THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO.: ANUHCV 2008/0512

BETWEEN

JESSICA HOOD

Claimant

AND

FREE TRADE AND PROCESSING ZONE COMMISSION

HOUGHTON FORDE

VERE CARBON

ANGELLA GONSALVES

Defendants

Appearances:

Ms. Asheen Joseph and Mrs. Georgice Mendes-Blackman for the Claimant
Mr. Kelvin John with him Mr. Loy Weste and Mrs. Lisa Weste for the 1st and 2nd Defendants.
Mr. Hugh Marshall Jr. and Ms. Kema Benjamin for the 3rd Defendant
Ms. Samantha May and Mrs. Stacey Richards Anjo for the 4th Defendant.

2011: December 5, 6
2012: July 27

JUDGMENT

[1] **REMY J.**: This claim arises out of a motor vehicle accident which occurred on 8th September 2005 on Old Parham Road. Involved in this accident were Motor Bus C1282, owned by the First Defendant (Free Trade and Processing Zone Commission), driven by the Second Defendant Houghton Ford, and Motor Car A3180, owned by the

Third Defendant (Vere Carbon) and driven by the Fourth Defendant (Angella Gonsalves). At the time of the accident, the Claimant was a passenger in Vehicle Motor Bus C1282, and was an employee of the First Defendant.

[2] By Claim Form and Statement of Claim filed on the 5th September 2008, the Claimant pleaded that the collision was caused by the negligence of the Second Defendant as servant or agent of the First Defendant and/or the fourth Defendant as servant or agent of the Third Defendant, and that as a result she suffered pain, injury, loss and damage. She claims damages including Special Damages in the sum of $124,132.75 as well as interest and costs. She also claims Exemplary Damages against the First Defendant.

[3] In its Defence, the First Defendant denied that the collision was caused by the negligence of the Second Defendant and further stated that the collision was caused wholly by the negligence of the Fourth Defendant as servant and/or agent of the Third Defendant. The First Defendant further denied the Particulars of Negligence alleged by the Claimant. With respect to the allegation of unfair dismissal, the First Defendant denied that the Claimant was dismissed on the 1st May 2006 or at all, and pleaded that it was Counsel for the Claimant who, on or about the 13th April 2006, communicated to Counsel for the First Defendant the Claimant's position that the employer/employee relationship between the Claimant and the First Defendant had been severed.

[4] The Second Defendant in his Defence also denied that the collision was caused by his negligence as servant or agent of the First Defendant or at all, and states that the collision was caused by the negligence of the Fourth Defendant as servant and/or agent of the Third Defendant. The Second Defendant further denied the Claimant's allegations as contained in the Particulars of Negligence.

[5] The Third Defendant in his Defence admits that he is the owner of vehicle A3180, but denies the allegations contained in the Claimant's Statement of Claim. He specifically denies that the Fourth Defendant was in his employ on the 8th September 2005 or at any other material time whatsoever. He pleaded that "the Fourth Defendant is the

material (sic) grandmother of the Third Defendant's daughter". He states that he was out of State on the date of the accident. He pleaded further that he "merely left his vehicle with the Fourth Defendant in his absence."

[6] The Fourth Defendant in her Defence admits that the Claimant was a passenger in vehicle C1282 but disputed the Claimant's claim that she was negligent as alleged. She denied that any personal injury, loss or damage suffered by the Claimant was as a result of her negligence.

ISSUES

[7] The first issue for determination by the Court is: - who is liable for the accident? In other words, was the accident caused by the negligence of the Second Defendant, or the Fourth Defendant, or both? The second issue to be determined is: - who must bear liability for the Claimant's injuries and consequential loss? The third issue for the Court, having determined the issue of liability, is: - what quantum of damages should be awarded to the Claimant?

EVIDENCE

[8] The Claimant testified on her own behalf and called several witnesses.

[9] The first Witness called at the trial to give evidence on behalf of the Claimant was Ms. Cecilia Barron (Ms. Barron). A Witness Summary was filed on her behalf and was tendered as her evidence in chief. Ms. Barron's evidence is that at the date of the accident, she was an employee of the First Defendant and at the time of the accident, was a passenger in vehicle C1282, and was on her way to work. She stated that after vehicle C1282 was hit, the Claimant was "unresponsive." She stated that she called an ambulance and accompanied the Claimant in the ambulance when she was transported to the hospital.

[10] Under cross examination by Mr. Marshall, Counsel for the Third Defendant, Ms. Barron testified that vehicle C1282, was moving along Independence Drive at "a crawling pace", and that it continued to move at that pace when it entered the roundabout adjacent to the Governor General's wall. She testified that she was seated in the second row of the bus, in the middle seat, behind the driver, and could see clearly out of the bus to the front. She testified that it was not raining that morning and that it was a "clear, bright, sunny morning", and that there was "clear visibility."

[11] The next witness to give evidence on behalf of the Claimant was Ms. Thalia Parker (Ms. Parker). A Witness Summary was filed on behalf of this witness and was tendered as her evidence in chief. The evidence as contained in the Witness Summary is that she knows the Fourth Defendant and Heike Goodwin, and has known them for over 12 years. Ms. Parker stated that Ms. Goodwin cohabits with Vere Carbon (the Third Defendant) and two children, and that Ms. Goodwin does not drive. She stated that about 4 or 5 years ago, she witnessed Mr. Carbon driving Ms. Goodwin to work as they passed her house each morning en route to Columbian Emeralds at the airport.

[12] The evidence of the Claimant as contained in her Witness Statement with respect to the events of the morning of the accident is as follows:-

> Paragragh 5 - "I entered the bus via the sliding passenger entrance on the left and sat in the first row of seats located directly behind the driver. Faye Benjamin was also seated in the first row next to the right passenger window directly behind the driver, Mr. Houghton Forde. I sat with a space between Faye Benjamin and myself closer to the passenger door on the left. We were the only two persons seated in the front row."
>
> Paragraph 6 - "The bus proceeded up Independence Avenue; I felt an impact which jolted the bus forward as it went around the Roundabout. The impact raised me forward out of my seat. I fell back and do not remember anything. My next recollection was that my head was in Ms. Benjamin's lap and someone was tapping my cheek and calling my name."

Paragraph 8 - "As I sat up my head was spinning. I became aware that the bus had stopped and that persons were agitated and Cecilia Barron, an employee and fellow passenger in the bus told me she called the ambulance and it was on the way."

Paragraph 9 - "... The ambulance was parked to the front left side of the Nissan Urvan. As I exited the bus, I saw a turquoise car at the back of the bus on the passenger door side."

[13] Under cross-examination by Mr. Weste, the Claimant testified that the accident took place on Old Parham Road and that she "saw the collision when it took place." The accident occurred on a school day and not a holiday. The St. Joseph's Academy is located near to where the accident took place. The day of the accident was not the first time that she had travelled to work in vehicle C1282 and that she was aware before the accident that there was no seat belt where she chose to sit, but nevertheless sat at that seat. There were about five or six individuals in the bus when the accident took place and that, to her knowledge, she was the only person injured. She "could not recall" whether traffic was congested on Independence Drive that morning and "could not recall" how fast the Second Defendant was driving at the time of the accident. The Claimant also testified that she had a driver's licence; she stated that Stapleton Road is a minor road in relation to Old Parham Road, but that she "did not know" whether a driver coming from Stapleton Road would be obligated to give way to traffic on the right, or whether a driver coming from Stapleton Road must give way to traffic already on the roundabout.

[14] Under a brief cross-examination by Mr. Marshall, the Claimant testified that it was "not correct" to say that she had no knowledge of how the accident occurred. She testified that she did not know which of the drivers was at fault.

[15] Under cross-examination by Ms. May, Counsel for the Fourth Defendant, the Claimant testified that she "could not recall" how fast the traffic was moving that morning.

[16] The next witness to give evidence on the Claimant's behalf at the trial was Dr. Kunwar Kaushlemra Singh. A Witness Summary was filed on his behalf and was tendered as his evidence in chief at the trial. The evidence as contained in the Witness Summary is that Dr. Singh is a consultant Orthopedic surgeon and medical doctor. He first evaluated the Claimant at his private office "some two weeks after the motor vehicle accident". The evidence of Dr. Singh will be dealt with later in the judgment.

[17] Mr. Weste and Ms. May declined to cross-examine Dr. Singh.

[18] Under cross-examination by Mr. Hugh Marshall, Dr. Singh testified that his reports were not based on the neurological assessments of Dr. Marques or on the reports of Dr. Bydasie, but that he awaited the reports of Dr. Bydasie and Dr. Marques "out of respect and courtesy to another colleague."

[19] The next witnesses for the Claimant namely, Dr. Ian Thomas and Dr. Matthew were unavailable to give evidence when called, due to commitments related to their work, and of which the Court was previously made aware. A Witness Summary had been filed on behalf of each of the witnesses and these were tendered, without objection by Counsel for the Defendants, as their evidence in chief. The evidence of Dr. Thomas and Dr. Matthew will also be dealt with later in the judgment.

THE EVIDENCE

[20] The first witness called to give evidence on behalf of the First and Second Defendants was Corporal Sheckles. His evidence in chief as contained in his Witness Statement is that, on the date of the accident, he was assigned to the Traffic Department at Police Headquarters. At about 8 a.m., he visited the scene of the traffic accident which occurred in the vicinity of the Antigua Recreation Grounds. On arrival on the scene, he met a green Toyota Cynos motor car registration no. A3180 "at a standstill position on Stapleton Lane, and facing southeast. It was very close to the said roundabout. The

right front portion of the vehicle was damaged." Angella Gonsalves (the Fourth Defendant) who was present at the scene, told him that she was the driver of the motor car. He also met a Nissan Urvan bus, registration No. C1282 at a "standstill position on the northern side of the roundabout, and facing east on Old Parham Road. Its left front door, left bonnet and left side of its bumper was damaged."

[21] Corporal Sheckles stated that both drivers gave him separate explanations of how the accident occurred in the presence of each other. Angella Gonsalves explained that she was driving from north to south on Stapleton Lane. As she reached the roundabout, she stopped. She did not notice traffic on her right or in front, so she moved off. She then heard and felt an impact and she stopped. Both drivers gave an agreed point of impact where he took and recorded measurements at the scene. He was informed by Mr. Forde (the Second Defendant) that there was a passenger, namely the Claimant Jessica Hood, who had left in an ambulance.

[22] Under amplification of his Witness Statement, Corporal Sheckles consulted his notebook and gave details of the measurements which he took at the scene.

[23] Under cross examination by Counsel for the Claimant, Corporal Sheckles testified that he could offer no explanation why there was no mention in his report that anyone was injured. He testified that he interviewed the Claimant "months after the accident." He could not recall whether anyone was ever prosecuted with respect to the accident and he could offer no explanation as to why this was so.

[24] When cross examined by Mr. Marshall, Corporal Sheckles testified that he did not take measurements as to the length of the vehicles, but he would agree that the motor car is less than 27 feet long. He saw the damage to the bus and to the car and would agree that the damage which he saw to the vehicles was "suggestive of a very slight impact." The damage to the bus appeared to begin at the front of the bus and going backwards towards the front left wheel. When asked whether or not that was consistent with the bus coming into contact with the car and travelling forward, the witness responded that

that "it was not necessarily so." He agreed that the damage to the car was limited to its right front portion.

[25] Under cross-examination by Ms. May, Counsel for the Fourth Defendant, Corporal Sheckles testified that he could not say whether the distance from the stop line on Stapleton Lane to the roundabout was approximately 30 feet, but that the distance from the stop line to the roundabout is approximately 30 feet. In response to Counsel's suggestion that motor vehicle A 3180 was not close to the roundabout as stated in his Witness Statement, but actually on the roundabout, the witness stated that "it was very close to the roundabout; my recollection would have been more clear at the date of the accident."

[26] The evidence in chief of Mr. Houghton Forde (Mr. Forde) as contained in his Witness Statement is that he is a driver for the First Defendant and has been driving for over 35 years. At the material time of the accident, namely at approximately 7.30 a.m., he was providing transportation for certain employees of the First Defendant from Lower Market Street to the First Defendant's workplace. He states that he turned onto Long Street, then took a left onto Independence Drive. A line of vehicles was in front of him and the traffic was congested and moving very slowly. He entered the roundabout driving in a northerly direction from Independence Drive. He was going clockwise around the roundabout driving at no more than about 5 miles an hour with a line of vehicles in front of him. He observed three lines of vehicles, all waiting to enter the roundabout coming down from Old Parham Road, Bishopgate Street, and Stapleton Lane. He had the right of way on the roundabout with respect to traffic coming out of Stapleton Lane.

[27] He observed Motor Vehicle A3180 being driven by the Fourth Defendant, approaching the stop sign and stop line before entry onto the roundabout from Stapleton Lane onto Old Parham Road and Independence Drive. He states that "it was unsafe for Angella Gonsalves to do so", since he had the right of way along the roundabout. He expected Ms. Gonsalves to stop. By then he was on the north-eastern side of the roundabout facing east and directly behind the vehicle immediately in front of him. It was at that point

that he observed "from the left corner of his eyes" that Motor vehicle A3180 being driven by Ms. Gonsalves was not stopping at the Stapleton Lane Stop Sign as he expected her to do, and as she was required to do, but that instead Ms. Gonsalves was proceeding onto the roundabout when it was unsafe to do so, and without yielding to the line of oncoming traffic to her right going around the roundabout. When he observed Motor vehicle A3180 coming towards him without stopping, he "veered to the right "to prevent vehicle A3180 colliding into Bus C1282 and he "stopped suddenly" in an attempt to avoid the collision.

[28] Mr. Forde stated that he was unable to avoid the collision. He states that vehicle A3180 struck bus C1282 on the left front door of the passenger side, but that the damage to both vehicles was "negligible" as it was "not a very forceful collision."

[29] Under cross examination by Counsel for the Claimant, Mr. Forde testified that the accident did not happen on Old Parham Road. He did not observe the Claimant exit the bus immediately after the accident, but he saw her exit it eventually. He saw someone assist the Claimant when she exited the bus and saw that the Claimant went into the ambulance when she exited the bus.

[30] Counsel for the Third Defendant declined to cross examine Mr. Forde.

[31] Under cross- examination by Ms. May, Mr. Forde testified that traffic was congested that morning; that he was driving at between 5 and 10 miles per hour and that he was coming from Independence Drive. He had a clear view of traffic coming from Stapleton Lane, and that the traffic coming from Stapleton Lane was flowing consistently. He observed Ms. Gonsalves approaching the roundabout from Stapleton Lane and was able to observe her "for a while".

[32] The next witness Mr. Vere Murphy, the Commissioner of the First Defendant, was called to give evidence. He had filed a Witness Statement, but failed to appear to give evidence at the trial. Accordingly, his Witness Statement was struck off.

[33] The final witness to give evidence for the First and Second Defendants was Ms. Vincere Roberts Nicholas. The evidence as contained in her Witness Statement is that she is an employee of the First Defendant. She states that the accident occurred at about 7.30 a.m that day. She was a passenger on Bus C1282 that morning and was seated immediately behind the Claimant and was "able to view first-hand the events leading up to the accident and the accident itself." She observed vehicle A3180 being driven by Angella Gonsalves approaching the stop sign and stop line before entry onto the roundabout from Stapleton Lane onto Old Parham Road and Independence Drive, when it was unsafe to do so since Mr. Ford had the right of way along the roundabout. Mr. Forde was already around the roundabout and was turning onto Old Parham Road when vehicle A3180 "slammed into the bus." Ms. Gonsalves never stopped or slowed down her speed immediately before the collision occurred.

[34] Ms. Nicholas stated that she felt the impact and held onto the seat immediately in front of her. Another passenger, Cecilia Baron also held onto the front seat as well. She came out of the bus, along with the other passengers except for the Claimant. She heard Angella Gonsalves saying to Mr. Ford that she had the right of way. She states that she interjected and asked Ms. Gonsalves how it is that she could claim that she had the right of way when there was a clear stop sign, but that Ms. Gonsalves did not respond.

[35] Under cross-examination by Ms. Joseph, Ms. Nicholas testified that she saw the Claimant "lay down on the seat", but did not observe anything else about the Claimant. She did not give a statement to anyone after the accident.

[36] Both Mr. Marshall and Ms. May declined to cross-examine Ms. Nicholas.

[37] The Third Defendant Mr. Vere Carbon had filed a Witness Statement but elected not to give evidence at the trial. Accordingly, his Witness Statement was struck off.

[38] The Fourth Defendant Ms. Angella Gonsalves (Ms. Gonsalves) gave evidence on her own behalf and called no witnesses. In her Witness Statement, Ms. Gonsalves stated that on the day of the accident, she was driving motor car A3180 owned by her son-in-law, the Third Defendant. (Mr. Carbon). She was driving from north to south on Stapleton Lane. Upon approaching the roundabout, she stopped "to observe traffic coming from the right and to give precedence to approaching vehicles." She states that "having determined that it was safe to do so", she "entered the roundabout to go on to Independence Drive." After clearing the junction, she felt an impact to the right side of the vehicle. After exiting the vehicle, she saw that she had been hit "on the right side" by motor bus C1282.

[39] Under cross-examination, Ms. Gonsalves testified that her grand-children are the children of Kydie Goodwin and Vere Carbon. Their names are Jane Carbon and Stephen Goodwin. On the day of the accident, she had no permission to drive vehicle A 3180 from the owner Mr. Carbon. She stated that on the day of the accident, she drove her grand-children to school, but did not have Mr. Carbon's permission to drive the children to school in his vehicle.

[40] Under cross-examination by Mr. Weste, Ms. Gonsalves agreed that there was a stop sign at the corner of Stapleton Lane. She testified that she "did not remember" whether there is a roundabout sign, or a give way sign before the stop sign. She testified that Stapleton Road is a minor road compared to Old Parham Road and that, when coming from Stapleton Lane, one must give way to traffic on the right. She testified that when exiting Stapleton Lane, one must give way to traffic already on the roundabout. Ms. Gonsalves testified that she could see the traffic coming from Independence Drive but that she "was not sure" if the traffic coming from Independence Drive was congested. She testified that she did not see any vehicle coming from Independence Drive, and never saw Motor bus C1282. She did not see any vehicle coming from Upper Bishopgate Street. Ms. Gonsalves denied entering the roundabout "when it was unsafe to do so".

[41] Mr. Marshall declined to cross-examine Ms. Gonsalves.

SUBMISSIONS OF COUNSEL

Claimant's Submissions

[42] Ms. Asheen Joseph, Learned Counsel for the Claimant submits that the Claimant's injuries were caused by the negligent actions of both the Second Defendant and the Fourth Defendant on the 8th September 2005. She further submits that the First Defendant is vicariously liable for the negligent acts of the Second Defendant. She submits that "the First Defendant has established a course of conduct of transporting the Claimant to work, a course of practice that has existed for at least 2 years." Counsel cites the following cases in support of her submission that an employer is vicariously liable for the torts of its employees which are committed in the course of the employee's employment:- **Ready Mixed Concrete (Southwest) v Minister of Pensions and National Insurance**[1]; **Rose v Plenty**[2]; **Hilton v Thomas Burton (Rhodes) Ltd**[3];

[43] Ms. Joseph submits that there is prima facie evidence that the Fourth Defendant, the driver of A3180 was the servant or agent of the Third Defendant. She further submits that since the Third Defendant elected not to give evidence at the trial, then if the Court finds that the Fourth Defendant's negligent act caused the Claimant's injuries, then it follows that the Third Defendant is vicariously liable for the negligent acts of the Fourth Defendant. Counsel cites the case of **Ramburran v Gurruchan**[4]. She states that this case held that ownership of a motor vehicle is prima facie evidence that the driver (of the vehicle) is the agent or servant of the owner and that owner is liable for the negligence of the driver.

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[1] [1968] 2QB 497
[2] [1976] 1WLR 141
[3] [1961] 1 ALL ER 74
[4] [1970] 15 WIR 212

First and Second Defendants' Submissions

[44] Mr. Loy Weste, Counsel for the First and Second Defendants, submits as follows:-

(a) The Claimant has not made out a prima facie case of negligence against the First and Second Defendants, and has failed to discharge her legal burden of proving that the Second Defendant caused or contributed to the accident. The Claimant's failure to provide any further explanation as to who was responsible for the accident is 'baffling' considering her bold assertion on cross examination that she saw the accident as it took place. The Claimant has not alleged in her Witness Statement any information upon which the Court can conclude or infer that the Second Defendant acted negligently at the time of the accident. Further, the Claimant has not alleged or proven in her evidence any negligent act by the Second Defendant at the time of the accident.

(b) The Fourth Defendant was "wholly" responsible for the collision. The Second Defendant did all that was required of a reasonably prudent driver, and therefore cannot be held liable in negligence to the Claimant.

(c) The Claimant was contributorily negligent for the alleged injuries she sustained from the accident through her failure to wear a seat belt; any award of damages should be reduced to the extent of her responsibility for the said injuries.

(d) The Claimant has wholly failed and/or refused to meet the legal requirement for breach of statutory duty against the First Defendant.

(e) The Claimant has failed to meet the legal threshold to ground a claim for exemplary damages against the First Defendant.

Third Defendant's Submissions

[45] Counsel for the Third Defendant submits that it is necessary for the Claimant to show firstly, that on a balance of probabilities, the accident was in fact caused by the Fourth Defendant, and then secondly, that the Fourth Defendant was the servant and/or agent of the Third Defendant. It is Counsel's submission that the Claimant herself has presented no evidence as to how the accident occurred. He contends that the Court is confined to the evidence of Houghton Forde (the First Defendant) and Angella Gonsalves (the Fourth Defendant) in order to determine negligence, if any. It is Counsel's further submission that, on a balance of probabilities, the Second Defendant caused the accident, or at the very least "significantly contributed to it." Counsel submits that it is the assertion of the Claimant that the Fourth Defendant is the agent and/or servant of the Third Defendant, but "that there is no direct evidence of this." He contends that "an analysis of the facts clearly shows that the Fourth Defendant was not on the business of the Third Defendant. The facts show that she was driving not only without his permission but also without his knowledge" and submits that "there is no evidence as for what purpose the Fourth Defendant was driving at the time of the accident, and that none can be inferred without speculation."

Fourth Defendant's Submissions

[46] Learned Counsel for the Fourth Defendant contends that the evidence of Corporal Sheckles does not assist the Court in making a determination as to who caused the accident.

FINDINGS

[47] Having heard the witnesses at the trial and observed their demeanour, and having considered the evidence and submissions of Counsel, I make the following findings of fact:-

[48] I did not find the Claimant Jessica Hood to be a reliable or credible witness. Ms. Hood is obviously an intelligent and educated woman. She was at the time of the accident, employed as a Human Resource Manager and she holds a Masters Degree in Human Resources Planning and Development. She testified that she is the holder of a driver's licence. I therefore have difficulty believing that she is ignorant of the basic provisions of the Highway Code or indeed of simple rules of the road. In particular I have difficulty accepting her testimony that she does not know whether a driver coming from Stapleton Lane would be obligated to give way to traffic on the right, or whether a driver coming from Stapleton Lane must give way to traffic already on the roundabout. As to the Claimant's evidence that "she saw the collision when it took place", I do not attach any weight to that evidence. According to the Claimant, she could not recall how fast the Second Defendant was driving at the time of the accident. She also testified under cross examination that she did not know which of the drivers was at fault.

[49] Despite the inconsistencies in his evidence, I found the Second Defendant Mr. Forde to be, on the whole, a credible witness. I accept his evidence that Ms. Gonslaves did not stop before exiting Stapleton Lane and that she entered the roundabout when it was unsafe to do so. Mr. Forde's evidence that he had the right of way is borne out by the evidence of Ms. Roberts, as well as the application of the most elementary principles of the Highway Code.

[50] I find the Fourth Defendant Miss. Angella Gonsalves to be a totally unreliable and untrustworthy witness. She was evasive, and her entire demeanour in the witness box as well as her insistence that she "did not recall" or "could not recall", in my view militated against her credibility. In particular, I do not believe her evidence that she was driving her son in law's vehicle that morning without his permission or knowledge. I am of the view that Ms. Gonsalves had made up her mind that she would say nothing which could be construed as attaching liability to either herself or the Third Defendant, her son in law. Having taken the oath to tell the truth, Ms. Gonsalves proceeded to completely disregard her oath. I was quite unimpressed with her performance. Where the

evidence of Ms. Gonsalves conflicts with that of Mr. Forde as to how the accident occurred, I have no difficulty in accepting that of Mr. Forde in preference to hers.

[51] The evidence of Ms. Gonsalves is that she did not see any vehicle approaching from Independence Drive and that she did not see any vehicle approaching from Bishopgate Street. In the view of the Court, if in fact Ms. Gonsalves did not see any vehicle approaching from either of these roads, this is because she failed not only to stop at the junction, but failed to look to her right as she was obliged to do.

[52] As to the evidence of Corporal Sheckles, the Court is of the view that the measurements taken by him were lacking in some important details. Further, that the failure of his accident report to include the fact that the Claimant had been injured speaks to a lack of thoroughness in his report. Notwithstanding this omission, the Court accepts his evidence of what was reported to him by Ms. Gonsalves and Mr. Forde.

ANALYSIS

[53] Professor Kodilinye in his text Commonwealth Caribbean Tort Law, at page 63 states:

> "The tort of negligence may be defined broadly as the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. There are three elements to the tort:
>
> a) A duty of care owed by the defendant to the plaintiff
> b) Breach of that duty by the defendant; and
> c) Damage to the plaintiff resulting from the breach."

[54] In the case at bar, the Claimant bears the legal burden of proving that the Defendants were negligent as pleaded.

[55] At paragraph 6 of her Statement of Claim, the Claimant pleaded that the Second Defendant was negligent. She states that the Particulars or Negligence of the Second Defendant are as follows: -

1) Driving too fast.
2) Failing to keep any or any proper lookout or to observe or heed the presence or approach of motor vehicle A3180 driven by the fourth defendant.
3) Failing to apply his brakes in time or at all or so to steer or control the said bus as to avoid the said collision.
4) Failing to advise the police of the injury to the claimant or to advise that she had been taken to Holberton Hospital by ambulance.
5) Failing to provide a security seat belt.

[56] The Claimant pleaded that the Fourth Defendant was also negligent. She states that the Particulars of Negligence of the Fourth Defendant are as follows: -

(1) Failing to stop at the Stop Sign from Stapleton Lane at its junction with Upper Bishopgate Street.
(2) Driving too fast.
(3) Failing to keep any or any proper lookout or to observe or heed the presence or approach of the vehicle being driven by the second defendant.
(4) Failing to apply her brakes in time or so to steer or control the said motor car as to avoid the said collision.

[57] The law is settled that the driver of a vehicle on the road owes a duty to take proper care not to cause damage to other road users (including drivers and passengers in other vehicles, cyclists and pedestrians) or to the property of others. It is therefore beyond dispute that the Second Defendant owed a duty of care to the Claimant, as a passenger in Vehicle C1282 of which he had control. He also had a duty of care to other road users. It is also beyond dispute that the Fourth Defendant, as the driver of vehicle A3180, owed a duty of care not to cause damage to other vehicles, or to cause damage or injury to other road users, including the drivers and passengers in other vehicles, as well as pedestrians and cyclists using the road.

[58] It is a question of fact in each case as to whether the defendant has observed the standard of care required of him in the particular circumstances - **Tidy v Battman**[5].

[59] Ms. Gonsalves was travelling from Stapleton Lane heading unto Independence Drive. She contends that she was already on the roundabout when the bus collided into her. It is not disputed by Ms. Gonsalves that Stapleton Lane is a minor road with respect to Independence Drive. It is accepted that at crossings, a motorist should generally give way to vehicles coming from the right and should give way when crossing onto a major road. Further, as submitted by Counsel for the First and Second Defendants, Section 88 (3) of the Vehicles and Road Traffic Act, Cap 460 of the Laws of Antigua and Barbuda provides that "a failure on the part of any person to observe any provision of the Highway Code may be relied upon by any party to establish or negative any liability which is in question." The Highway Code provides at paragraph 185 that when reaching the roundabout, a road user should give priority to traffic approaching from his/her right and watch out for all other road users already on the roundabout.

[60] I am of the view that the Fourth Defendant failed to observe paragraph 185 of the Highway Code. I accept the evidence of Mr. Houghton and Miss Nicholas, as well as the submission of Counsel for the First and Second Defendants, that Ms. Gonsalves did not give way to traffic on her right, but proceeded ahead when it was unsafe for her to do so. She proceeded onto the roundabout from Stapleton Lane, whilst the Second Defendant was already on the roundabout to her right and had the right of way. To exit a minor road without stopping, as she did, is clear evidence of a breach of duty on her part in relation to other road users. It was therefore reasonably foreseeable by Ms. Gonsalves that breach of duty on her part could lead to a collision. Further, based on the evidence of Mr. Forde, which I accept, the traffic was congested that morning. The accident occurred about 7.30 a.m. It was a school day; according to the evidence of Mr. Forde, which I believe, there were three lines of vehicles, all waiting to enter the roundabout coming from Old Parham Road, Bishopgate Street, and Stapleton Lane. According to the Claimant's evidence, the St. Joseph's Academy is located near to where the accident

[5] [1934] 1 KB 319, page 322

took place. I therefore find that Ms. Gonsalves was negligent; she did not observe the standard of care required of her.

[61] Was the Second Defendant also negligent? The evidence of Mr. Forde is that he saw the Fourth Defendant "out of the left corner of his eyes" exiting Stapleton Lane without stopping and he veered to the right to escape her vehicle colliding into the bus which he was driving. He also "stopped suddenly" but was unable to avoid the vehicle which collided into the front left side of the bus. Mr. Forde stated that he was driving at about 5 to 10 miles per hour at the time. He also gave evidence that there was traffic congestion.

[62] A driver is not bound to foresee every extremity of folly which occurs on the road. Equally he is certainly not entitled to drive upon the assumption that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of a road user teaches that people do, albeit negligently – per Slade J. in **Berrill v Road Haulage Executive**[6].

[63] The speed at which a vehicle should be driven must be reasonable in the circumstances. Apart from the evidence of the Second Defendant Mr. Forde, and that of Ms. Vincere Nicholas, the Court is not assisted by any other evidence with respect to the speed at which Mr. Forde was driving. In spite of the Claimant's assertion under cross examination that she "saw the entire accident", the Claimant testified that she "could not recall" how fast Mr. Forde was travelling. Miss Gonsalves also testified that she "could not recall" how fast Mr. Forde was driving. Given the fact that the accident occurred on a week day and a school day at approximately 7.30 a.m., I accept the evidence of Mr. Forde that the traffic was congested. I accept the evidence of Mr. Forde that he was driving at between 5 and 10 miles per hour. Ms. Vincere's evidence, which I accept, also supports Mr. Forde's evidence. I find therefore that the Claimant has not made out her case, on a balance of probabilities, that Mr. Forde was driving too fast.

[6] (1952) 2 Lloyd's Rep. 490

[64] The Claimant has also pleaded that the Second Defendant was negligent in failing to advise the police of the injury to the Claimant or to advise that she had been taken to Holberton Hospital by ambulance. I know of no law that would impose liability on a defendant for failing so to do.

[65] The Claimant also pleads in her Particulars of Negligence that the Second Defendant failed to provide a security seat belt. The Claimant cannot hold Mr. Forde liable in negligence under this head. In the first place, Vehicle No. C1282 is not owned by Mr. Forde; it is owned by the First Defendant. In its Defence, the First Defendant pleaded that Bus C1282 is manufactured without seat belts at the rear seats, where the Claimant was seated at the time of the collision. The First Defendant further pleaded that the law does not mandate that the second row and other rear seats require seat belts. The First Defendant therefore denies liability for negligence on this issue.

[66] The Court notes that, in his closing submissions, Counsel for the First and Second Defendants contends that "the Claimant was contributorily negligent for the alleged injuries she sustained from the accident through her failure to wear a seat belt and therefore any award of damages should be reduced to the extent of her responsibility for the said injuries." The Court cannot endorse this submission, as it is at variance with the First Defendant's pleadings as stated in paragraph 65 above.

[67] Mr. Forde's evidence is that when he observed motor car A3180 coming towards him without stopping, he "veered to the right" to prevent the motor car colliding with him and "stopped suddenly" in an attempt to avoid the collision. A sudden braking may raise an inference of negligence in the absence of an explanation from the driver **Elizabeth v MIB**[7]. Mr. Forde's explanation is that the presence of the Fourth Defendant on Independence Drive caused him to veer and brake suddenly. The question for the Court is whether Mr. Forde was exercising that degree of care and attention which a reasonable and prudent driver would exercise in the circumstances. The question is one

[7] [1981] R.T.R. 405

of fact and not of law – see **Simpston v Peat**[8]. If indeed, as he contends, Mr. Forde was driving at between 5 to 10 miles per hour, in traffic which was congested and had seen the approach of Ms. Gonsalves, and most importantly, observed that Ms. Gonsalves was not stopping when she should have done so, there would have been no need for him to "brake suddenly" in the absence of some degree of negligence on his part. A prudent driver, having not merely anticipated the folly of Ms. Gonsalves in not stopping at the stop sign, but having witnessed her folly, would have kept himself sufficiently clear of her vehicle as to avoid the collision. The Court finds that, although he had the right of way, it was still the responsibility of Mr. Forde to approach the roundabout with caution.

[68] The learned writers of Clerk & Lindsell on Torts (at page 548, paragraph 8-181) state that "joining a main road from a minor road is potentially hazardous and frequently both parties to a collision will be held liable." Based on the evidence and on the authorities, I am of the view that both the Second Defendant Mr. Forde and the Fourth Defendant Ms. Gonsalves were both to blame for the accident. Ms. Gonsalves was negligent for her failure to stop before exiting Stapleton Lane and for failure to observe the Highway Code, namely her failure to give precedence to vehicles to her right. Mr. Forde was also negligent for his failure to make absolutely certain that Ms. Gonsalves had cleared the road before proceeding. His evidence is that he observed that Ms. Gonsalves was not stopping at the exit of Stapleton Lane. The possibility of a collision occurring as a result of Ms. Gonsalves' failure to stop was reasonably apparent to Mr. Forde. A reasonable and prudent person, placed in the position of Mr. Forde would have taken special care to ensure that he was not in the path of Ms. Gonsalves' vehicle. He would have stopped his vehicle and allowed Ms. Gonsalves to proceed well ahead of him. I find Mr. Forde and Ms. Gonsalves both at fault and I apportion liability at 70/30, with Ms. Gonsalves liable for 70% and Mr. Forde liable for 30%.

[8] (1952) 2 QB 24

WAS THE NEGLIGENCE OF THE SECOND AND FOURTH DEFENDANTS THE CAUSE OF THE CLAIMANT'S INJURIES?

[69] The Claimant must prove that the Second and Fourth Defendants' breach of duty caused her injuries. The standard test of causation is the "but-for" test, namely the Claimant must prove that she would not have sustained her injuries but for the negligence of the Second and Fourth Defendants. Having regard to the evidence, I find that, on a balance of probabilities, the accident resulted in injuries to the Claimant.

(B) VICARIOUS LIABLITY

[70] In **Omrod v Crosville Motor Services Ltd**[9], Denning LJ stated:-

> "It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment.....The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter it is his servant, his friend or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver."

[71] The Claimant's case against the First Defendant is one of vicarious liability. The evidence relative to this issue reveals that the Second Defendant was an employee of the First Defendant. The undisputed evidence is that at the material time of the accident, the Second Defendant drove a vehicle owned by the First Defendant. The First Defendant does not dispute that the Second Defendant was using the vehicle for the owner's purposes under a delegation of a task or duty. There is no dispute that the Second Defendant was acting within the scope of his employment when he drove vehicle No. C1282 on the day of the accident. Based on my finding that the Second Defendant was negligent, it therefore follows that the First Defendant is vicariously liable for the negligence of the Second Defendant.

[9] [1953] 2 ALL ER 753

[72] The Claimant's case against the Third Defendant is also one of vicarious liability. Her claim is that the Fourth Defendant is the servant or agent of the Third Defendant. It is not disputed that the Third Defendant was at the material time of the accident the owner of vehicle A 3180 driven by the Fourth Defendant Angella Gonsalves. However, under cross examination, Ms. Gonsalves testified that she had neither the permission nor the consent of the Third Defendant Mr. Vere Carbon to drive Motor Vehicle A3180 at the material date of the accident. The factual issue to be decided by the Court is therefore whether or not the Third Defendant was vicariously liable for the negligence of the Fourth Defendant.

[73] In her Submissions, Counsel for the Claimant contends that since the Third Defendant elected not to give evidence, then if the Court finds that the Fourth Defendant's negligent act caused the Claimant's injuries, then it follows that the Third Defendant is vicariously liable for the negligent acts of the Fourth Defendant.

[74] The rival submission of Counsel for the Third Defendant with respect to the above submission is that:-

(a) An analysis of the facts clearly show that the Fourth Defendant was not on the business of the Third Defendant. The facts show that she was driving not only without his permission but also without his knowledge.

(b) There is no evidence as for what purpose the Fourth Defendant was driving at the time of the accident and respectfully it is submitted that none can be inferred without speculation."

[75] The law is settled that ownership of a motor vehicle is prima facie evidence that the driver is the agent or servant of the owner and that owner is liable for the negligence of the driver - **Barnard v Sully**[10] .

[10] (1931) 47 TLR 557

[76] The owner of the vehicle can rebut the presumption of agency by either:-

(a) Giving evidence of the driver's object in making the journey in question and establishing that it served no purpose of the owner, or

(b) By asserting that the car was not being driven for the owner's purpose and providing the assertion with any supporting evidence available to him.

[77] The decision of **Ramburrun v Gurruchan**[11] illustrates that the question of the agency is ultimately a question of fact. The facts of the Rambarran case, (as stated on page 345 of Professor Kodilinye's Commonwealth Caribbean Tort Law) are as follows:-

> "A car belonging to the defendant/appellant, a farmer, collided with and damaged the plaintiff/respondent's car, owing to the negligent driving of the appellant's son, L. The car was originally purchased by the appellant for the use of his whole family, and L. and his three brothers had a general permission to use it at any time. The appellant was not aware that L. had taken the vehicle out on the day of the accident. The Court of Appeal of Guyana held that the presumption that L was driving the car as agent of the appellant had not been rebutted, since the appellant had not given evidence as to the purpose of the journey which was being made when the collision occurred. Furthermore, in the opinion of the court, the presumption had been strengthened by the fact that, on the day of the collision, L was driving with the appellant's permission, under an "ever-existing authority."

[78] The case went to the Privy Council, which held that the inference of agency arising from proof of ownership was displaced by the evidence that L. had a general permission to use the car, since it was impossible to assert, merely because the appellant owned the car, that L was not using it for his own purposes as he was entitled to do. Lord Donovan, who delivered the judgment of the Board, had this to say:-

> "The appellant, it is true, could not, except at his peril, leave the court without any other knowledge than that the car belonged to him. But he could repel any inference, based on this fact, that the driver was his servant or agent in either of two ways. One, by giving or calling evidence as to Leslie's object in making the journey in question, and establishing that it served no purpose of the appellant. Two, by simply asserting that the car was not being driven for any purpose of the appellant, and proving that

[11] [1970] 15 WIR 212

> assertion by means of such supporting evidence as was available to him. If this supporting evidence was sufficiently cogent and credible to be accepted, it is not to be overthrown simply because the appellant chose this way of defeating the respondent's case instead of the other. Once he had thus proved that Leslie was not driving as his servant or agent, then the actual purpose of Leslie on that day was irrelevant..."

[79] In the instant case, the Third Defendant Vere Carbon, the owner of vehicle A3180, elected not to give evidence at the trial. He was within his rights to do so. However, as stated by Lord Diplock in **Herrington v British Railway Board**[12], I am entitled to draw all reasonable and/or adverse inferences against him (Mr. Carbon.) This is what Lord Diplock had to say:-

> "The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold."

[80] It is the evidence of the Fourth Defendant under cross examination that, at the material date of the accident, she was driving not only without the permission of the Third Defendant but also without his knowledge. The Court has great difficulty in accepting this evidence. Further, as stated above, the Court finds that Ms. Gonsalves was a most unreliable witness and was totally lacking in veracity.

[81] The Court is of the view that in the case at bar, the presumption of agency is not displaced. The facts before the Court relative to the question of agency are as follows: - Mr. Carbon is the owner of Vehicle No. C3180. Ms. Gonsalves is the mother-in –law of Mr. Carbon. Her grandchildren are the children of Mr. Carbon. On the day of the accident, Mr. Carbon was out of State, but had left his vehicle with her. The mother of the children, with whom Mr. Carbon resides, does not drive. On the day of the accident, Ms. Gonsalves drove her grandchildren – Mr. Carbon's children - to school.

[12] [1972] A.C. 877 at 930

The accident occurred at approximately 7.30 a.m. that day. The evidence of Ms. Gonsalves is that, although she drove her grandchildren to school that morning, she did not have Mr. Carbon's permission to drive her grandchildren to school in his vehicle that morning. She goes further and testifies that she did not have the consent of Mr. Carbon to drive his vehicle. As stated in my findings above, I find Ms. Gonsalves to be an untruthful witness and totally reject her evidence. I am of the view that I am entitled to reasonably infer that the fact which Mr. Carbon has chosen to withhold by his failure to give evidence at the trial, is that his mother in law, Ms. Gonsalves, had his permission to drive his children to school during his absence from the State, since their mother could not drive.

[82] The court is of the view that from the fact of ownership as well as the above facts, there is a presumption that Ms. Gonsalves was driving vehicle No. A3180 as the servant or agent of Mr. Carbon.

[83] Based on the Rumbarrun case, Mr. Carbon could have supplied the proof necessary to rebut the presumption of agency in one of two ways; either:-

a) Giving evidence of Ms. Gonsalves' object in making the journey in question and establishing that it served no purpose of his, or
b) By asserting that the car was not being driven for his purpose and providing the assertion with any supporting evidence available to him.

[84] Mr. Carbon could have given evidence at the trial that his vehicle was not being driven by Ms. Gonsalves on the date and time of the accident for his purposes. This would have been enough to rebut the presumption of agency. He chose not to do so; and did so at his peril.

[85] The Court finds that, on a balance of probabilities, the Fourth Defendant's act of negligent driving occurred during the course of her agency. Therefore, the Third Defendant Mr. Carbon, is vicariously liable for the negligence of Ms. Gonsalves.

DAMAGES

[86] Having established liability, the task of the Court is to assess the quantum of damages which must be paid by the Defendants to the Claimant by way of compensation.

[87] In her Statement of Claim, the Claimant claims (a) special damages in the sum of $124,132.75; (b) exemplary damage against the First Defendant. She also claims interest and costs.

[88] In personal injury cases, such as the instant case, damages are classified as general or special.

Special Damages

[89] The particulars of special damage claimed by the Claimant are as follows:-

Loss of wages from 1st May, 2006 to 30th November, 2007 @ $5,300.00 per month	$ 111,300.00
Medical fees Ortho Medical Associates	$ 3,407.50
Airfare to Trinidad	$ 2,027.10
Hotel accommodation in Trinidad	$ 762.71
Taxis in Trinidad	$ 810.00
St. Clair MRI Centre & Medical Associates	$ 4,002.81
Medical fees Dr. H. Bedaysie	$ 605.00

Medication	$ 1,067.65
Taxi fares to Dr. Singh's Office	$ 150.00
Total	$ 124,132.75.

[90] At the trial, it was agreed by Counsel for the parties that the Claimant's claim for special damages arising from the accident, excluding her claim for loss of wages was $12,832.75 (E.C.) The Court therefore so awards.

[91] As regards the Claimant's claim for loss of wages, the Claimant has claimed "loss of wages from 1st May 2006 to 30th November 2007 @ $5,300.00 per month - $111,300."

[92] The law is settled that special damages must be specifically pleaded and strictly proven (**British Transport v Gourley**[13]) Special damages are "awarded in respect of out-of – pocket expenses and loss of earnings actually incurred down to the date of the trial itself." In the instant case, the Claimant has provided no documentary evidence to substantiate her loss of earnings. As stated by Gordon J.A. in **Cedric Dawson v Cyrus Claxton**[14], ".....It is the obligation of the Claimant in any claim for damages to provide the best evidence of which he is capable."

[93] In any event, under cross-examination by Counsel for the Fourth Defendant, the Claimant testified that her claim for loss of wages "is as a result of employment issues with her former employers and not as a result of the accident." This was re-iterated under cross-examination by Counsel for the First and Second Defendants, when the Claimant testified: - "no, I did not lose my employment because of the accident." Accordingly, the Claimant's claim for loss of wages is unsustainable and the Court makes no award for the same.

[13] 1953 3 ALL ER 803
[14] (BVIHCA2004/0023)

[94] The Claimant has also made a claim for exemplary damages against the First Defendant. In paragraph 9 of her Statement of Claim, she has pleaded that the facts and matters on which she grounds her claim are as follows:-

i). The First Defendant willfully and/or recklessly denied the Claimant access to a qualified orthopedic surgeon, Dr.K.K. Singh, MBBS, MS (Orthopedics), F.I.C.S and Head of Orthopedics at the Holberton Hospital insisting instead that the Claimant submit herself to the care of a physiotherapist selected by the First Defendant.

ii). The First Defendant unlawfully refused to accept reports from the said Dr. Singh submitted by the Claimant in respect of the extent of her injuries, the treatment thereof or the sick leave to which she was entitled in respect of the said injuries.

iii). The First Defendant denied the Claimant access to reports issued by the physiotherapist to the First Defendant in respect of his treatment and progress or otherwise of the Claimant."

[95] The law is settled that Exemplary Damages are punitive in nature and are awarded to teach the defendant that "tort does not pay" and to deter him and others from similar conduct in the future – see **Broome v Cassell & Co Ltd**[15] per Lord Hailsham.

[96] Counsel for the First Defendant submits that "the Claimant has failed to meet the legal threshold to ground a claim for exemplary damages against the First Defendant." Counsel quotes from Charlesworth on Neglience (Sweet & Maxwell, London, 1971,) paragraph 128 that: - "Exemplary damages can be given in actions of negligence, although they are virtually unknown. They are only given in cases of 'willful negligence', that is, where the negligence is accompanied with a contempt of the Claimant's rights and convenience." Counsel states that "it is a fact that the Claimant was always offered the transportation services of the First Defendant to accommodate

[15] [1972] A.C. 1027

her to and from her physiotherapy sessions." He states that "the Claimant's own evidence reflects that the First Defendant played an integral role in assisting the Claimant in her recovery process by making the services of Dr. Matthews available to her at no charge to the Claimant." Further, that the Claimant was never restricted to visiting only Dr. Matthews and was never requested by the First Defendant to submit herself to Dr. Matthews alone.

[97] Counsel for the First Defendant refers to the fact that under cross-examination, the Claimant testified that she was happy with the manner in which she was treated by the First Defendant. Additionally, that this is borne out by the Claimant's letter to the First Defendant dated the 6th day of October 2005, thanking them for their assistance since the date of the accident. It is Counsel's submission that the facts do not support the Claimant's claim for exemplary damages.

[98] I agree. I find that, based on the law and on the facts of the instant case, there is no basis for the award of exemplary damages against the First Defendant. In any event, the Claimant's claim for exemplary damages, like her claim for loss of wages is, in the view of the Court, inextricably linked with the issue of her employment. Accordingly, I make no award under the head of exemplary damages.

GENERAL DAMAGES

[99] Mr. Hugh Marshall Jr. Counsel for the Third Defendant, in his Submissions, contends that the Claimant has made no claim for general damages against any of the Defendants in her Statement of Claim. It is Counsel's submission therefore that "no judgment can be given that awards general damages when this has not been the Claim of the Claimant." He cites the case of **Knowles v Knowles**[16]: – as authority for this proposition. The Court respectfully disagrees with Counsel's submission. In the Knowles case, Barrow J.A. was dealing with the issue where "one case was pleaded and the judgment

[16] Civil Appeal No. 17 of 2005

pronounced on a different case." It is my respectful view that the Knowles case does not assist the Third Defendant in his submission.

[100] Even if, as contended by Mr. Marshall, the Claimant had failed to claim for general damages, the law will presume general damages to be the direct natural or probable consequence of the action complained of. In **British Transport Commission v Gourley**[17], Lord Goddard stated:-

> ".....Secondly, there is general damage which the law implies and is not specially pleaded....."

[101] In any event, Mr. Marshall has failed to note that, although the prayer of the Statement of Claim is silent on the claim for general damages, the Claimant's Claim Form states that the remedies sought by the Claimant are:-

1) Special Damages
2) **General Damages** (my emphasis)
3) Exemplary Damages
4) Interest pursuant to the Eastern Caribbean Supreme Court Act, Cap. 143 of the Laws of Antigua and Barbuda
5) Prescribed costs.

[102] With respect to general damages, Sir Hugh Wooding CJ, in the leading case of **Cornilliac v St. Louis**[18], established the legal principles governing the assessment of damages. These are:-

(i) the nature and extent of the injuries sustained;
(ii) the nature and gravity of the resulting physical disability;
(iii) the pain and suffering endured;
(iv) the loss of amenities; and
(v) the impact on the claimant's pecuniary prospects

[17] [1956] A.C. 185 at 206
[18] (1965) 7 WIR 491

THE NATURE AND EXTENT OF THE INJURIES SUSTAINED

[103] What injuries were sustained by the Claimant are to be gleaned from the several medical reports tendered in evidence by the Claimant and from the Witness Summaries and evidence of the various physicians. The Claimant was 34 years old on 8th September 2005. At the date of the trial she was 40 years old. Her claim is that when the incident occurred between A3180 and C1282, she was thrown forward out of her seat, struck her head and fell back unconscious/unresponsive onto her seat. An ambulance was called and when the Claimant woke up, she was assisted out of the bus into the ambulance and transported to Holberton Hospital. At the Hospital, the Claimant was examined by Dr. Raju who granted the Claimant sick leave form 8th September 2005 to 15th September 2005. Dr. Raju opined the Claimant had a whiplash injury. A CT Scan and x-ray was conducted. She was fitted with a cervical collar.

[104] On the 21st September 2005 the Claimant suffered with neck ache and headache. Her neck and shoulders became stiff and sore. She attended the offices of Dr. K. K. Singh who examined her, reviewed her x-rays and requested n MRI [Bundle 3 page 190]. She complained of severe neck pain. After examination and review of the Claimant's X-Ray scans taken directly after the accident, he diagnosed the Claimant with the classical symptoms of severe whiplash soft tissue injury and recommended that she obtain an MRI which he requested. He gave her a Philadelphia collar to immobilize her cervical spine and medication to reduce pain and swelling.

[105] The Claimant subsequently saw and was treated by a series of specialists and several medical reports were tendered in evidence by the Claimant. The several medical reports all seem to conclude that the injuries sustained by the Claimant were: - traumatic disc herniation of the C5/6 and C6/7, with left nerve root involvement and pressure on the thecal sac.

NATURE AND GRAVITY OF THE RESULTING PHYSICAL DISABILITY

[106] On 9th February 2009 Dr. K. K. Singh, an Orthopedic Surgeon, evaluated the Claimant's permanent disability at 10%. His report stated that the permanent disability will increase on account of developing further traumatic degeneration joint disease. He concluded the Claimant may also need surgical interference to maintain her current level of ability or prevent the increase of percentage of physical impairment or to prevent future disabilities.

[107] On 4th February 2010 Dr. Singh reviewed the MRI report from Dr. Marquez, a consultant neurologist, and concluded the Claimant was 17% permanent disabled as a person ; further, that percentage will increase as the Claimant develops post traumatic degenerative joint disease. Dr. Singh's assessment of the Claimant for the purposes of disability included her neurological condition; under cross examination, Dr. Singh stated that he made the assessments of the Claimant independent of Dr. Marquez. He repeated the need for future surgical interference to maintain the status quo.

[108] The report of Dr. Marquez dated the 18th December, 2009 stated among other things, that "the small disco–osteophytic complexes at C5-6 and C 6-7 and the right foraminal protrusion at L5- S1 noted on the MRI are of no clinical significance and do not require surgical intervention." Dr. Marquez states in his report:-

> "I had a long discussion with Jessica following her investigation. I explained to her that her prognosis is excellent and that her initial pain was due to soft tissue injuries attributable to the motor vehicle accident.
>
> .....
>
> The major thrust of her management from here on end is going to be that of exercise and primarily core strengthening exercises aimed at strengthening the abdominal and lower back muscles. Range of movement exercises to the neck were also recommended.
>
> The best way to achieve this is for Jessica to return to her physical trainer in a gym. I understand that she had done this previously and had felt fantastic after doing so."

PAIN AND SUFFERING AND LOSS OF AMENITIES

[109] In paragraph 7 of her Statement of Claim , the Claimant pleaded that she "experienced spasms and weakness in her extremities, an inability to concentrate, memory lapse, periods of extreme pain for a period of some 20 months." She further pleaded that despite her best efforts, she was unable to function at the level for which she had trained.

[110] In her Witness Statement the Claimant stated that after the accident she underwent X-ray scans of her neck and a CT scan of her head. Dr. Raju, who reviewed the scans, informed her that he saw no damage "but thought that she had a whiplash injury." He advised her to wear a soft collar, gave her a prescription for pain medication and placed her on certified sick leave. The Claimant states that at the end of the assigned period of sick leave, she still had a headache and neck ache. Additionally, her neck and shoulders were becoming stiff and sore. She stated that she requested and took her vacation for a further two weeks. She stated that although she rested and took pain medication during that period, there was no relief and her symptoms worsened. At one point she could not turn her neck at all. The stiffness in her neck increased and spread to her shoulders and upper back and she was in constant pain.

[111] The Claimant stated that at one point she underwent physiotherapy at NSA with Dr. Matthew three (3) times a week over a six to eight week period. As a result of their treatment, she experiences a reduction in swelling, pain and stiffness in her neck, shoulder and upper back. She stated that during the period of physiotherapy, her right hand would begin to shake uncontrollably from time to time. Over time, it became more difficult for her to hold on to items with her right hand. Dr. Singh checked the strength of both her hands and found decreased strength in her right arm. The Claimant stated that she suffered from excruciating back pain and that this forced her back to see Dr. Singh.. Towards the end of the year – 2005- the First Defendant company closed for the end of the year. On resumption of work in January 2006, she was given leave with pay. She

states that while on leave, she began to experience numbness and pins and needles sensations in her right hand.

[112] The Claimant stated that over the next four years, she continued to be treated for the pain in her head, neck, shoulders, hands and upper back and continued to seek treatment in that regard. She stated that treatment was done through intra-muscular injections and oral pain killers. She stated that her symptoms changed over time from a position of constant pain to painful periods every week then every month and so on requiring period of medication and rest. She stated that she presently experienced painful sensations in her hands, neck and upper back and instances of pain and swelling which is alleviated by prescription painkillers and rest. The Claimant states that these symptoms are "aggravated almost daily due to the state of the roads." She stated that she continued to experience painful spasms in her hand, neck and back through 2009, as a result of which she was referred to a neurologist in Barbados.

[113] The Claimant has not produced any evidence to the Court that she has suffered loss of amenities , that is, any loss in her ability to enjoy life in the way that she did before, brought about or caused by her injuries.

LOSS OF FUTURE EARNINGS / LOSS OF EARNING CAPACITY

[114] At the date of the accident, namely the 8th September 2005, the Claimant was 34 years of age and was employed as a Human Resources Manager with the First Defendant Company.

[115] The Claimant has produced no evidence by way of medical reports or otherwise that the injury caused to her on the date of the accident rendered her unable to engage in future employment. Indeed, as stated above, it is the Claimant's evidence, under cross-examination, that her loss of employment was not as a result of the accident.

QUANTUM

[116] The Court will now consider the issue of assessing general damages appropriate to the Claimant's pain and suffering and loss of amenities. Counsel on both sides referred the Court to a number of authorities with respect to quantum of damages. Counsel for the Defendants have all submitted that, in the event that the Court finds liability established, that the Claimant is entitled to no more than $50,000.00 in respect of general damages. Counsel for the Claimant has suggested a figure of $120,000.00 should be awarded by the Court for the Claimant's pain and suffering.

[117] The Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases, (the Guidelines) 10th edition, states that the type of injury sustained by the Claimant falls within the classification of "Orthopaedic Injuries", specifically under the sub-heading (A) Neck Injuries. Under the sub-heading "Moderate" are (1) "cases involving whiplash or wrenching-type injury and disc lesion of the more severe type resulting in cervical spondylosis, serious limitation of movement, permanent or recurring pain, stiffness or discomfort and the possible need for further surgery or increased vulnerability to further trauma." According to the said guidelines, the range of awards for injuries of this nature should be between £9000 to £16,400 – between approximately E.C. $ 36,000.00 to E.C. $ 65,000.00 .

[118] The sub-heading "Moderate" also includes ".....moderate whiplash injuries where the period of recovery has been fairly protracted and where there remains an increased vulnerability to further trauma."According to the said guidelines, the range of awards for injuries of this nature should be between £5,150 to £9,000 – between approximately E.C$20,000.00 to E.C $36,000.00.

[119] The Court is of the view that the Claimant's injuries fall in the mid-range of the moderate category for neck injuries as described by the Guidelines, for which the range of award would fall between £5150 and £16,400. – approximately between E.C $ 20,000.00 and E.C $65,000.00. The Court is mindful, however, that the Judicial Studies Board

Guidelines, while they afford a good starting point in assessing the quantum of general damages in personal injury cases, are only guidelines.

[120] In making an award of general damages, I must bear in mind that:-

> ".....The underlying principle regarding damages is that they are compensatory. They are not designed to put the plaintiff in a better financial position than that which he would otherwise have been in if the accident had not occurred. At the same time the principle (is) of a once-for-all award....." - per Lord Oliver of Aylmerton in **Hodgson v Trapp**[19].

[121] I must also be minded that "the compensation must be fair and just to the Claimant but not out of accord with what society as a whole would perceive as reasonable" – **Heil v Rankin**[20].

[122] I must also have regard to the observation of Lord Hope of Craighead in the case of **Wells v Wells**[21] that:-

> "The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases, as represents the court's best estimate of the plaintiff's general damages."

[123] Counsel for the Claimant, in her Submissions, referred the Court to the following cases:-

(a) **Rosetta Elousie Mayers v Deep Bay Development Company Ltd**[22]. In that case, an award of $230,000.00 was made for pain and suffering and loss of amenities for a fracture to the vertebrae.

(b) **Oscar Frederick v LIAT (1974) Ltd.** [23] The Claimant in that case was awarded a total of $140,000.00 for pain and suffering and loss of amenities. He suffered

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[19] [1988] H.L
[20] [2001] Q.B. 272
[21] [2002] EWCA Civ 476
[22] Suit No. 241 of 1993

from compression of sciatic nerve roots at L4-L5, multiple disc herniation in cervical spine C4/C5, C3/4 and C5/6 and surgery at the level of L4/L5 and L5/L1.

(c) **Cedric Dawson v Cyrus Claxton**[24]. In that case, the Court of Appeal upheld an award of $ 97,200.00 for pain and suffering and loss of amenities. The Claimant in that case suffered a C3-C4 herniation.

(d) **Cecilia Hatchett v First Caribbean International Bank**[25] In that case the sum of $54,000.00 E.C. (or $20,000.00 U.S.) was awarded to the Claimant who suffered from degenerative disc disease at L5-S1.

[124] Counsel for the First and Second Defendants referred the Court to the following cases:-

(a) **Martha Le Blanc v Augustus Thomas**[26], where the Claimant, a 41 year old woman, who suffered a traumatic disc prolapse of the C5/6 vertebrae, and who suffered from persisting neck pain and loss of flexibility in her neck, was awarded $16,000.00.

(b) **Rashid Pigott v Gale Force Windows & Doors** [27], delivered January 11, 2007.

(c) **Celia Hatchett v First Caribbean International**. (supra) In that case, the Claimant suffered from fractured C3 vertebrae without displacement of her cervical spine and also central disc herniation of her lumbar L5/S1 vertebrae with degenerative disc disease at L4/L5 disc level. She was awarded $20,000.00 (U.S.) or $54,000.00 (E.C).

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[23] ANUHCV 2007/0391
[24] BVI Appeal No. 23 of 2004
[25] (BVI, Claim No. BVIHCV 2006/0227)
[26] Domhcv2009/0296
[27] Antigua & Barbuda, ANUHCV 2009/0069

[125] Counsel for the Third Defendant referred the Court to the following cases:-

a. **Martha Le Blanc v Augustus Thomas and John Le Blance** (referred to in paragraph 124 above.)

b. **Celia Hatchett v First Caribbean International Bank et al** (referred to in paragraphs 123 and 124 above.)

c. **Danny Bramble v William Danny and Key Properties Ltd.**[28], where the Court awarded the Claimant general damages in the amount of $50,000.00. In that case, the Court took into account that the injuries sustained in the accident aggravated a pre-existing degenerative joint disease.

[126] Counsel for the Fourth Defendant referred the Court to the following cases:-

a. **Cedric Dawson v Cyrus Claxton** (referred to in paragraph 123 above)

b. **Celia Hatchett v FirstCaribbean International Bank et al** (referred to in paragraph 125 above)

c. **Rashid Piggot v Gale Force Windows and Doors** (referred to in paragraph 124 above).

[127] Having reviewed the cases cited by Counsel for the Defendant, and having regard to the authorities, I am of the view that an award of $50,000.00, suggested by Counsel for the Defendants would in the circumstances be fair, just, reasonable and appropriate for the Claimant's pain and suffering.

[28] Claim No. AHUHCV 1990/ 0160

CONCLUSION

[128] I find that the balance of probabilities was in favour of both drivers having been negligent. I find that the collision was caused as a result of the negligence of both the Second Defendant and the Fourth Defendant and that the First Defendant and the Third Defendant are vicariously liable for the negligence of the Second Defendant and the Fourth Defendant respectively. Accordingly, and based on my finding in paragraph 68 above, I apportion liability 30% to the First Defendant and 70% to the Third Defendant. I find that the Claimant is entitled to general damages for negligence in the sum of $50,000.00 (paragraph 127 above). The Claimant has also proved her case for Special Damages in the sum of $12,832.75. Her claim for loss of wages in the sum of $111,300.00 has not been proved. Her claim for exemplary damages against the First Defendant has also not been proved.

ORDER

(i) Judgment is entered for the Claimant against the First and Third Defendants as follows:-

First Defendant

a) General damages in the sum of $15,000.00. (i.e. 30% of $50,00.00)
b) Interest on the general damages at the rate of 5% per annum from the date of filing the claim to the date of judgment – i.e from the 5th day of September 2008 to the 27th day of July, 2012.
c) Special damages in the sum of $3,849.83. (i.e. 30% of $12,832.75)
d) Interest at the rate of 2 ½ % per annum on the sum of $3,849.83 from the date of the accident to the date of the trial – i.e. from the 8th day of September 2005 to the 6th day of December, 2011.
e) Prescribed costs in accordance with the Civil Procedure Rules (CPR) 2000.

Third Defendant

a) General damages in the sum of $35,000.00. (i.e. 70% of $50,00.00)

b) Interest on the general damages at the rate of 5% per annum from the date of filing the claim to the date of judgment – i.e from the 5th day of September 2008 to the 27th day of July, 2012.

c) Special damages in the sum of $8,982.92. (i.e. 70% of $12,832.75)

d) Interest at the rate of 2 ½ % per annum on the sum of $8,982.92 from the date of the accident to the date of the trial – i.e. from the 8th day of September 2005 to the 6th day of December, 2011.

e) Prescribed costs in accordance with the Civil Procedure Rules (CPR) 2000.

JENNIFER A. REMY
High Court Judge