

ANTIGUA AND BARBUDA

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO ANUHCV2011/0474

BETWEEN:

[1] **TREVOR GREENAWAY**

[2] **TASSICA GREENAWAY**
(By her next friend TREVOR GREENAWAY)

Claimants

AND

VERNON DOWDY

Defendant

Appearances

Mr John Fuller for the Claimants

Mr Jason Martin for the Defendant

.....
2012: September 26: November 21
.....

JUDGMENT

INTRODUCTION

[1] **LANNS, J [Ag]:** On 28th July 2008, between 9:00pm and 10:00pm, a collision occurred along the All Saints Main Road in the vicinity of the Belmont School of Business between a private car owned and driven by Trevor Greenaway, and a taxi bus owned and driven by Vernon Dowdy. This action arises out of that vehicular collision.

[2] Mr Greenaway pleads, among other things that the accident was caused by Mr Dowdy's negligence in that he

a) failed to heed Mr Greenaway's signal of his intention to turn right;

- b) failed to slow down, swerve or otherwise manoeuvre his vehicle in such a manner as to avoid colliding with Mr Greenaway's vehicle;
- c) failed to drive safely in all the circumstances

[3] Mr Greenaway asserts that as a result of Mr Dowdy's negligence, he and his daughter Tassica suffered loss and damage, injury and pain.

[4] Mr Greenaway described his injuries as follows

- a) Injury to left shoulder
- b) Injury to neck
- c) Pain in back

[5] Tassica's injuries were described as "Severe pain in left back requiring hospitalization for 2 days"

[6] Mr Greenaway particularized his loss as follows:

- a) Total loss of motor car \$27,500.00 being the difference between the pre-accident value of \$30,000.00 and the salvage value of \$2500.00.
- b) Cost of X-ray in the amount of \$750.00
- c) Medical expenses totaling \$300.00
- d) Medication expenses in the amount of \$300.00

[7] By way of defence, Mr Dowdy denies that he drove negligently as alleged by Mr Greenaway or at all. He contends that it was Mr Greenaway who drove in a negligent manner by speeding and attempting to overtake him on his left side thereby causing the collision and injury and loss to Mr Dowdy. He particularized Mr Greenaway's alleged negligence as follows:

- a) Attempting to overtake the Defendant's vehicle on the wrong side of the road;

- b) Driving too fast in all the circumstances;
- c) Failing to keep any or any proper lookout;
- d) Failing to stop, steer or otherwise control his car so as to avoid striking the Defendant's car;
- e) Causing his car to collide with the Defendant's car.

[8] Mr Dowdy claimed that as a result of Mr Greenway's negligence, his car was declared a write off. He counterclaimed for loss and damage allegedly suffered as a result of Mr Greenaway's alleged negligence. Mr Dowdy particularized his loss as follows:

- a) Cost of repairs to vehicle in the amount of \$35,103.56
- b) \$1820.00 for loss of use for 14 days at EC\$130.00 per day
- c) Legal practitioner's costs
- d) Interest pursuant to statute

[9] In his reply, Mr Greenaway maintained that the accident was caused by Mr Dowdy's negligence. He asserted that he stood by the facts as pleaded at paragraph 6 of his Statement of Claim. He further maintained that both he and his daughter Tassica sustained injury and suffered pain.

[10] By way of Defence to the Counterclaim, Mr Greenaway pleads that he neither admit nor deny that Mr Dowdy's vehicle was a write off. Nor does he admit that Mr Dowdy suffered the loss and damage that he particularized in his Counterclaim because that information is not within his knowledge. He therefore put Mr Dowdy to strict proof.

THE ISSUES

[11] The issues which seem to arise for determination are:

1. Whether or not the collision was caused by the negligence of the Defendant
2. Whether or not the collision was caused by the negligence of the Claimant

THE EVIDENCE

(a) Mr Greenaway

- [12] Mr Greenaway's evidence is that around after 9:00 pm on 20th July 2008, he left his mother's home in Potters with his thirteen year old daughter, Tassica in his vehicle, and proceeded along the Potters/Herbert's Main Road. When he got to the intersection of Herbert and All Saints Roads, he came to a stop and checked for traffic along the All Saints Main Road. When it was safe to do so, he made a complete right turn and then proceeded west on All Saints Road driving at 25 miles per hour.
- [13] As he was approaching the Belmont School of Business, he looked in his rear view mirror, slowed down, and put on his indicator signaling his intention to turn right into the side road leading into Belmont. He then came to a complete stop to allow vehicles travelling in the opposite direction to pass. When all the vehicles travelling in the opposite direction had passed, he checked his rear view mirror again. No vehicle was behind him, and none was approaching him. The road was clear. With his indicator still on, he commenced his right turn to head into the side road. As he was making the right turn to come off All Saints Road, he felt a heavy bump at the rear of his vehicle. His vehicle was pushed forward spun around, and ended up in a gutter on the north side of the road. When his vehicle came to a stop, it landed on its left side (the driver's side). He exited his vehicle through the right window and then pulled his daughter through the same window. His daughter had lost consciousness but with the assistance of a nurse who attended the scene, she soon regained consciousness.
- [14] His vehicle was written off and both he and his daughter Tassica sustained injuries as a result of the collision.
- [15] Mr Greenaway testified that Mr Dowdy was driving motor vehicle TX805 which had collided with the back of his vehicle.

- [16] Mr Greenaway stated that he and Tassica were taken to the hospital by ambulance. Mr Greenaway was discharged after initial treatment but Tassica was warded. Mr Greenaway said he sustained injury to his left shoulder and his neck, and he experienced pain in his back. Tassica experienced severe back pain requiring hospitalization for two days.
- [17] Mr Greenaway in his Witness Statement stated that the police attended the scene of the accident. He stated that a police officer also attended the hospital while he (Mr Greenaway) was there and identified himself as the investigating officer of the accident.
- [18] About four weeks after the accident occurred, the investigating officer re-visited the scene with Mr Greenaway and Mr Dowdy who both pointed out certain points of impact to the officer. The officer took measurements and filed a report in respect of the accident.

Cross-examination and Reexamination

- [19] Mr Greenaway was cross-examined by Mr Martin. He stated that the car he was driving was a two door Coupe which is a sportier version of the Honda Accord.
- [20] He testified that around the time of the accident, there was traffic travelling west to east but none at the back of him travelling east to west and he had to wait for the cars travelling west to east to pass. He waited for about ten seconds or a bit more. He maintained that he checked his rear view mirror for vehicles behind him before he made the manoeuvre to turn right. Asked whether he made the manoeuvre from the center of the road, in the middle of the road or closer to the road, Mr Greenaway answered that he made the manoeuvre closer to the side of the road. He explained that as he started to make the manoeuvre, he felt the impact. He testified that his car spun around, went into a ditch and a lamp post stopped it. He felt contact at the rear end of his vehicle. He agreed that as the car ended up on the left side it should have sustained damage. He testified that the indentation on the left of his vehicle was caused by a lamp post. It was suggested to him that his car ended up on its four wheels, but he denied that suggestion. He maintained that Mr Dowdy collided with his vehicle as he was making a right turn on to the byroad. He

denied that he attempted to overtake Mr Dowdy who was allegedly in front of him; he denied that he had to abort the manoeuvre because light was coming over the hill from the other direction. He denied that the indentation on the right rear quarter panel of his vehicle was the indentation from the lamp post; rather, it was the indentation from the impact of the collision by Mr Dowdy's vehicle.

[21] Under re-examination, Mr Greenaway confirmed that he climbed out of the right window of his vehicle because his car was resting on its left side and the door could not open. He reiterated that the damage to his right rear end of his car came from the impact of the taxi driven by Mr Dowdy. Mr Fuller then proceeded to question Mr Greenaway as to what happened to Tassica, whereupon Mr Martin objected on the basis that the issue did not arise in cross examination. The objection was sustained.

(b) Mr Dowdy

[22] Mr Dowdy stated that on 20th July 2008 he was driving on All Saints Road in a westerly direction. As he approached Buckley Corner going towards Belmont Hill, he heard a race car coming behind him. He looked in his rear view mirror and saw "this car" coming with terrible speed and noise behind him. The car was on the right side of the road about 50 ft when it attempted to pass him. Then a light came over the hill from a car travelling in an easterly direction. Then he heard a noise at his left side. It was the race car. It was trying to pass him on the left. The car pulled back on the road almost in front of him. The car hit the bus on the left side from the passenger door to the front left corner and pulled off the left corner piece of his bumper. At the point of impact, his bus stalled near to the center of the road. The car momentum took it forward and it ended up on its four wheels in a gutter a good distance facing St Johns.

[23] He immediately came out of his bus and went to the car. He asked Mr Greenaway what happened to him if he was trying to kill him, to which Mr Greenaway responded "I am sorry, I thought I could make it." He saw a girl in the passenger seat. He told Mr Greenaway that they had to call the police, and Mr Greenaway informed him that he had

already called the police. Mr Greenaway asked him if he was damaged. His reply was that his ribs felt like they were mashed up and that he had pain in his head and neck. Mr Greenaway told Dowdy to call the ambulance. While he was trying to locate his phone from his van to call the ambulance, two vehicles travelling in an easterly direction pulled up. His niece approached him. Then Charlesworth Williams, another taxi bus driver appeared. His niece called the ambulance, and he was rushed to the hospital and was warded for 9 days following x-rays which showed that he had sustained three broken ribs. While at the hospital, a police officer appeared and asked him what happened and he explained to him how the accident happened. The officer promised to return for a statement, but he never came for the statement.

[24] Upon his discharge from the hospital, Mr Dowdy contacted Police Constable Jacobs who arranged a visit to the site of the accident. Mr Dowdy testified that he answered a few questions from Constable Jacobs who took some measurements thereafter, and promised to get in touch with him so that he can take a statement. He never got in touch with him; so he never gave a statement.

[25] Mr Dowdy testified that he paid \$35,103.56 to fix his vehicle, in accordance with an estimate dated 1st August 2008, provided by Mr Vernon Defreitas who was the mechanic who did the repairs.

Cross-examination and reexamination

[26] Mr Dowdy was cross examined by Mr Fuller. He said that he is a member of the Dockyard Taxi Association. He has known Mr Charlesworth Williams for over twenty years. He knows Mr Williams is a member of a Taxi Association but he does not know which one. He maintains that at the date of the accident he was travelling from east to west on All Saints Road. Mr Greenaway was behind him and attempted to overtake him on the right. A car was coming over the hill on the right side when he heard "bam" on the left side of his bus and the door slid open. At this juncture, Mr Fuller asked, "So how did the front of your vehicle get damaged?" Answer: "Because of the impact. The car cut off a little piece of my bumper."

[27] When shown page 44 of the core bundle, containing three photographs of what appears to be Mr Dowdy's bus, TX 508, Mr Dowdy stated that the left front of his bus is not pushed in but pushed across. He said that the bottom part of the left door is not pushed back; rather it is bent in. When it was suggested to him that the damage to his bus was as a result of his bus hitting Mr Greenaway's car in front of him, he answered "I never hit nothing in front of me because nothing was in front of me." He was adamant that the damage to his bus happened as a result of Mr Greenaway attempting to overtake him on his left side. It was further suggested to him that the damage to his bus was as a result of him running into an object; to which he answered "If I had run into something the whole of the front of my bus would have been damaged not the door only." It was further suggested to Mr Dowdy that the damage to Mr Greenaway's car was from his bus. His response was "That's what you say Sir. I did not see Mr Greenaway's vehicle at the scene because I was in so much pain. I never knew his car" Ask whether he went to look for Mr Greenaway's car, Mr Dowdy answered "The insurance took pictures."

[28] Under reexamination, Mr Dowdy denied that he was travelling fast. He said that he does not drive fast. He normally drives 25 to 30 miles per hour and that he was driving too slowly for Mr Greenaway. He said there were no skid marks or tire marks in the road. He testified that the accident occurred a little beyond the road leading to St Johns, and not near the road leading to Belmont as suggested by Mr Greenway. He maintained that his front left did not hit Mr Greenaway's car on the back right.

[29] Mr Dowdy testified that his bus was comprehensively insured; that he made a claim on his insurers and they wrote off the bus and gave him the value of the bus being the sum of \$22,000.00. He took the money and bought a bus. Mr Dowdy testified that the post accident value of the bus was \$6000.00.

[30] He was adamant that Mr Greenaway told him at the scene of the accident and at the hospital that he was sorry; he thought he could make it.

(c) Mr Williams

[31] Mr Charlesworth Williams gave evidence on behalf of Mr Dowdy. He said that he has diabetes. He also has cataract for about three to four years now. He is a member of the St Johns Taxi Association. He said that Mr Dowdy was not his friend. He knew him for many years. He saw the accident happened four years ago. He had no difficulty seeing at the time of the accident. He could see and drive at that time. Now he needs someone to drive him. He testified that there were about four cars a quarter of a mile ahead of him or between him and the accident. He did not know who was driving which car.

[32] Under cross examination he said that he did not know how the front of Mr Dowdy's bus got damaged. When he got to the scene of the accident he parked his bus. He does not know if the cars that were in front of him stopped. He came out of his bus and went to Mr Dowdy who was inside his bus crying for pain in his ribs. He did not go to Mr Greenaway. Asked whether he could explain how the accident occurred, Mr Williams replied "I saw a car overtake on the left hand side and that's all I know."

[33] Under re-examination, Mr Williams maintained that he saw a car overtake on the left side of the bus and that he was roughly four cars behind when this happened. He did not see any other accident on that road.

VISIT TO THE LOCUS IN QUO

[34] The court visited the locus. In attendance were the parties and their legal representatives. Mr Williams was not present.

[35] Upon further examination at the locus, the parties pointed out different points of impact - Mr Greenaway pointing to the road near Belmont byroad, and Mr Dowdy pointing to the road near to the St John's byroad. There were no inconsistencies in the evidence already proffered. Mr Dowdy said that he came to a stop when he felt the "lick." He was in the middle of the road facing west when he came to a stop. At the locus, Mr Greenaway said that at the time of the accident he was living at Belmont and he pointed to the house where

he was living. He said that he was heading to his home when the accident occurred. The distance between the entrance to the Belmont byroad and Mr Greenaway's home, was estimated to be about half a mile. Under cross examination at the locus in quo, Mr Greenaway admitted that there are several roads that can take him to Belmont.

[36] At the locus, the court posed the question as to the whereabouts of the police report. Mr Fuller replied that a police report exists but Mr Martin did not agree to it being included in the bundle because it was adverse to Mr Dowdy. Mr Martin on the other hand merely replied, "That is the evidence My Lady" At this point, Mr Dowdy began to say something pertaining to a police report but Mr Martin shut him up there and then in the presence and hearing of the court, and all present.

CLOSING SUBMISSIONS

(a) Mr Fuller

[37] Mr Fuller's closing submissions may be summarized thus:

- (1) It is undisputed and unchallenged that the Claimant lives on the byroad where the Claimant lived.
- (2) The injuries to the Claimant are undisputed
- (3) The loss of value to the Claimant's vehicle mainly \$27,500 is undisputed.
- (4) It is also undisputed (based on photos at page 43 of the Core Bundle) that the Claimant's vehicle was struck by the Defendant's vehicle in the rear right side
- (5) It is further undisputed that the Defendant's bus was damaged on its front left side as seen by photos at pages 44 and 45 of the Core Bundle.

- (6) The Claimant denies that he struck the Defendant's vehicle while attempting to pass the Defendant on his left.
- (7) The Defendant's witness Williams admitted that at the time of the collision he had, and still has cataract. He alleges that he was a quarter of a mile behind the Defendant with several vehicles travelling between him and the Claimant, when he saw Claimant overtaking the Defendant on the left. He stopped his bus at the scene and went over to the Defendant because he knew him.
- (8) After the collision, the Defendant went over to the Claimant, had a conversation with him and returned to his bus. This must have taken several minutes before Williams went to the Defendant.
- (9) It must be concluded as a matter of fact that Mr Williams was a considerable distance away when the collision occurred.

[38] Mr Fuller asks the court to find

- (1) That the Claimant did stop with his indicator indicating his intention to turn right at the byroad upon which he lived; that he stopped to allow vehicles to pass coming from the opposite direction;
- (2) That the clear and unambiguous evidence from the photographs show that the claimant was struck from behind and could not have been passing the Defendant on the Defendant's left side.
- (3) That it was impossible for Williams to have seen the collision, given his distance from the collision and given his sight impairment;

- (4) That the Defendant failed to see the Claimant's intention to turn right and to take measures to avoid the colliding with the Claimant's vehicle;
- (5) That the Defendant's location of the point of impact, namely beyond the byroad is unbelievable having regard to the reasonable conclusion that the Claimant was turning right at the byroad
- (6) All of the real evidence, namely the photographs, the position of the byroad where the claimant lived, the allegation by the Defendant as to where the collision took place inescapably lead one to conclude that the Claimant's version of the collision is true.

(b) Mr Martin

[39] Mr Martin's closing submissions are summarized thus:

- (1) Mr Greenaway's version of the accident is materially inconsistent with the evidence adduced at the trial of this matter and it cannot be maintained that he proved his case to the requisite standard or at all;
- (2) Mr Greenaway's evidence is incredulous, having regard to the fact that he admitted that he had a clear line of sight for a quarter of a mile behind him, and the fact that there was no other traffic impeding his vision;
- (3) A vehicle would have to take some reasonable amount of time to travel that distance all the while being in the line off sight of a driver into the position that Mr. Greenaway claims he was in and would have clearly been visible during this period.

- (4) The fact that this accident took place at night when vehicles would have been even more visible by their headlights makes Mr Greenaway's version all the more incredible;
- (5) When shown pictures of the vehicle at page 43 of the bundle, Mr Greenaway could not identify any damage from the picture. The picture adduced showing the left side of Mr Greenaway's vehicle, is of excellent quality, and shows no evidence of any damage at all far less the type of damage to be expected had it indeed come from the car rolling over on to that side. The smooth continuous lines of the left side of the vehicle can be traced from front fender to rear left quarter panel. This represents clear photographic evidence that Mr Greenaway is not being truthful with the court.
- (6) It is highly improbable that the lamp post damaged the fiberglass bar at the bottom of the rear of this vehicle having regard to the following:
- a. Mr Greenaway accepted that the photographs showed the bumper of the vehicle and no discernible damage to the same;
 - b. The back bumper and more particularly the lines of the bumper are clearly visible and show no indentation whatsoever;
 - c. The back bumper would have covered the fibre glass bar and would have been the first part of the car damaged if the car hit a lamp post from the rear;
 - d. The entire rear trunk of Mr Greenaway's car is perfectly visible and there is no hint of damage to the same, which would be extremely unlikely if the rear of the vehicle had hit a

standing lamp post with any degree of force to cause an indentation.

- (7) Mr Greenaway's version of events lack credibility in material respects and the court should not accept that version without more as Mr Greenaway has offered no evidence in support of his claim.
- (8) Mr Dowdy's version of the accident is the one which is to be accepted by the court. He was materially consistent in his evidence. Moreover the photographs produced of Mr Dowdy's bus are more consistent with his evidence that Mr Greenaway attempted to overtake him on the wrong side and making contact with the left front of the bus.
- (9) If Mr Dowdy's bus had collided with Mr Greenaway's vehicle in the manner averred by Mr Greenaway, it would have of necessity sustained damage to its entire front, as it ploughed head first into the rear of Mr Greenaway's vehicle.
- (10) An inspection of the photographs of Mr Dowdy's vehicle on page 44 of the bundle shows almost two-thirds of Mr Dowdy's bus in a pristine condition, with the front right being the only area of localized damaged. This localized damage is consistent with Mr Dowdy's evidence that it was Mr Greenaway who hit him along the **"Defendant's front right door and front right side.** (my emphasis). There is obviously a mistake in the submission in bold. In this case, there was no question of damage to the front right door and front right left of either vehicle. I take it that there was some cutting and pasting there.
- (11) Mr Dowdy's evidence is supported by an independent witness who witnessed the events leading up to the accident and who gave evidence which corroborated Mr Dowdy's account of the accident.

(12) The court should find for Mr Dowdy on the issue of liability and dismiss the Mr Greenaway's claim.

DISCUSSION AND DECISION

[40] There is no dispute that a collision occurred between vehicles owned and driven by Mr Greenaway and Mr Dowdy. There is also no dispute that Mr Greenaway, Mr Dowdy and Tassica sustained injuries as a result of the collision. There is also no dispute that both vehicles were extensively damaged. Where the parties part company is on the questions as to how the collision occurred, and who caused the collision and most importantly the point of impact. They also part company as to the position of Mr Greenaway's vehicle in the gutter. Each party blames the other for the collision and the damage to the two vehicles. Curiously, whereas Mr Greenaway puts the point of impact near to the Belmont byroad, Mr Dowdy puts the point of impact some distance beyond the St John's byroad. Further, whereas Mr Greenaway says his car ended up on its left side, in a gutter, Mr Dowdy says Mr Greenaway's car ended up on its four wheels in the gutter. The questions which come to the fore are where was the point of impact? What is the likely cause of the collision? Who was liable for the collision? Who is to be believed? Which version is more probable?

[41] The court is not of the view that these questions can be determined solely on the evidence adduced at trial. The court is of the opinion that the evidence is limited. To determine those questions, independent opinion and the evidence of experts in the field of vehicle collision damage and auto body repair to give logical, cogent, reliable and trustworthy evidence as to the likely cause of the collision, or how the damage was likely to have been caused, is required.

[42] Additionally, the court is of the view that evidence and the report of the investigating officer would have greatly assisted the court in the determination as to the point of impact, and how the accident was caused. The police officer who attended the scene of the collision was not called to give evidence. He might have been able to opine as to whether or not

the accident could have been caused by a forceful impact/collision, or if it was a low speed collision, and the positioning of the vehicles immediately after the accident. Mr Greenaway testified that he was driving at 25 miles per hour. Mr Dowdy said Mr Greenaway was speeding; and he (Mr Dowdy) was driving slowly - too slowly for Mr Greenaway; hence, the reason why Mr Greenaway tried to overtake him. In light of these assertions, I find it mindboggling as to why Mr Martin did not agree for the Police Report to be included in the agreed List of Documents. I also find it mindboggling as to why Mr Fuller did not call the investigating officer to testify at the trial and to report on the collision.

[43] Both parties placed heavy reliance on photographs which were apparently taken of both vehicles and placed in the Core Bundle. Mr Martin describes those photographs as "clear photographic evidence." whereas Mr Fuller describes them as "clear evidence"; and "real unambiguous evidence." The court is unable to agree with those descriptions. The truth is that those photographs were never placed in evidence by anyone. The court has no knowledge as to who actually took these photographs, or when or where they were taken. Contrary to the view of counsel for the parties, the court is unable, optically, to discern from those photographs, any structural and or superficial damage done to the vehicles so as to draw an inference that would fix liability on either of the parties. In the result, the court has difficulty in making a finding consistent with the case put forward by either party. The court cannot discern from those photographs whether or not Mr Greenaway's vehicle ended up on its four wheels or on its left side.

[44] That being said, the onus of proof is on the Claimant to establish his claim as asserted in the Statement of Claim. The burden of proof in civil matters is on a balance of probabilities. In other words, the Claimant must prove to the court that his version of the material facts used to substantiate the claim being made against the Defendant is more rather than less likely than the Defendant's version of facts. The ultimate question for the court is whether the evidence convinces me or persuades me on balance that the Claimant's version is more likely than the Defendant's version of the facts. If the scales are evenly balanced, then the claim is not proven to the standard required and the Claim must be dismissed. This means that if the version of facts put forward by the Claimant and

the Defendant are equally capable of being true then the evidence cannot be evidence which will legally support either version of facts.

[45] Looking at the evidence adduced as a whole, I am unable without independent evidence to say with confidence where the impact took place or whether the collision was caused by the negligence of the Defendant rather than the negligence of the Claimant. Counsel for the Claimant has submitted that on the Claimant's evidence, the Defendant was the negligent party. On the other hand, counsel for the Defendant has submitted that on Mr Dowdy's evidence, Mr Greenaway was wholly to blame.

[46] Not unexpectedly, Mr Williams did not show up at the locus in quo. I am not convinced that Mr Williams was in a position to see the collision. I find as a fact and hold that his view was obscured by the four vehicles that were travelling in front of him. He was evasive in answering certain questions. For example, he was evasive when asked whether Mr Dowdy was his friend. I do not believe him when he denied that they were friends. I do not find the evidence proffered by him in relation to the collision, to be reliable. I reject it.

[47] In all the circumstances, and having examined the facts, the limited evidence and arguments as put to the court, I am unable to say whose negligence caused the accident. Neither explanation is persuasive. Yet both may be plausible. I am left in doubt, without independent evidence, as to where on the All Saints Road the collision actually took place - whether near the side road leading to Belmont, or beyond the St Johns side road. I am left in doubt as to the point of impact. I do not think that I can safely postulate, without more, which of the two scenarios put forward is more probable. I therefore consider that the right course to adopt is to apply the **Baker v Market Harborough Co-operative Society**¹ principle and hold the parties equally to blame.

[48] In **Howard v Bemrose** [1973] RTR 32 at p38, Buckley LJ summarized the principle in **Baker** as follows:

¹ [1953] 1 W.L.R. 1492

"The principle of **Baker's** case, is that when, after all available evidence has been heard, it is clear that on the balance of probabilities there has been negligence on the part of somebody but when, on that evidence, and again on a balance of probabilities, the court is unable to say whether the negligence is that of one party or the other, or both parties, then it is open to the court – once again on the balance of probabilities to say that the negligence was the negligence of both parties, and then, being without further information enabling the court to apportion the blame, the court will conclude that the parties contributed equally to the accident.

[49] I think the principle in **Baker** applies in this case, and as I am unable to determine the degree of blameworthiness of each party, both are equally to blame.

CONCLUSION

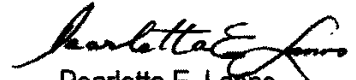
[50] In the result, it is hereby adjudged that

1. There will be Judgment for the Claimant for damages to be assessed.
2. There will be Judgment for the Defendant for damages to be assessed.

AND IT IS ORDERED that

- [1] Assessment of damages shall take place on a contested Chamber day on application by each party.
- [2] Each party is to file and serve an application for assessment of damages supported by evidence on affidavit together with supporting documents authorities and brief submissions in support of the assessment within 21 days of today's date.
- [3]. This court remains seized of the assessment of damages hearing unless a consent order or notice of discontinuance is sooner filed.

[51] The court is greatly appreciative of the assistance of counsel for the parties.



Pearletta E. Larrins

High Court Judge [Ag]