have changed the cause of this accident. The 1st Defendant was positioned to turn right with his indicator on. The 3rd Defendant ought to have stopped or passed to the left of the 1st Defendant.*

- [34] Mr. Hemmings submitted that applying the principles enunciated in that case to the instant case, even if the lights and sirens had been on, the 1st defendant was still negligent in breaking the stoplight as he had a greater duty of care at a pedestrian crossing taking into account the busy nature of the location. Counsel argued that in this case liability was not a straightforward matter between the Claimant and the Defendant as there was clear contributory negligence on the part of the police officer signalling the ambulance to break the traffic light.
- [35] Counsel also cited the decision of ***Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4*** in which the court considered whether the police could not be sued for negligence except in exceptional circumstances. Mr. Hemmings argued that in that decision, the Court made it clear that contributory negligence could arise if it was reasonably foreseeable that an accident could occur by the positive act of the officer. He contended that by signalling the ambulance to break the red light in the relative dark and physical conditions of Half Way Tree the officer was liable for contributory negligence. In considering this submission however, I noted that unlike the ***Robinson*** case, this officer was not sued by the Claimant, as such, this court would be impeded in giving consideration to this argument.
- [36] Mr. Hemmings posited that in deciding whether there had been any contributory negligence on the part of the Claimant, the Court should give careful consideration to the decisions of ***Clifford v Drymond [1976] RTR 134*** and ***Venel Williams v***

***Pableto Henry [2017] JMCA Civ 85.*** He argued that if the court found that the Claimant was contributorily negligent, it was no more than 15% liability as; (a) he had safely crossed most of the intersection (b) the defendant had a higher duty of care (c) the defendant had a duty to exercise care even when signalled by the officer (d) there was contributory negligence on the part of the police and (e) the claimant acted lawfully as he had the walk light.

[37] On the question of whether the second defendant was vicariously liable, Mr. Hemmings submitted that there could be no dispute in that regard as it has been accepted by them that the 1<sup>st</sup> defendant was their servant and agent and had been acting in the course of his employment at the relevant time.

### **Defendants' Submissions**

[38] In submissions advanced on behalf of both Defendants, Mrs. Radlein asked the Court to give careful consideration to the credibility of the Claimant who she asserted was not a witness of truth. She highlighted what she described as several material inconsistencies in his account which included;

- a. His changing evidence on the colour of the lights when he came out of the restaurant to the crossing.
- b. The position of the vehicles which he initially described as moving then stated they were stationary.
- c. His assertion that other persons were crossing with him when he was the only person hit.
- d. His admission that a patient was inside the ambulance when viewed against his insistence that the lights and sirens were off.
- e. His insistence that he had reached the third lane on the crossing yet never seeing the ambulance which Counsel stated was a classic example of not showing due care and attention.

- f. Refuting the contents of his own statement that it was the police who signalled him to cross and insisting it was the light.
- g. The mention of an injury to the abdomen for the first time when this was never stated in either medical report.

[39] Mrs. Radlein rejected the Claimant's contention that the Court should consider the principle of Res Ipsa Loquitur in coming to a decision on how the collision occurred. She argued that the Claimant had the burden of proof and needed to show negligence on the part of the 1st Defendant. Counsel cited the decision of Ng Chun Pui v Su Chuen Tait [1988] UKPC 7 in support of her contention that this principle did not apply. She contended that on a review of the Particulars of Claim, the Claimant had specified a total of 5 ways in which the 1st Defendant had been negligent, which negated the application of this principle. Mrs. Radlein opined that in any event, there was cogent evidence presented by the 1st Defendant which a Court would be able to consider in determining how the collision occurred.

[40] Counsel further submitted that the Claimant had failed to make out a prima facie case as based on his use of the terms '*to the best of my knowledge, information and belief*' in his statement, it is clear that he had no idea of what had occurred and as such could not have been keeping a proper lookout. Counsel argued that apart from his insistence that he had been on the pedestrian crossing, Mr. Williams provided no other evidence as to any act of negligence on the part of the 1<sup>st</sup> Defendant.

[41] On the issue of the duty of care owed, Counsel relied on the decision of **Nance v British Columbia** where the duty of care of motorists as well as pedestrians was stated as follows;

*'Generally speaking when two parties are so moving in relation to one another so 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. If it were not so the individual on foot could never be sued by the owner of the vehicle for damage caused by his want*

*of care want in crossing the road for he would owe to the plaintiff no duty to take care.....when a man steps from the curb into the roadway he owes a duty to traffic which is approaching him with risk of collision to exercise due care....'*

[42] On the question of the 1st Defendant's duty of care, Counsel made reference to the evidence of both Mr. Brown and Mr. Douglas. She asked the Court to carefully consider their insistence that both the lights and sirens were on and had been on for some time. Mrs. Radlein argued that given the Claimant's admission that a patient had been in the ambulance, it was more likely than not that the warning signals would have been engaged.

[43] Mrs. Radlein acknowledged that the duty of care expected of the driver of an emergency vehicle is the same duty owed by any other road user, which is to exercise such care and skill as is reasonable in all the circumstances<sup>1</sup>. Counsel made reference to the decision of **Keyse v Commissioner of Police**, which she stated dealt with very similar facts and provides useful guidance. In that matter, a 17-year-old Claimant was crossing the road to catch a bus when he was struck by a police car being driven by the 1<sup>st</sup> Defendant en route to a burglary scene. On appeal, it was held by the Court of Appeal that the officer was not at fault for accelerating through the junction, at paragraph 31 of the judgement, the Court observed;

*it was not unreasonable for him to accelerate through the junction when it appeared to be wholly and obstructed. It would not have been realistic to expect him to anticipate that a pedestrian in dark clothing would hurry across the road, directly across his path, at an angle away from him without a second glance when the traffic light was showing green to the vehicle on its well-advertised emergency journey.....although drivers should allow for the unexpected when they are at the wheel of a car it would inhibit the valuable work done for the community as a whole, if drivers in the emergency services were not allowed to drive their vehicles on the basis that pedestrians would recognise their warning lights and sirens and give them proper priority by keeping out of their paths."*

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<sup>1</sup> John Donaldson MR – Marshall v Osmond [1983] QB 1074



[44] Mrs. Radlein submitted that the Claimant also owed a duty of care and relied on ***Clifford v Drymond 1976 RTR 134*** where Lord Justice Bridge stated as follows:

*"there is a duty on a pedestrian who steps onto the pedestrian crossing not only to satisfy himself that it is reasonable to do so at the moment when he leaves the pavement and sets foot on the carriageway but also if at that time any car is near enough and travelling fast enough to raise any doubt in the mind of a reasonable pedestrian as to whether the car will in fact accord the precedence to which the pedestrian is entitled, there is a duty on the pedestrian to keep that car under observation and to see whether the car is going to stop<sup>2</sup>"*

[45] On the question of whether either party had failed to abide by their duty of care, Mrs. Radlein argued that the 1<sup>st</sup> Defendant had done all that could reasonably be expected/required of him as he had the lights and sirens engaged, approached the intersection with due care and attention and came to a stop at the stop line. She submitted that he followed the instructions of the officer when he moved off along with visible precautions and acted as a reasonable person operating in an emergency would have done.

[46] Mrs. Radlein submitted further that by way of contrast, the Claimant was not paying attention as he neither saw nor heard the ambulance. She pointed to the contradictions in his account as to what alerted him to walk and questioned whether any of his evidence could be believed. She posited that he had failed to yield to the ambulance per Section 4 of the Road Traffic Regulations, as his focus had been on crossing the road to begin having his food.

[47] Mrs. Radlein asserted that Mr Williams had failed to observe both common law and statutory duties as he had;

- a. Entered the roadway when it was unsafe to do so.
- b. Failed to keep a proper lookout.

- c. Failed to observe the presence of an ambulance.
- d. Failed to yield to the ambulance.
- e. Failed to remain in place at the side of the roadway until the ambulance passed.
- f. Disobeyed the instructions of the police officer
- g. Failed to have regard for his own safety.

[48] On the issue of any contributory negligence on the part of the 1st Defendant, Counsel submitted that on the evidence, this did not arise.

#### **LAW – Negligence/Liability**

[49] In my consideration of the issues joined between the Parties, I carefully reviewed the case law and statutory framework which I found relevant to the issues before me. In addition to the authorities cited by Counsel, I also took note of a number of other decisions which I found useful. On the issue of negligence, a classic definition is to be found in the case of **Blyth vs. Birmingham Waterworks [1856]** 156 ER 104.7, specifically the dictum of Alderson, B, where he opined:

*“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do”*

[50] It is well established, that for a claim in Negligence to succeed, the Claimant must prove on a balance of probabilities:

- a) The existence of a duty of care, owed to the Claimant by the Defendant.
- b) A breach of that duty.
- c) Damage resulting from that breach.

[51] Decided cases have also confirmed that all users of the road owe a duty of care to other road users (see also: **Esso Standard Oil SA Ltd and Anor vs. Ivan Tulloch (1991)28 JLR 557**)

[52] In the case of **Bourhill v. Young (1943) A.C. 92** the Court emphasised that a driver must exercise reasonable care to avoid injury or damage to other users of the road. Reasonable care is the care which an ordinary skilful driver would have exercised under all the circumstances, and which includes avoidance of excessive speed, keeping a proper look out and observing traffic rules and signals.

[53] The duty placed on a motorist was also examined by the Court in the case of **Foskett v Mistry (1984) R.T.R 1 C.A 660**, where it was stated:

*“it is the duty of the driver or rider of a vehicle to keep a good look out. A driver who fails to notice in time that the actions of another person have created a potential danger is usually held to be negligent; he must look out for other traffic which is or may be expected to be on the road, whether in front of him, behind him or alongside him, especially at crossroads, junctions and bends.”*

[54] The principles enunciated in the foregoing cases, were specifically adopted by Laing J in the decision **Elizabeth Brown v Daphne Clarke et al. [2015] JMSC Civ. 234** where he is stated:

*[31] The driver of a motor vehicle must exercise reasonable care to avoid causing injury to persons or damage to property.*

*[32] Reasonable care is the care which an ordinary skilful driver would have exercised under all the circumstances and includes an avoidance of excessive speed, keeping a proper look out and observing traffic rules and signals (see **Bourhill v. Young [1943] AC 92.**)*

*[33] Section 51(2) of **The Road Traffic Act (“the RTA”)** imposes a duty on motorist to take such action as may be necessary to avoid an accident.*

[55] In this jurisdiction, among the legislative framework which governs the rules of the road is The Road Traffic Act (RTA). It provides guidance to persons in their use of the road and imposes certain duties on these users. A fundamental duty imposed under the Act is set out at section 32 which requires all drivers to exercise due care

and attention in their use of the road and to have reasonable consideration for other road users.

[56] Section 51(2) of Act also provides useful guidance as 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 a collision, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.”*

[57] The other statutory and regulatory provisions which are germane to the legal duties of the Parties in this matter are noted as follows;

*S. 95(1) - The Island Traffic Authority shall prepare a code (in this Act referred to as the “Road Code”) comprising such directions as appear to the Authority to be proper for the guidance of persons using roads, and may from time to time revise the Road Code by revoking, varying, amending or adding to the provisions thereof in such manner as the Authority may think fit.*

*(2) - ...*

*(3) - The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings. ...*

*S. 96(4) - In this part the expression “traffic sign” includes marks on the surface of roads, all signals, whether automatic electric signals or otherwise, warning sign posts, direction posts and signs or other devices for the guidance or direction of persons using roads.*

*97(1) The driver of every vehicle and the rider of every bicycle shall obey-*

*(a) **all red lights and stop signs; and***

***(b) all other traffic signs which may be lawfully placed, erected or exhibited on or near any road, or so as to be visible from a road, in accordance with the provisions of section 96.***

*(2) Any person who fails to comply with any such traffic signs shall be guilty of an offence.*

**[58]** For the purpose of this matter, I also considered it prudent to examine the provisions of **The Road Traffic (Emergency Vehicles) Regulations, 1961**, specifically Regulations 3 – 4 which state:

*3. Emergency vehicles giving audible signal by siren horn shall have the prior right of passage along all roads.*

*4. Upon the approach of any emergency vehicle giving audible signal by siren horn,*

*a. the driver or operator of every other vehicle being used on a road shall immediately drive the vehicle as near as possible and parallel to the left edge or kerb of the road clear of any intersection and shall stop and remain stationary until the emergency vehicle has passed; and*

*b. every pedestrian on the road shall immediately proceed as near as possible to the extreme edge of the road and shall remain there until the emergency vehicle has passed.*

**[59]** The provisions of **The Island Traffic Authority Road Code, 1987 (“the Road Code”)**: were also identified as relevant and applicable to the issues to be determined, particularly **Part 2** which provides at paragraphs 15 – 18 and 53:

***Intersection and Road Junction Operation***

***15. Approach all intersections with caution, have your vehicle in control at all times;***

***16. Be prepared to stop, rest foot slightly on brake pedal and proceed through cautiously;***

***17. Bring your vehicle to a full stop at all ‘stop’ signs and proceed only when it is safe to do so; and***

***18. At the “Traffic Light Signal controlled junctions”, proceed only on the green signal. Do not enter an intersection on red or amber. If you***

*are already in the intersection when the amber light comes on you may proceed cautiously.*

### **Emergency Vehicles**

*53. When you hear the siren, bell, Two Tone horn or see the flashing red light of an emergency vehicle (Fire, Ambulance, Police) observe the following rules:*

*Drive your vehicle as near as possible and parallel to the left edge or kerb of the road, clear of any intersection. Stop and remain stationary until the emergency vehicle shall have passed.*

***Every pedestrian on the road must immediately proceed to the sidewalk as near as possible to the extreme edge of the road and stop until the emergency vehicle shall have passed.***

*The driver of a vehicle may not follow closer than 500 feet behind any emergency vehicle.*

[60] The RTA and accompanying regulations are complemented by case law. For the tort of negligence to be made out there must be specific proof by the Claimant, on a balance of probabilities, before he can succeed in an action against another road user. The test of whether a duty of care exists in a particular case was enunciated by Lord Bridge of Harwich in the leading case of **Caparo Industries plc v Dickman [1990]** 1 All ER 568, 573-574, where after reviewing a number of authorities on the point, the Learned Judge stated:

*“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”*

*[50] As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof, on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case (see Clerk & Lindsell, op. cit., para. 8-149; see also, **Ng Chun Pui v Lee Chuen Tat [1988]** RTR 298, per Lord Griffiths at page 300). But the actual proof of carelessness may often be problematic and the question in*

every case must be “what is a reasonable inference from the known facts?”  
(*Clerk & Lindsell, op. cit.*, para. 8-150).

[61] The existence of and application of a duty of care was also examined by the Court in **Theron Scott v Huntley Manhertz [2017] JMSC Civ 148**. In that case, the Claimant sought damages against the defendant for negligence. He stated that the defendant suddenly and without warning turned right from Old Hope Road in breach of the traffic light into his path causing a collision. The defendant’s contention was that the accident was caused solely by the negligence of the Claimant in that, among other things, the Claimant disobeyed the stop light and failed to yield to the defendant’s right of way or in the alternative the claimant significantly contributed to the collision.

[62] At paragraphs 46 – 48 Thompson-James, J. stated that:

*[46] It is well established that the driver of a motor vehicle has a duty to take reasonable care not to cause injury or damage to other road users. Lord Jamieson in **Hay or Bourhill v James Young** 1941 S.C. 395, 429, a statement which was later approved by the House of Lords ([1943] A.C. 92) explained the duty as follows:*

*No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in the premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care.”*

*[47] Reasonable care means the care which an ordinarily skilful driver would have exercised under all circumstances, and connotes an “avoidance of excessive speed, keeping a good look out, observing traffic rules and signals” and so on. What is reasonable depends on the circumstances of each case and is a question of degree (**Bourhill vs Young [1943] A.C 92**).*

[63] In **Griffins v Merseyside Regional Ambulance [1997] EWCA Civ J1008-2**, it was pellucid that there is no absolute rule in favour of traffic crossing a junction on a green light. Consequently, even a motorist in whose favour the traffic light shows green still has a duty to exercise reasonable care in accessing an intersection. The case also noted that the duty on the ambulance driver crossing an intersection against the red light was a heavy one, but there is equally a duty of care upon other road users to include a driver of the private motor vehicle, which went beyond

merely taking reasonable steps to avoid colliding with the ambulance driver. This reasoning was also evident in the case of ***Marshall v Osmond [1983] QB 1074***, which stated that the standard of care of the driver of an emergency vehicle is to drive with such care and skill as is reasonable in all the circumstances. Such a driver owes a duty of care to other road users, including the Claimant, notwithstanding the fact that he is responding to an emergency.

- [64] It is noteworthy that the emergency vehicle regulations in Jamaica do not address the duties of the drivers of emergency vehicles but specifically outline the circumstances in which the duty of other drivers and pedestrians arise in relation to emergency vehicles. This however does not negate the duty of care owed to other road users by the drivers of emergency vehicles.
- [65] The decision of ***Damean Wilson v Christopher Dunn and Ors [2014] JMSC Civ. 257***, which was cited by Mr. Hemmings was also examined. A review of the facts in that matter reveal that there was a collision between an ambulance and a motor vehicle driven by the 1st defendant, as a consequence of which the claimant sustained injuries. The 3rd defendant, the driver of the ambulance maintained, amongst other things, that his flashing lights were on. The court however found the 2nd and 3rd defendants liable for negligence. The relevant dicta of Batts J at para. 25 of his judgment has already been outlined above.
- [66] A review of these cases confirms that although other road users, have a duty to give way to emergency vehicles operating with signals which indicate that they are on an emergency mission, drivers of emergency vehicles also have a duty to assess the circumstances and exercise due care and regard for other road users while proceeding on their emergency mission.
- [67] In respect of the duty of care owed by pedestrians, the decisions of ***Clifford v Drymond*** and ***Keyse v Commissioner of Police*** make it clear that there is a correlating duty owed by pedestrians to other road users. This duty has also been



enshrined in statute and it would not be correct to say that either branch of law imposes a heavier standard or duty on a specific branch of road users.

## **ANALYSIS/DISCUSSION ON LIABILITY**

### **Whether the defendant owed a duty of care to the Claimant, did he breach this duty of care?**

**[68]** In arriving at my decision on the question of liability, it is clear that these questions would have to be considered together. It is also clear that the answers to these questions lies in the evidence that this Court accepts as being true and reliable. In this case, the undisputed evidence before the court is that the collision occurred on October 10, 2013 at about 6:00 in the evening at the intersection of Constant Spring Road, Half Way Tree Road and Hope Road right by the clock. It is also accepted by the Parties that the intersection of Half Way Tree Road and Constant Spring Road is regulated by traffic lights.

**[69]** The abovementioned facts aside, the cases of the Claimant and defendants are diametrically opposed in several material aspects which include;

- whether the claimant ran from the right side of the road across the path of the ambulance;
- whether the claimant failed to obey the instructions of the Police and the warning signals on the ambulance;
- whether the Claimant was actually on the pedestrian crossing;
- whether the defendant was speeding; and
- whether the siren and ambulance lights were on.

**[70]** There has been no independent or physical evidence presented in this matter, as such this case turns substantially on the credibility of the parties. In light of this fact, the court must be circumspect in its assessment of both versions given the

significant differences between the Parties. In deciding the issue of credibility, I carefully considered the demeanour of the witnesses as well as any inconsistencies or discrepancies in their evidence particularly where they are material.

**[71]** The evidence of the Claimant had a number of inconsistencies, the more significant ones were noted as follows :-

- a. In his witness statement, Mr. Williams gave evidence that a Police Officer who was at the scene directing traffic had signalled to the 1st Defendant to slow down and allow for him to safely cross the pedestrian. In cross-examination, his statement was put to him. Mr Williams rejected having said this and indicated that this had not occurred.
- b. In his witness statement, Mr. Williams indicated that a Police Officer was at the scene of the incident directing traffic. Under cross- examination, he insisted that this was not true as the Police Officer was 'just standing up', meaning that the Police Officer was not directing the traffic.
- c. Mr. Williams stated that he did not see the ambulance as he waited for the pedestrian light but under cross-examination, he admitted that after exiting the restaurant, he was more focused on the lights than he was on the vehicles along the roadway.

**[72]** From my review of the relevant case law and statutory provisions, it is evident that both pedestrians and motorists owe a duty of care to other road users and neither bears a heavier burden. In my analysis of the evidence of the witnesses, I found that Mr Williams failed to comply with this duty in at least two (2) important respects. The first was his complete disregard of the presence and commands of the officer who was on duty. This is seen in his outright rejection of his earlier remark that she signalled him to cross and his efforts to reduce her role to a passive bystander. These contrasting accounts on his own case begged the question whether Mr. Williams had adopted this approach because he was aware

that the signal to proceed had been given to the ambulance driver. In circumstances where the legislation makes it clear that the signals of an on-duty officer take precedence over the traffic lights, Mr. Williams should have been taking careful note of the actions of the police officer before making his way across the intersection and I am satisfied on the evidence that he failed to do so.

**[73]** Mr Williams also failed to keep a proper lookout and this is clearly seen in his admissions that he did not see the ambulance until it hit him and that he was more focused on watching for the pedestrian light than he was on the vehicles on the roadway. Both case law and statute makes it clear that even in the use of a pedestrian crossing, an individual is still required to keep a proper lookout to ensure that it is safe to cross before doing so. Mr. Williams' evidence on this point reveals that contrary to the actions of a reasonable road user, he operated in the belief that it was sufficient to have the pedestrian light in order to move and on that basis, he could utilize the crossing without satisfying himself as to the positions of the vehicles.

**[74]** Apart from disclosing a clear breach of his duty of care, I found that the several inconsistencies identified were material to Mr. Williams' credibility and the reliability of his case as a whole. I was also not impressed with his demeanour as he gave evidence. While I accept that he was a farmer and not an intellectual, his responses to even the most innocent of questions seemed ponderous, combative and marked with an attempt to outsmart or refute, even at the expense of refuting his own pleadings.

**[75]** I found that his changing responses left me with questions as to the reliability of his account on the sequence of events that resulted in the collision and I did not believe his evidence that there were no flashing lights or sirens coming from the ambulance even though he conceded that it was transporting a patient. I was also unable to find that he had provided any evidence of speeding on the part of the 1st defendant. In contrast to the Claimant, I was impressed with the demeanour of the 1st defendant as he gave his evidence. I believe that the lights and sirens had

been engaged from the point at which the patient had been collected at Whitehall Avenue and that these were still being used at the point of collision. In circumstances where the lights facing the oncoming vehicles had changed, I am satisfied that the officer would have signalled the ambulance to proceed given the clear indication that it was operating in emergency mode.

**Was the collision caused by the defendant's breach of his duty of care? Did the Claimant suffer injuries and damages as result of the defendant's breach of his duty of care? Was there contributory negligence on the part of the defendant or did the Claimant fail to take reasonable steps to avoid or minimize injuries to himself?**

[76] It is evident from the account of the 1<sup>st</sup> defendant and his witness, that while transporting the patient, the lights changed to red and Mr. Brown brought the vehicle to a stop. In doing so he acted in compliance with his duty of care to obey and comply with traffic signals and the pedestrian crossing even while operating as an emergency vehicle. I have considered whether the collision was caused or contributed to by the 1<sup>st</sup> defendant's breach of his duty of care and I was unable to conclude that he was wholly at fault as he had obeyed the lights and only moved the vehicle when instructed to do so by the officer.

[77] In arriving at this conclusion, I carefully reviewed the 1<sup>st</sup> Defendants evidence including his unusual turn of phrase that he obeyed the officer's signal to 'come around' with 'visible precautions'. He was asked to explain this and stated that from a visible perspective the officer had cleared the area of pedestrians and it was in these circumstances that he moved. In my analysis of this aspect of the 1<sup>st</sup> Defendants evidence, I was struck by this statement as it was the defendants case, that no pedestrians had been on the crossing, but the evidence of the 1<sup>st</sup> defendant seems to suggest that there were, particularly where he said he was instructed to come around. This raised the question as to what or who he was being told to come around. This is of some significance given the Claimant's contention that he was in the process of crossing and other persons were behind him.

[78] I also considered Mr Brown's evidence that he had seen the Claimant prior to the collision standing in the vicinity of the Tastee one car lane away. It had been suggested to the Claimant that he had dashed from the restaurant across the roadway and into the ambulance's pathway but the evidence of Mr. Brown that he had seen him on the sidewalk seems to contradict this. Based on this utterance I believe that Mr. Williams was in fact among the persons on the side to whom Mr. Brown referred as pedestrians. I also believe that he was likely in a visible position at that area and this was why the 1<sup>st</sup> defendant's attention had been drawn to him.

[79] I believe, that the 1st Defendant was aware that the Claimant was waiting to cross or was in the process of crossing when the red light was displayed to the vehicles. It was then of the utmost importance that any movement on his part be done in circumstances where he continued to keep an eye on the individuals in this area given his concession that the roadway was very busy at that time of evening. I believe that while Mr. Brown sought to act in compliance with the instructions of the officer he placed a greater reliance in proceeding on the indication from the police and in that narrow window failed to keep a proper lookout for the movement of pedestrians. I am satisfied that it was in these circumstances that his vehicle came into contact with the Claimant.

[80] Section 3(1) of the Law Reform (Contributory Negligence) Act provides:

*"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 damage ..."*

[81] In **Jones v Livox Quarries Ltd** [1952] 2QB 68 Lord Justice Denning opined:

*"Although contributory negligence does not depend on a duty of care, it does depend on foreseeability ... A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might hurt - 16 - himself and in his reckonings he must take into account the possibility of others being careless"*

[82] Applying the principles enunciated in both statute and case law, it is clear that although Mr. Brown was guilty of a minor lapse in judgment, the Claimant fell woefully short of his responsibility to ensure that it was safe to proceed. The evidence proves that he acted on what he believed was the right of way given by the walk light without satisfying himself that it was entirely safe to do so. It is in this regard that I found him to be largely responsible for the collision which occurred. This Court therefore finds the Claimant liable for contributory negligence and apportions liability at 80% to the Claimant and 20% to the Defendant.

## **Damages**

### **Special Damages**

[83] In respect of the award of special damages, Mr. Hemmings submitted that this had been agreed in the sum of \$206,000, whereas Mrs. Radlein countered that the agreed figure was in fact \$87,500. In light of the fact that there was a sharp difference in opinion as to the sum which has been agreed, I considered it prudent to review the pleadings as well as the evidence provided in respect of this head of damages. I noted that although Mr. Hemmings made submissions on loss of earnings and reduced earnings, this was never pleaded or particularised. Additionally, there was no evidence, documentary or otherwise elicited on this area. The sum total of the evidence for which there were pleadings and proof was in relation to the medical expenses and police report which were exhibited. On a careful calculation of the figures stated, I found that that the expenses incurred amounted to \$88,500 and I am prepared to award same as special damages.

### **General Damages**

[84] It is trite law that the sum of money to be awarded for General Damages for personal injury suffered by a Claimant ought to be a sum as “**nearly as possible**” which puts the Claimant in the same position she would have been in if she had not sustained the wrong” (per Lord Blackburn in *Livingstone v Rawyards Coal Co. (1880) 5.A.C. 25 at 39.*

**[85]** Arising from the accident/collision, the claimant has said that he suffered pain and injury and sustained loss and damage. The particulars of his injuries as outlined in his Medical Report prepared by Dr. Melton on August 23, 2019 are;

- i. 4cm by 1cm laceration of the scalp
- ii. Abrasions to the shoulders
- iii. Pain in the waist area
- iv. Pain in the lower back upon lifting, sitting for long periods, standing and long walks
- v. Pain in the right shoulder
- vi. Wasting in the supra and infraspinatus muscles
- vii. Mild tenderness over the right greater tuberosity
- viii. Chronic symptomatic lumbar spondylosis
- ix. Soft tissue injury of the right shoulder
- x. 2% impairment of the whole person

**[86]** In respect of the quantum of damages which should be paid to this Claimant, Mr. Hemmings highlighted the injuries sustained as well as his loss of amenities. He submitted that Mr. Williams suffered a drastic reduction in the number of days he could work as a result of his injuries. He also emphasised that the Claimant had been assigned a 2% whole person impairment (WPI) by Dr. Douglas, a Consultant Orthopaedic Surgeon.

**[87]** Mr. Hemmings relied on a number of cases as providing useful guidance as to the appropriate award which include the following;

- a. ***Jhamiellah Gordon v Jevon Paul Devere Chevannes [2016] JMCA Civ 79*** – The Claimant who was self-employed had suffered whiplash in a motor vehicle accident (MVA), she experienced pain to mid and lower back, 2% PPD and loss of earnings. An award of \$1.4 million given in May 2016 updates to \$2,003,420.75 using September CPI.
- b. ***Venell Williams v Pableto Henry supra*** – 39-year-old Claimant, self-employed, involved in a MVA on a pedestrian crossing. Injuries included a left ankle sprain, 3%WPI. Award in January 2017 of \$1.6 million, updates to \$2,173,160.17.
- c. ***Janet Barclay v Met Management Transport Holdings 2007HCV05184*** – Claimant suffered tenderness of left acromioclavicular joint of the left shoulder, mildly wasted muscles of left arm and shoulder and 3% whole person impairment in relation to her shoulder. Award of \$1.5 million in April 2008 updates to \$3,850,418.41.
- d. ***Jason Williams v Racquel Antoinette Jarrett-Foster 2013HCV00589*** – Claimant suffered soft tissue injury to the neck and back, resulting 2 % impairment of lower back. Award in April 2016 \$2 million, updates to \$2,868,571.43.
- e. ***Dalkeith James v Margaret Brown and Errol Scott Claim No. 2011 HCV 03960***, the Court awarded \$7,000,000.00 for pain and suffering and loss of amenities. The relevant injuries were small laceration over the scalp, pain in the shoulder and pain in the lumbar region of his back radiating to his right side. of middle of right fibula. This award when updated would be \$8,420,588.23.

**[88]** Mr. Hemmings submitted that a comparison of Mr Williams’ injuries with those of the Claimants in the relevant authorities confirm that an appropriate award is \$3,854,344.35.



- [89] Mrs. Radlein submitted that in determining the appropriate quantum of damages, the Court should take careful note of the fact that after the Claimant was treated at KPH and made two follow up visits to the clinic, he did not return to a doctor until four (4) years later when he was seen by Dr. Douglas.
- [90] She submitted that although the report of Dr. Douglas made reference to wasting of the Claimant's right shoulder and mild tenderness in that area, there was no mention of a right shoulder injury mentioned in the original report. Counsel also highlighted that Dr. Douglas made no findings in respect of the Claimant's hip and in respect of his neck area, the findings showed a normal gait and no tenderness of the spine.
- [91] Mrs. Radlein submitted further that Dr. Douglas only saw the Claimant once and in relation to his findings of lumbar spondylosis, when questioned about this he stated that this is a degenerative condition of the spine. Counsel opined that there was no nexus established between the MVA and the findings in the 2017 report and argued that the degenerative changes were not surprising given the Claimant's age of 54 years.
- [92] Mrs. Radlein contended that if damages are to be assessed, the appropriate guide should be the medical report from KPH. On the matter of the award, Counsel cited the decision **Yee v Grant** pg 204 *Harrisons on Personal Injuries*. In that case, the Claimant suffered injuries to the abdomen, hip, right side of the neck, a sprained ankle and a laceration to the head. He was unable to work for two weeks. An award of \$5000 was made which updates to \$282,227.27. She submitted that taking this decision into account, any award made should not exceed the sum of \$300,000.

### **Analysis/Discussion**

- [93] On the issue of the appropriate award to be made to the Claimant, I have taken note of the cases cited by Mr Hemmings in support of the award of \$3,854,344.35. On a careful review of these authorities cited, it is clear that the **Janet Barclay**, **Jason Williams** and **Dalkeith James** are somewhat comparable to the situation

of the Claimant, taking into account the injuries which have been outlined in both reports. On the other hand, Mrs. Radlein has argued that the findings outlined in the report of Dr Douglas should be wholly rejected and an award made based on the findings at KPH. The basis for this submission lies in her assertion that the significant injuries highlighted by Dr Douglas are not mentioned in the KPH report and the doctor having seen the Claimant 4 years after the incident, the report could provide no true nexus between the accident and the injuries noted.

- [94]** While it is correct that the report prepared by Dr Douglas mentioned abrasions to shoulders and pain in the waist area, neither of which were mentioned by the attending doctor at KPH, I noted that the earlier medical report stated that Mr. Williams suffered a laceration to the head and soft tissue injury to the neck and hip. In his report, Dr Douglas stated that the Claimant suffered injuries to these areas and consequently developed chronic pain in the lower back and right shoulder. Dr Douglas also stated that following his injury, Mr. Williams had limited contact with the doctor and has not had a full complement of treatment for his various pains. The doctor also indicated that Mr Williams would benefit from a full course of physiotherapy.
- [95]** In analysing the submissions made by Mrs. Radlein, I considered whether there was merit to her argument that the significant injuries were 'new' and not connected in any way to the collision. The findings of the original physician however confirm that there were soft tissue injuries in the region of the neck which based on the human physiology is connected to the shoulder and to the hip which is also interconnected with the back, specifically the lower back.
- [96]** Dr Douglas was asked about his diagnosis of chronic symptomatic lumbar spondylosis as well as his finding that there was degenerative disease with mild narrowing of the disc at L3/L4. He explained that lumbar spondylosis is degeneration of the lumbar spine from any cause. He expanded on this statement by remarking that age related wear and tear of the spinal column is the most common cause of spondylosis. He was asked if aging is a common cause of

degenerative disc disease and he agreed that it is. He added however that there are other factors which can accelerate the process such as trauma. With this indication, it is clear that while the degeneration noted could be explained by age as Mrs. Radlein argued, it was of some importance that the doctor also emphasised that it can be caused by trauma. This is especially significant where the accepted evidence is that the Claimant was hit by the ambulance and fell onto the roadway, both of which were sufficient to have caused trauma. In light of the foregoing findings, I am satisfied that there is sufficient nexus between the collision and the injuries noted, neither is there any basis to question the reliability of Dr Douglas' report.

[97] In arriving at the appropriate award, I gave due consideration to the case law cited on behalf of the defendants. In light of the accepted medical evidence, I found that it failed to provide any useful assistance as the injuries and prognosis of this Claimant is far more serious than obtained in those circumstances. In respect of the authorities cited by Mr. Hemmings, I found that the injuries of the Claimant fell in the midpoint between the *Dalkeith James* and *Janet Barclay* decisions based on the similarity of the injuries and the whole person impairment. It is my opinion that the appropriate award would be \$5 million dollars. This sum is to be apportioned by 80 % being borne by Mr. Williams and 20% by the Defendants.

## **Disposition**

[98] Accordingly, I make the following orders in keeping with my findings on liability:

- i. Judgment awarded in favour of the Claimant to be apportioned in the ratio of 80% contributory negligence on the part of the Claimant and 20% contributory negligence on the part of the Defendant.
- ii. The claimant is awarded general damages in the sum of \$5 million dollars 20% of which is to be borne by the Defendants with interest at the rate of 3% from October 7th, 2019 to December 2nd, 2022.

- iii. The claimant is awarded special damages in the sum of \$88,500 with interest at the rate of 3% from October 13th, 2013 to December 2nd, 2022.
- iv. The Claimant is to be paid 20% of his costs.
- v. The Defendants are to be paid 80% of their costs.