[2021] JMSC Civ 36

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2010HCV05572

BETWEEN	**ROBERT FRANKLIN**	**CLAIMANT**
AND	**EVERTON WALTERS**	**1ST DEFENDANT**
AND	**COLUMBUS COMMUNICATIONS LIMITED T/A FLOW**	**2ND DEFENDANT**

IN OPEN COURT

Mr. Everol McLeod instructed by Kinghorn & Kinghorn for the Claimant.

Ms. Jacqueline Cummings instructed by Archer Cummings and Associates for the 2nd Defendant.

Heard: February 1, 2 and 26, 2021.

Negligence – Road accident – Pedestrian walking in road – Contributory negligence – Standard of care expected of drivers of motor vehicles and pedestrians walking on roadway – Whether the defendants breached a duty of care owed to the claimant – Whether contributory negligence on the part of the claimant established – Apportionment of liability – Quantum of damages.

N. HART-HINES, J (Ag.)

[1] On September 9, 2010 a collision occurred along Barry Street in the parish of Kingston between the claimant and the motor vehicle driven by Mr. Everton Walters, at a time when he was the servant or agent of the 2nd defendant. The

claimant alleges that the collision occurred as a result of Mr. Walters' negligence in operating a Toyota Hiace van bearing registration CH 2630, owned by the 2nd defendant. The claimant seeks damages against the 2nd defendant for negligence in respect of injuries, losses and damage sustained. Although Mr. Walters is named as 1st defendant, he was never served with the claim form and particulars of claim. Throughout this judgment I will refer to him as "Mr. Walters". The action proceeded only against the 2nd defendant.

[2] In the defence filed on April 9, 2013, the 2nd defendant denies that there was any negligence on the part of its servant and stated that the claimant caused or materially contributed to the collision through his own negligence.

[3] The claimant alleges that he was hit from behind by the van operated by Mr. Walters, because Mr. Walters was on his mobile phone at the time of the collision. He alleges that his right leg was broken because the van ran over it. The witnesses for the 2nd defendant contend that the claimant carelessly walked in between two parked cars and then suddenly walked into the van's left wing mirror and fell, and that Mr. Walters was not on his mobile phone at the time of the collision. From the evidence of all the witnesses, it is clear that the uncontroverted evidence is that:

1. the claimant fell on impact with the van;
2. the claimant's right leg was under the van when the van stopped after the collision;
3. the claimant's right leg was injured as a result of the collision;
4. At some point after the collision, the claimant leaned on a parked taxi and was told expletives by the driver of the taxi and told to get off his vehicle.

THE ISSUES

[4] The credibility of the witnesses is in issue. Other issues for the determination of this court are:

1. What is the standard of care expected of Mr. Walters?
2. What is the standard of care expected of the claimant?
3. Did Mr. Walter's conduct fall below the standard of care expected of him?

4. Did the claimant's conduct fall below the standard of care expected of him?
5. How should liability be apportioned?

THE EVIDENCE

The scene of the accident

[5] Barry Street is a one-way road in the heart of "downtown Kingston" which is a business area. There is a "vending zone" sign prominently displayed near the intersection of Barry Street and King Street and there is a widened section of the roadway on the right hand side in which food vendors tend to park carts. The court has taken judicial notice of the fact that the road is often busy with pedestrians and food vendors, who use carts to transport food products. Although there are yellow markings on the curb wall on both sides of the road indicating that the area is a "no parking" zone, several taxis park along the left hand side of the road. Strangely, taxi drivers park in a perpendicular manner to the curb wall so that the full length of their cars juts out into the roadway at its widest point, where the road intersects with King Street. The parties agree that on September 9, 2010, the taxis that were parked near to the intersection, were parked in a similar manner, that is, perpendicular to the curb wall.

[6] There was a visit to the *locus in quo* during the claimant's evidence, and measurements were taken of the road and observations made. The following observations were made by the court:

1. There is no sidewalk on the left hand side of Barry Street.
2. Several taxis were parked in a perpendicular manner to the curb wall on the left hand side of Barry Street. This therefore means that if a pedestrian wished to walk on the left side of the road, he/she would have to walk in the asphalted road, either in front of, behind, or in between the parked cars.
3. The first taxi seen was parked 22 feet and 3 inches from the King Street and Barry Street intersection.
4. The distance between the curb wall (by the enclosed garage) at the new entrance to the Post Office and the front of the first taxi was 15 feet 6

inches. This car was parked fairly close to the curb wall, and so the length of that car could be estimated as approximately 15 feet.

5. The width of the roadway in the front of the third taxi (from the sidewalk by Khemlani Mart) was 21 feet.
6. The total estimated width of the roadway in the region of third taxi would be approximately 36 feet and 6 inches (15 feet 6 inches plus 21 feet).
7. The distance between the intersection and the old entrance to the Post Office on Barry Street was 78 feet.
8. The distance between the intersection and the third taxi was not measured but could be estimated as approximately 38 to 45 feet, having regard to the average width of a car (6 feet) and the spaces between the parked cars.
9. It would have taken a vehicle a few seconds to travel from the intersection to the location of the third taxi.

The claimant's account

[7] The claimant gave evidence that on September 9, 2010, he went to the Accountant General's Department at its office, which was then located at King Street, Kingston, to look about his pension. The claimant said that he parked his car at the old entrance to the Post Office on Barry Street. On leaving the Accountant General's Department, the claimant alleged that he walked in the roadway along Barry Street to return to his car. His back was to oncoming traffic on Barry Street. He alleged that he had to walk in the road because the taxis had been parked along Barry Street very close to the curb wall and he was not able to walk behind them.

[8] As the claimant alleges that he was hit from behind, he offered little evidence on what happened before the collision. The salient points of his evidence are:

- He was hit from behind and fell face down on the ground;
- He "turned around" and realized that he was hit down by a vehicle;
- He rolled over to his bottom, and slid out from under the vehicle unto the front of a taxi.
- Prior to being hit by the vehicle he did not hear a car horn or brakes;

- When the van stopped, he was "*partially under the vehicle"*;
- When he found it difficult to stand on both legs, he leaned on a car that was *"right next to [him]"*;
- The owner of that car told him *"a lot of expletives and asks that [he] lean up off his car"*.

[9] When asked what part of the vehicle hit him, the claimant initially said "*the left front wheel*". Then he said "*the bumper got to be what hit me down and the left front wheel went over me…. I was hit from behind. I did not see*". He went on to say "*if it was the left rear wheel [that ran over the foot], I would be outside the vehicle not underneath it. I would be at the back of the vehicle.*" I must indicate at this juncture that I interpret the claimant to be saying that when the vehicle came to a stop, he was under the vehicle somewhere between the front and back wheels.

[10] He denied that the driver of the taxi said *"… you mussi a idiot a see car and walk inna the road*". The claimant denied that he walked into the side of the FLOW van and was hit by the left wing mirror on the van door. He was asked whether he looked up towards King Street at any time. His response was unconvincing when he said "*Yes. I was seeing before me. I looked*".

[11] As regards his position in the road just prior to the collision, he said that he was walking very close to the front of the parked taxis and indicated a distance of approximately nine inches away from the cars. He stated that the taxis do not park in the intersection, but instead they start to park between 20 or 40 feet from the intersection.

[12] The claimant alleged that the collision occurred in the vicinity of the third taxi from the intersection. Based on my visit to the *locus in quo*, this would have been approximately 38 to 45 feet from the intersection. At this alleged point of impact, the distance between the front of the third taxi and the sidewalk across the road from that taxi was 21 feet.

[13] As regards his injury, the claimant said in his witness statement that he was taken to Medical Associates by Mr. Walters and after his leg was examined, he was referred to the University Hospital of the West Indies ("UHWI"), which he visited later that evening. At the UHWI, he was given information about the extent of the injuries, and his leg was placed in a brace. He was given medication and sent home. He further said:

> *"a few days after leaving the hospital my foot was hurting me real bad and so I went back to the hospital and they placed my foot this time in a cast. I started to have fever a lot of times and my foot did not look or feel right to me and out of concern I visited a private doctor. I went to the Essential Medical Services where I was seen by Doctor Ijah Thompson".*

[14] The cast was eventually removed and he was referred to physiotherapy which he did. The medical report dated March 5, 2013 signed by Dr. Ijah Thompson of Essential Medical Services, indicates that the claimant was first seen on September 15, 2010, with a review done on September 25, 2010, December 10, 2010, February 5, 2011, June 16, 2011 and March 5, 2013. The doctor's assessment on September 15, 2010 was that he had received the following injuries:

1. transverse fracture right fibula and medial malleolus tibia
2. contusions to his left leg, and
3. upper respiratory tract infection.

Mr. Walters' account

[15] Mr. Walters alleged that he was not able to recall many facts from September 9, 2010. The salient points from his evidence are:

- He knew the area very well and knew it to sometimes be congested with pedestrians and motor vehicles;
- He thinks he was driving at approximately 3 to 5 Km/h because the van had just moved off from a position of rest when he stopped on the King Street at the intersection, before turning left unto Barry Street;
- He was about 15 feet away from the claimant when he first saw him and observed him up until the point of the collision;
- He was not on his mobile phone just prior to the collision and Mrs. Bryan-Colely did not accuse him of that;

- He felt only one impact to the van;
- He could not recall how much space there was between the front of the parked cars to his left and the Toyota Hiace;
- He recalled that there was space behind the parked cars for the claimant to walk, as the security guard at the post office was able to run behind some cars to the scene of the accident;
- The claimant walked from in between two stationary vehicles and into the roadway and into left side mirror of the Toyota Hiace;
- The claimant was caused this accident, as he collided into the vehicle;
- In his witness statement he said that there was nothing he could have done to avoid the accident as the claimant did not observe the road before stepping out into the road;
- During cross-examination, he said that he could not recall if he did anything to avoid the collision.
- Mrs. Bryan-Colely accompanied him and the claimant to Medical Associates.
- Mr. Walters retracted a statement made in his witness statement that the left back tyre ran over the claimant's leg. He opined that the claimant fell with his foot out. He said that the claimant "*fell sideways to a car*" which was in close proximity, on the right, and when he fell on the car his "foot was out"[1]. He added that he only saw a bruise on the claimant's foot.

Mrs. Bryan-Colely's account

[16] Mrs. Bryan-Colely gave evidence that on September 9, 2010, she was the fleet supervisor at FLOW and had journeyed to downtown Kingston with Mr. Walters to go to the Tax Office. The salient points from Mrs. Bryan-Colely's evidence are:

- She thinks Mr. Walters was driving at about 5 Km/h;
- She thinks the collision occurred between the second and third taxi, which was about 38 feet from intersection;

[1] The use of the word "foot" here was interpreted to mean "leg".

- The claimant walked from in between two stationary vehicles and into the left side mirror of the Toyota Hiace;
- When she first saw him, the claimant was looking to his left.
- She felt one impact to the van;
- She was not sure whether or not the claimant fell to the ground immediately after the collision;
- She recalled seeing him leaning on a taxi and the driver told to him "*lean up off mi car cause you a mussi ediot*".
- Mr. Walters did not take any evasive action prior to the accident.
- She accompanied Mr. Walters and the claimant to Medical Associates.

SUBMISSIONS

[17] I thank counsel for their industry in preparing written submissions, which I have considered. In addition to addressing the issue of credibility, counsel cited provisions of the Road Traffic Act ("the Act") and the Road Code for my consideration. I will now briefly summarise the submissions.

Submissions on behalf of the claimant

[18] Mr. McLeod submitted that the claimant was a credible witness and, in contrast Mr. Walters' account was incredible. Counsel Mr. McLeod submitted that the totality of the evidence suggests that Mr. Walters was responsible for the collision by being on the phone and failing to keep a proper look and failing to use evasive measures to avoid the collision. Counsel also relied on the doctrine of *res ipsa loquitor* although this was not pleaded. Mr. McLeod submitted that an inference is to be drawn that Mr. Walters was negligent.

Submissions on behalf of the 2nd defendant

[19] Counsel Ms. Cummings submitted that the claimant has not proven that Mr. Walters was negligent, and that the 2nd defendant has established that the claimant failed to take reasonable care for his own safety, and substantially contributed to the collision.

THE LAW

[20] The claimant bears the burden of proving, on a balance of probabilities, that Mr. Walters has failed to exercise due care and so negligently operated his motor vehicle that he caused injury to the claimant. He might not know precisely in what particular respects Mr. Walters' failure occurred, but he must adduce sufficient evidence to permit the court to draw the inference of negligence on the part of Mr. Walters. The claimant's account must satisfy the court that the collision was more likely to have occurred than not, as a result of Mr. Walters' negligence.

[21] It may be appropriate, based on the circumstances, to draw an inference of negligence. However, once the defendant adduces evidence, that evidence must be evaluated to see whether or not it is still reasonable to draw the inference of negligence from the mere fact of the accident.

[22] The claimant must establish these three (3) matters:

(1) that Mr. Walters owed him a duty of care;

(2) that Mr. Walters breached the duty of care in that his conduct fell below the standards that the law requires; and

(3) that as a result of the breach the claimant suffered damage of a kind that the law deems worthy of compensation.

[23] It is accepted by the parties that Mr. Walters owed a duty of care to the claimant. What remains to be determined in this case is whether Mr. Walters breached the duty of care owed to the claimant, and whether the claimant's injury was caused by that breach or by some other factor, such as the claimant's own negligence, or both.

[24] The 2nd defendant bears no legal burden of proof by merely denying the claim, but does bear the legal burden of proving the defence of contributory negligence, relied on. In alleging that the claimant was contributorily negligent, the 2nd defendant must show that the claimant did not take care for his own safety when walking on the road at the time of the accident and thereby

contributed to his injury. Viscount Simon in ***Nance v British Columbia Electric Railway Co Ltd*** [1951] 2 All ER 448 said at page 450:

> "*… when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury*".

[25] **Section 32(1)** of the Act makes it an offence for a person to drive a motor vehicle without due care and attention or without reasonable consideration for other persons using the road. **Section 51(2)** of the Act provides:

> *"(2) Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident…."*

[26] **Section 95** of the Act provides for the issuance by the Island Traffic Authority of directions for guidance of users of the road. The Island Traffic Authority Road Code (1987) ("Road Code") is one such direction issued. The Road Code is not entrenched in law here, and breach of the Road Code does not create a presumption of negligence[2]. However, the Road Code is a guide for motorists and pedestrians and a breach of it may "*be regarded as evidence to support an allegation of negligence*"[3]. **Section 95(3)** provides that the failure to observe any provision of the Road Code may be relied upon by any party in proceedings as tending to establish or negative any liability which is in issue.

What is the standard of care expected of a driver?

[27] Case law and the Road Code offer a guide as to the standard of care expected of a driver, and this includes:

1. Driving with due care, attention and concentration;
2. Driving within speed limits and adjusting the speed of the vehicle depending on the road conditions and vehicular and pedestrian traffic;
3. Being alert and keeping a proper look out for other road users, including pedestrians emerging suddenly into the road;
4. Driving slowly where pedestrians are seen, such as in crowded streets;

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[2] See ***Powell v Phillips*** [1972] 3 All ER 864.
[3] Per Batts J in ***Damean Wilson v Christopher Dunn*** [2014] JMSC CIV. 257 at paragraph 28.

5. Honking the horn to alert others, including pedestrians, to the presence or the approach of the vehicle; and
6. Taking evasive action where necessary.

What is the standard of care expected of a pedestrian?

[28] It is settled law that all road users, including pedestrians, owe a duty of care to other road users. Viscount Simon in ***Nance v British Columbia Electric Railway Co Ltd*** [1951] 2 All ER 448 further said at page 450:

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

[29] Pedestrians must take reasonable care of themselves and the amount of care reasonably required of them depends on the usual and actual state of the traffic on the road. This means that if the pedestrian is aware that the road is a busy one, he should exercise greater care and alertness so as to not expose himself or other road users to danger. The Road Code offers a guide in respect of the standard of care expected of a pedestrian, and this includes:

1. Taking reasonable care for his own safety when on the road[4];
2. Avoiding walking on the roadway with one's back to the traffic[5];
3. Using sidewalks or footpaths when there is one, and when there is none, walking on the right hand side of the road, facing oncoming vehicles[6];
4. Avoiding walking into the roadway from in front, behind[7] or in between stationary vehicles; and
5. Ensuring that one can see vehicles and can be seen by vehicles before walking into the roadway.

[30] Whether the conduct of Mr. Walters and the claimant fell below what is expected is question of fact to be determined based on an objective standard. The court must apply the test of what a "reasonable man" would have done in Mr. Walters' position. Likewise, regard must be had to whether or not the

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[4] See ***Davies v Swan Motor Co (Swansea) Ltd*** [1949] 1 All ER 620.
[5] See the Island Traffic Authority Road Code (1987) Part 1, Rule 1.
[6] Supra Part 1, Rule 2.
[7] Supra Part 1, Rule 4.

claimant took reasonable care for his own safety himself.

ANALYSIS

Credibility of witnesses

[31] I will indicate my finding as regards the credibility of the witnesses and then indicate my analysis of the evidence, having regard to the standard of care expected of Mr. Walters (as a driver) and the claimant (as a pedestrian).

Credibility of the claimant

[32] I observed his demeanour and gave consideration to his response to the question regarding whether he looked up towards King Street at any time. As indicated earlier, I found his answer *"[y]es. I was seeing before me. I looked"* to be unconvincing. If his account is to be believed, after he had made the left turn unto Barry Street, King Street would have been behind him. So it would not have been physically possible to see King Street "*before*" him, while on Barry Street. His reply that "*I was seeing before me*" would suggest that he was in fact walking in between the parked cars on Barry Street (as Mr. Walters and Mrs. Bryan-Coley have alleged), and, to that extent, he would have seen the vehicles which were passing directly in front of the parked cars. However, the standard of care expected of a pedestrian would be higher than merely looking in front of him. He was required to look to his right, from which the vehicular traffic flowed.

[33] I have noted another response given during cross-examination which suggests that he did come in contact with the left side of the van and not the van front. When he was asked what part of the van hit him, his initial response was "*the left front wheel*". However, he then retracted that response and said "*the bumper got to be what hit me down".* His first response would be more in keeping with what Mr. Walters said actually transpired on September 9, 2010, that the claimant came in contact with the left side of the van. However, it seems improbable that the left front wheel would have hit him unless the wheel was turned left from under the wheel arch.

[34] I have also considered the fact that the claimant admits that at some point shortly after the collision, he leaned on a parked taxi and was told expletives by the driver of the taxi. The parties agreed that this evidence forms part of the *res gestae*. While the claimant denied that the driver of the taxi said *"… you mussi a idiot a see car and walk inna the road*", he offered no plausible alternative explanation for the hostility and lack of compassion expressed by taxi driver towards him, after he collided with the van.

[35] More importantly, the medical report does not seem to support the claimant's evidence that he fell "*face down",* rolled over and slid out from under the van. His evidence suggests that he fell forwards on the asphalt after being hit from behind by the van. However, there is no medical evidence to suggest that his hands, forearms, elbows, face or head were bruised or otherwise injured as he fell "*face down*" in the road. I would expect to see evidence of even a bruise to one or more of these areas after falling on asphalt, but there was none. The only other bruise or contusion noted in the medical, was one to his left leg.

[36] Further, the medical does not support the allegation made at paragraph 18 of the claimant's witness statement, that the X-ray revealed that the "*top*" of his foot[8] was "*fractured in two places*". The medial malleolus tibia is the lower part of the tibia, in the region of the ankle, and not the top as he alleged, and the medical report suggests that there was a single transverse fracture to the tibia.

[37] It is my opinion that the location and nature of the fracture could assist the court to determine (1) the direction from which the leg was impacted or (2) the type of impact. To this extent, a medical report explaining the injuries is very important. However, the medical in this case does not assist the court in that regard. A comminuted fracture or multiple fractures, might have been more indicative of impact due to a heavy van (such as a Toyota Hiace), driving over the claimant's leg, as seems to be alleged by the claimant when he said that he had to roll over and slide out from under the van. A single transverse

[8] He used the words "leg" and "foot" interchangeably in paragraphs 8, 16, 18, 19 and 20 of his witness statement.

fracture of the tibia in the region of the ankle might suggest that the claimant's leg was impacted either as a result of a fall to the ground, or, as a result of being hit by the van.

[38] I am mindful that I did not have the benefit of expert evidence from a medical professional or accident reconstruction expert regarding the velocity of the vehicle, height of the bumper and the likely resulting injuries. However, when I consider the (1) medical evidence and (2) the absence of any injury to the claimant's hands, arms, back or any other area except his legs, and (3) the claimant's initial response that he was hit by "*the left front wheel*", I prefer Mr. Walter's account as being more plausible than that of the claimant. The location and nature of the injury to the right leg seems more consistent with a fall backwards or sideways whereby the claimant's right leg was raised or extended, and either hit the ground with force or came into contact with the left side or undercarriage of the van.

[39] As regards the reference to an "*upper respiratory tract infection*" in the medical report, no explanation was given by the claimant to indicate how this related to the collision. If the claimant is asserting that he was injured in his chest and this resulted in an infection, the claimant ought to have explained how his chest became injured, if not by coming in contact with the left wing mirror of the van.

[40] On the whole, when I assess his answers in cross-examination, as well as the medical evidence, I do not find the claimant to be a credible witness. I do not find that the claimant had adequate regard for his own safely as he walked along Barry Street on September 9, 2010. When stepping off the sidewalk on King Street and turning left unto Barry Street, he ought to have looked to his right to ensure that no vehicle was turning left. As he was familiar with the area, he would have been aware that there was no sidewalk on the left hand side of the road. Having regard to where he parked his car, he would have to walk a distance of 78 feet to get to his car. The claimant would have the court believe that it was safe for him to walk that distance with his back turned to oncoming vehicles. However, his witness statement is silent on the issue of

whether or not he checked that it was safe to walk on the left hand side of Barry Street, immediately after leaving the Accountant General's Department or at any point while walking.

[41] I find on a balance of probabilities that the claimant was in fact walking in between the parked cars on Barry Street and that he did not look to his right before emerging from in between the parked cars. The only time that he saw vehicles "before" him while on Barry Street, was when vehicles were passing directly in front of the parked cars.

Credibility of Mr. Walters

[42] I have noted Mr. Walters' inability to recall various matters, but I find this is simply one of the consequences of a protracted delay in the progression of the case. With the passage of time, witnesses' memories will fade. In assessing how credible and reliable the witnesses' accounts were, I must bear in mind that the events in this case occurred more than ten years ago. Despite Mr. Walters' inability to recall some things, I formed the view that, he gave credible evidence in relation to key areas, such as when he saw the claimant, and the fact that he was driving slowly at the time of the collision. Also, I have noted that he never sought to embellish his account regarding any area in which he might be faulted, such as not swerving or applying his brakes.

[43] I have taken judicial notice of the fact that the average height of a car is approximately 5 feet. From what I was able to observe of the claimant's height as he stood to be sworn to give evidence via video link, it seems that he is about 5 feet 6 inches tall. If my observations are correct, it is unlikely that he would have towered over the parked cars as he walked between them. At best, Mr. Walters would have seen only the claimant's head above the car roofs as he walked. Further, I must bear in mind that the claimant is likely to have been in Mr. Walters' peripheral view since at least three cars were parked to the left side of the road, and since Mr. Walters made a left turn unto Barry Street. This means that the claimant was partially obscured by the parked cars. This created a hazard.

[44] I also accept Mr. Walter's account that he was driving slowly after just moving off from a position of rest at the intersection. This account seems credible and reliable and I accept his account. I find that Mr. Walters could not be criticized in relation to the speed at which he drove the van. I will discuss the likely speed below at paragraph 51. If Mr. Walters only saw the claimant when he was 15 feet away from him, this would mean that Mr. Walters only saw the claimant about 1 or 2 seconds prior to the collision, depending on the speed of the vehicle. I will discuss whether Mr. Walters could have done anything to avoid the collision at paragraph 58.

[45] When I assess Mr. Walters' evidence, I find him to be a credible witness. I accept his account that he was not on his mobile phone, and that the claimant walked from in between two parked vehicles and into the left side mirror of the Toyota Hiace.

[46] Mr. Walters' account in cross-examination that the claimant might have injured his leg when he fell sideways unto a car with his leg out, appears to be supposition. However, it is plausible, having regard to the location and nature of the injuries recorded in the medical report. I prefer this account to that in Mr. Walters' witness statement, that he believed the rear tyre ran over the claimant's right leg. Had the rear tyre run over the claimant's leg, it is unlikely that the claimant's leg would have been under the van when it stopped, since the van must be expected to have journeyed a little distance before stopping after the impact. It is noted that the claimant made this point.

Credibility of Mrs. Bryan-Colely

[47] I found Mrs. Bryan-Colely to be honest when she admitted that Mr. Walters did not take evasive action prior to the collision. In her opinion he could not have done so as the claimant was not in the path of the vehicle, and the road in front of the vehicle was clear. I note that she stated that Mr. Walters no longer works at FLOW and he did not work there for long. I find that she would have no motive to tell a lie on his behalf.

[48] I find her estimate of the distance from the intersection to the point of impact to be in keeping with my observations at the locus. I believe that Mrs. Bryan-Coley had the best vantage point or opportunity to observe the events on September 9, 2010, and I accept her account that the claimant walked into the left wing mirror. I find her to be a credible and honest witness.

Did Mr. Walter's conduct fall below the standard of care expected of him?

[49] At paragraph 27, I have listed some examples of the standard of care expected of a driver. I will now consider whether Mr. Walters exhibited the requisite standard of care on September 9, 2010, light of the uncontroverted evidence and the other evidence heard during the trial.

Keeping a proper look out

[50] Mr. Walters accepted that Barry Street is sometimes a busy road and traversed by many pedestrians. It was necessary for him to look out for pedestrians. He said that he was not on his mobile phone at the time of the collision. Mr. Walters also said that he saw the claimant as he was walking. This suggests that he was keeping a proper look out for pedestrians, and I so find.

Speed of the motor vehicle

[51] Mr. Walters said that he was driving at about 3 to 5 km/h. This seems unrealistic as this is the speed of a vehicle when moving off from a point of rest. It is only logical that the vehicle would have picked up some speed as it travelled from the intersection to the point of impact, which is accepted to have been in the vicinity of the third taxi[9]. His evidence regarding a speed of 3 to 5 km/h is therefore not accepted. Notwithstanding, there are some circumstances surrounding the collision which suggest that Mr. Walters was driving slowly.

[9] I estimate this to be between 38 and 45 feet from the intersection, having regard to the fact that the average car is approximately 6 feet wide, and there was space between the cars for the claimant to walk.

[52] I am able to take judicial notice of the length of a Toyota Hiace motor bus, which I estimate to be about 15 feet. Further, I have taken judicial notice of the Road Code insofar as it indicates the usual breaking distance of vehicles. The Road Code Stopping Distance Chart indicates that if a vehicle is travelling at 20 mph (or 32 km/h), the thinking distance would be 20 feet and the braking distance would be a further 20 feet, for a total stopping distance of 40 feet.

[53] It appears from the evidence of Mr. Walters and Mrs. Bryan-Colely, that Mr. Walters only applied the brakes after the vehicle came into contact with the claimant. The claimant said that when the van stopped, his leg was under van, somewhere between the front and back wheels. This does not appear to have been challenged by the 2nd defendant's witnesses. Since the Toyota Hiace was about 15-feet long, the vehicle is likely to have stopped about ten (10) feet after the point of impact. Using the Road Code's Stopping Distance Chart as a guide, it would seem that Mr. Walters was travelling far less than 32 km/h at the time of the accident. In order for Mr. Walters to apply the brakes and stop swiftly after the point of impact, so that the claimant's leg was under the vehicle, it seems likely that he was travelling at a speed closer to 10 km/h, which would yield a total stopping distance of 3.27 metres or 10.73 feet.

[54] I am mindful that the Road Code's Stopping Distance Chart is merely a guide and that there are certain variables to be considered which might impact the speed at which a vehicle stops, such as the condition of the brakes or the tyres, the weight of the vehicle, the road surface, and the force at which the brakes are applied. Again, I did not have the benefit of evidence from an accident reconstruction expert. However, when I consider the evidence given that Mr. Walters had just turned left at the intersection of King Street and Barry Street, and consider the fact that he was able to brake almost immediately following impact, I am satisfied not only that he was driving at a slow speed, but also that he was keeping a look out for pedestrians.

[55] Using the length of the van and the Road Code's Stopping Distance Chart as a guide, it seems likely that 1st defendant was travelling at approximately 10 or

15 km/h at the time of the accident. This range was within the speed limit for the area and would not have been excessive in the circumstances.

[56] I accept Mr. Walters' account that he first saw the claimant at a distance of about 15 feet away, and that he does not recall applying the brakes because he thought the claimant would stop. However, his expectation that the claimant would stop walking, is evidence of misjudgment on Mr. Walters' part.

Driving with due care and attention

[57] Having regard to the estimated speed at which he was travelling, and the fact that he kept a look out for pedestrians, I find that Mr. Walters drove with due care and attention.

Taking evasive action

[58] Pursuant to **section 51** of the Act, Mr. Walters was required to "*take such action as may be necessary to avoid an accident*", and this includes evasive action such as swerving, braking, and blowing the vehicle horn.

[59] My understanding of the evidence of Mr. Walters and Mrs. Bryan-Coley is that the claimant walked in between the parked cars and suddenly emerged to the left side of the van, and walked into the van. Although I accept their evidence that this incident happened suddenly, I believe that it would have been possible for Mr. Walters to swerve to the right just as he observed the claimant in between the parked cars. I am not satisfied that applying the brakes would have necessarily avoided the collision, having regard to the total braking distance required and the sudden action of the claimant. However, I believe that it would have been prudent for Mr. Walters to swerve to the right. He should not have expected the claimant to stop walking.

Use of the horn

[60] I am not satisfied that honking the horn would have yielded an appropriate and quick response from the claimant so as to avoid the accident. This is simply

because there is insufficient evidence before to me as regards how briskly he was walking and the exact position he was in when Mr. Walters first saw him.

Did the claimant's conduct fall below the standard of care expected of him?

[61] In ***Davies v Swan Motor Co (Swansea) Ltd*** [1949] 1 All ER 620, Denning LJ said at page 631:

> *"When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe to a motorist who is going at an excessive speed any duty to avoid being run down. Nevertheless, if he does not keep a good lookout, he is guilty of contributory negligence. The real question is not whether the plaintiff was neglecting some legal duty, but whether he was acting as a responsible man and with reasonable care…".*

[62] Even on his own account, the claimant would have breached some provisions of the Road Code by walking on the left hand side of the road with his back to vehicular traffic. On the evidence of the 2nd defendant's witnesses, the claimant would have suddenly emerged from between stationary vehicles without stopping and checking that it was safe to do so. He did not ensure that he could see vehicles driving along Barry Street, and also that he could be seen by vehicles before walking into the roadway. On either account, it seems clear that the claimant was unaware of the approach of the van, simply because he did not look to his right. He was not keeping a proper look out as would be required for his own safety.

[63] I have taken judicial notice of the fact that the average sedan is about five feet high. If the claimant was walking between two cars, he could have seen over the top of the cars, had he looked. The evidence does not suggest that Mr. Walters was speeding, and therefore the claimant ought to have seen him while he walked between the two parked cars, and before he stepped out in front of those cars. It was reasonable for the claimant to have looked in the direction of the van before emerging unto the road, but he did not do so.

CONCLUSION

[64] While I accept that Mr. Walters drove at a reduced speed, and kept a proper look out for other road users, that is not sufficient for me to find that he exercised the standard of care of a reasonable driver in the circumstances. I

find that there was some negligence on his part. I accept the evidence of Mrs. Bryan-Colely that Mr. Walters did not swerve to avoid the collision. To that extent, Mr. Walters contributed to the collision. However, the matter does not end there. I also find that the claimant did not exercise the standard of care required of a reasonable pedestrian.

[65] In ***Jones v Livox Quarries Ltd*** [1992] 2 Q.B. 608, at 615, Denning LJ said

> "*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 be hurt himself; and in his reckonings he must take into account the possibility of others being careless*".

[66] I find that the 2nd defendant has adduced sufficient evidence to establish contributory negligence on the part of the claimant. The 2nd defendant has shown that the claimant walked into the Toyota Hiace van, and the only inference that could be drawn is that he did not look before emerging from between the two parked cars, unto the roadway. To that extent, I find that the claimant's conduct had a greater causal effect on the collision, than Mr. Walters' conduct.

[67] Had the claimant stopped and looked to his right and checked that it was clear to step out into the area of the roadway (which was being used for vehicular traffic), I believe that the collision would not have occurred. Much of the blame for the collision therefore rests with the claimant.

How should liability be apportioned?

[68] In apportioning liability, the court must compare the relative degrees of departure of the parties from the respective standards of care expected of them by the law. While I find that Mr. Walters could have swerved to avoid the collision, it seems clear from the evidence that, by failing to look before stepping into the road, the claimant acted contrary to what the reasonable or prudent man would have done in the circumstances. Further, by walking in between two parked cars (and thereby being concealed to some extent), and then suddenly emerging in the road, the claimant created a hazard for himself. I am satisfied that the claimant substantially contributed to his injuries.

[69] **Section 3(1)** of the **Law Reform (Contributory Negligence) Act** states as follows:

> ***"****Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damages..."*

[70] The claimant should bear the greater of responsibility for the collision. Having regard to the age of the claimant at the time of the accident, he ought to have known and understood the Road Code and what was expected of him when using the road as a pedestrian. He ought to have stopped and ensured that the road was clear for him to walk before he emerged from between two cars. I find that the claimant was seventy per cent (70%) to blame for the accident and Mr. Walters was thirty per cent (30%) to blame. The 2nd defendant, by virtue of its relationship with Mr. Walters on September 9, 2010, is vicariously liable for his negligence and the resulting damage.

ASSESSMENT OF DAMAGES

Amendment of particulars of claim in respect of special damages

[71] As counsel Ms. Cummings submitted, the claimant's claim for loss of earnings in the sum of United States one thousand five hundred dollars (USD$1,500) per week for 12 weeks, must fail since he produced no payslips in relation to his employment in the United States of America at the time of the accident.

[72] The claimant relied on receipts which were tendered and admitted into evidence as Exhibits 3A to 3F, 4A and 4B, 5 and 6, to indicate the medical expenses incurred, totalling ninety-seven thousand seven hundred dollars ($97,700). However, counsel Ms. Cummings submitted that as the claimant's statement of case only referred to fifty-three thousand dollars ($53,000.00) in medical expenses, he should not be permitted to recover a larger sum.

[73] The court considered that no prejudice would be suffered by the 2nd defendant and had regard to the fact that the particulars of claim might be amended at

any time prior to judgment being delivered[10]. In the circumstances, the court permitted an oral application to be made to amend the particulars of claim to reflect that ninety-seven thousand seven hundred dollars $97,700 was claimed as special damages.

General Damages

[74] Both counsel cited two authorities as regards awards for comparable injuries. The most applicable cases were ***Linden Garibaldi v Anthony Nicholson***[11], cited by Mr. McLeod, and ***Maureen Golding v Conroy Mitter & Duane Parsons***[12], cited by Ms. Cummings. I believe that the latter case is more apt as the injury in that case was also in the region of the claimant's ankle. There, the award was five hundred and eighty dollars ($580,000.00) in July 2006, with a CPI of 37.9. This award would update to one million, six hundred and sixty-eight thousand and seventy-three dollars and eighty-eight cents ($1,668,073.88) today with a CPI of 109 in December 2020. The claimant would be awarded 30% of that sum, which is five hundred thousand and four hundred and twenty-two dollars and sixteen cents ($500,422.16).

Special Damages

[75] The claimant is awarded 30% of the special damages sought ($97,700), which is twenty-nine thousand and three hundred and seventy dollars ($29,370).

DECISION AND ORDERS

[76] My orders are as follows:

1. Judgment for the claimant. Liability is apportioned 70% against the claimant and 30% against the 2nd defendant.
2. General damages awarded to the claimant in the sum of five hundred thousand and four hundred and twenty-two dollars and sixteen cents ($500,422.16) plus 3% interest from the date of service of the claim form on November 8, 2010.

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[10] See ***Shaquille Forbes v Ralston Baker and others*** Claim No. 2006HCV02938 (unreported) judgment delivered March 3, 2011.

[11] Reported in Personal Injury Awards, Ursula Khan, Volume 4, at page 82.

[12] Reported in Personal Injury Awards, Ursula Khan, Volume 6, page 62.

3. Special damages awarded to the claimant in the sum of twenty-nine thousand and three hundred and seventy dollars ($29,370) plus 3% interest from the date of the collision on September 9, 2010.
4. Half of the claimant’s costs to be agreed or taxed.
5. Attorney for the claimant to prepare, file and serve this order.