

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT  
(CIVIL DIVISION)**

**[Unreported]**

*Civil Suit No: CV962 of 2008*

**BETWEEN:**

**KEITHLEY BOYCE**

**CLAIMANT**

**and**

**THE ATTORNEY GENERAL  
CARLOS HALL**

**FIRST DEFENDANT  
SECOND DEFENDANT**

**Before:**

The Honourable Madam Justice Maureen Crane-Scott

Judge of the High Court

**Appearances:**

Mr. Alrick Scott in association with Miss. Makala Holder for the Claimant

Mr. Roger Barker in association with Miss. Sharon Deane and Mrs. Deidre Gay-McKenna for the Defendants

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2011: May 26, 27;

June 7;

2013: September 6  
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## DECISION

- [1] **Crane-Scott, J:** By Writ of Summons filed on June 10, 2008 Keithley Boyce (“the Claimant”) instituted proceedings in negligence against the Attorney-General of Barbados (“the First Defendant”) and Carlos Hall (“the Second Defendant”). In these proceedings, he claimed damages for personal injuries and consequential losses which he allegedly suffered as a result of an incident which occurred on July 19, 2005 whilst he and the Second Defendant, were carrying out crime prevention duties at Neil’s Plantation, the residence of former Chief Justice, Sir David Simmons, K.A.
- [2] The Claimant alleged that his injuries were caused by the negligence of the Second Defendant in the conduct of his duties as a police officer and/or by the negligence of the First Defendant, its servants or agents in failing to ensure that the vehicle MP-413 used by its employees was properly maintained and safe for use.
- [3] The negligent acts and omissions alleged on the part of the Second Defendant were particularised in the Statement of Claim as follows:

### “PARTICULARS OF NEGLIGENCE ON THE PART OF THE SECOND DEFENDANT

- (a) Failing to engage the handbrake properly or at all.
- (b) Causing or allowing MP-413 to roll backwards.
- (c) Failing to warn the Claimant that the handbrake was not or not properly engaged.
- (d) Parking MP-413 on an incline.
- (e) The Claimant will rely on the happening of the accident as evidence in itself of the negligence of the Second Defendant
- (f) Failing to check and ensure that the handbrake was engaged before alighting the police vehicle.
- (g) Failing to take all reasonable care in the circumstances.
- (h) Driving or causing the vehicle to be driven with a defective handbrake.”

[4] The negligence alleged on the part of the First Defendant was also particularized in the Statement of Claim in the following terms:

“PARTICULARS OF NEGLIGENCE ON THE PART OF THE FIRST  
DEFENDANT

- (a) Failing to institute or enforce any or any adequate system for the inspection and maintenance of the vehicle whereby the existence of a defect in the handbraking system might have been detected and remedied before the accident.
- (b) Causing or permitting the vehicle to be used upon the road when the handbraking system was in a defective condition.
- (c) The Claimant will rely on the happening of the accident as evidence in itself of negligence on the part of the First Defendant its servants or agents.”

[5] By Defence filed on March 23, 2009 and subsequently amended on April 15, 2011, the First and the Second Defendants both denied the allegations of negligence against them and further contended that the matters complained of by the Claimant were caused wholly or in part by the Claimant’s own negligence.

[6] The negligence alleged by the Defendants against the Claimant was particularized in their Amended Defence as follows:

“PARTICULARS OF THE CLAIMANT’S NEGLIGENCE

- (a) Unbeknownst to and in some way unknown to the First and Second Defendants, but through his own actions, letting down the handbrake and engaging the neutral gear.
- (b) Not being the authorised driver, causing the motor vehicle to roll backwards from its parked position and strike the sidewalk.
- (c) Operating outside the scope of his duties by carelessly and negligently attempting to stop a moving vehicle with his body.
- (d) Failure to take care or to have any sufficient regard for his own safety while on duty.
- (e) Failure to take any and/or sufficient steps to avoid the alleged injuries, loss or damage.”

- [7] *Facts not in dispute:* While both Defendants have strongly contested the allegations of negligence and liability for the Claimant's loss and damage, a number of facts are not in dispute. This is clear not only from the Statement of Agreed Facts, but also from the pleadings and the evidence adduced at the trial. The undisputed facts are outlined below and provide a brief background to the dispute.
- [8] Firstly, the Claimant is and was at all times employed as an officer of the Royal Barbados Police Force. Secondly, the proceedings were instituted against the First Defendant as the Crown's representative pursuant to the provisions of the *Crown Proceedings Act, Cap 197* of the Laws of Barbados, and thirdly, like the Claimant, the Second Defendant is and was at all times also employed as a police officer.
- [9] At the time of the incident the Claimant, then 28 years of age, was assigned to the District 'A' Police Station where the Second Defendant was also assigned.
- [10] Both the Claimant and the Second Defendant reported for duty sometime before midnight on or about July 18, 2005 as they were scheduled to work a shift starting from 12:00 am and ending at 7:00 am of the next day. Before reporting for duty, the Claimant had worked a previous shift which had concluded some two hours earlier at 10:00 pm on July 18.
- [11] The Claimant and the Second Defendant had both been jointly assigned to perform what is known in policing circles as 'crime prevention duty' in a police vehicle bearing registration number MP-413. The vehicle which they used had a manual transmission or gearbox. The Second Defendant was the authorised driver of this vehicle, as of the two he alone was licensed to do so.
- [12] Crime prevention duty to which the parties were assigned required them to conduct patrols and to visit businesses and residences within the precincts of the District "A" Police Station. The properties to be visited included business which operated late at night or on a 24-hour basis, such as fast food outlets and gas stations, as well as the residences of specified dignitaries, namely, the Commissioner of Police, the Attorney-General and the Chief Justice.

- [13] During the course of their patrol and in the early morning hours of July 19, 2005, the Claimant and the Second Defendant both visited Neils Plantation which was the residence of then Chief Justice, Sir David Simmons.
- [14] Upon arrival at the residence of Sir David Simmons, the Second Defendant drove into the yard and parked MP-413 on a slight incline situated at the end of the driveway near the garage. He then exited the vehicle to conduct a foot patrol of the premises.
- [15] The exact position at which MP-413 had been parked before it started to roll backwards and the precise location on the driveway at which the vehicle came to a halt after rolling down the incline are both matters in dispute. As will shortly appear, the respective versions as to what each man did as MP-413 rolled slowly backwards down the incline from its parked position are also at variance.
- [16] Also hotly contested is the question of whether the Claimant (as he claimed) had alighted from the vehicle immediately after the exit of the Second Defendant so as to conduct the patrol with his partner, or whether (as the Second Defendant testified) he had remained behind in the vehicle, asleep, and only gotten out at a much later stage. What is clear from the evidence, however, is that the vehicle started to roll slowly backwards down the incline from its parked position just after the Claimant had gotten out of the vehicle and walked towards the garage area.
- [17] Both sides agree that it was the Claimant who had first noticed MP-413 rolling backwards and who had shouted to the Second Defendant to alert him to that fact. Both sides also agree that the Claimant had rushed to the driver's side of MP-413 as it was rolling backwards and had pushed against it in an attempt to stop it or to slow its backward course down the incline.
- [18] Medical Evidence: In their Amended Defence, the Defendants made no admissions as to any injuries, loss and damage allegedly sustained by the Claimant. However, at the start of the trial, the medical evidence and the witness statements of one of the doctors and two of the physiotherapists who treated the Claimant were admitted into evidence by consent.

[19] The evidence initially disclosed that the Claimant suffered an injury to his back and wrist, allegedly sustained as a result of a vehicular accident on July 19, 2005. These injuries are mentioned in the Public Medical Journal in which they were recorded by Dr. Anne Auguste, the Police Public Medical Officer who the Claimant had visited on July 21, 2005. The Claimant was treated by her and subsequently referred to and treated first by Dr. Prasad Chode, an orthopaedic surgeon, and then by physiotherapist Ms. Jacqueline King only for back injuries. Because of the injury to his back, the Claimant also sought and obtained treatment from the Physiotherapy Department of the Queen Elizabeth Hospital, where he was seen by registered physiotherapist, Lynn E. Morris and a colleague of hers.

[20] No medical report was provided by Dr. Anne Auguste. However, the medical report of Dr. Prasad Chode dated January 15, 2010 was entered into evidence, as were the medical reports of Jacqueline King and Lynn Morris. The Court does not intend, at this stage, to examine the medical evidence in any detail. It confines its examination to three observations. Firstly, Dr. Chode in his report revealed that he first examined the Claimant on September 9, 2005 at which point the Claimant was complaining of pain to his back that was not relieved by the medication prescribed by Dr. Auguste. The Claimant did not report any injury to his wrist. Secondly, Dr. Chode in a section entitled “Relevant past medical history as stated by the patient”, further noted:

*“[The Claimant] suffered back injury in the past while trying to stop a culprit.”*

[21] Thirdly, the Court notes that in her report dated February 24, 2010, Ms. Jacqueline King stated that prior to the accident the Claimant had been in good health and had not been experiencing low back pain.

[22] The Claimant also filed a Schedule of Loss and Damages where he reported that his pre-accident injury included an injury to his lower back sustained in 2002 when he was attempting to apprehend a suspect. He claimed that the injury was long settled before the accident of July, 2005 and he had been in good health at the time of the accident. The

only injuries mentioned in the Schedule as resulting from this accident were an injury to his neck and back. There was no mention of any injury to his wrist.

- [23] *The Claimant's version of events:* The Claimant filed two witness statements in this matter on October 29, 2010 and April 26, 2011 respectively. In the first of these statements, he outlined his version of the incident. Pursuant to **Rule 29.9** of the ***Supreme Court (Civil Procedure Rules) 2008*** he amplified his witness statements at trial.
- [24] The Claimant stated that on or about July 19, 2005 he and the Second Defendant were conducting crime prevention duty in motor vehicle MP-413, which the Second Defendant had been driving. In the course of that duty, they visited Neils Plantation in the parish of Saint Michael, and specifically the residence of the Chief Justice at the time. They arrived at the Chief Justice's residence at around 4:30 a.m. The Second Defendant then drove into the property itself and proceeded along a driveway, at the end of which he parked MP-413.
- [25] According to the Claimant, the vehicle was parked on an incline and at an angle so that it partly faced the double garage on the premises. Behind the parked vehicle, the driveway sloped away from the double garage towards a curbed sidewalk, beyond which lay an expanse of lawn on which trees, including a coconut tree, were planted. The Claimant testified that the curb in question was just slightly bigger than a regular sidewalk and was less than a foot from the ground. In cross-examination, the Claimant explained that while he could not speak to the steepness of the incline on which the vehicle had been parked, the incline was very slight and was in his words: "*a slight slope, just a little slope*".
- [26] The Claimant told the Court that after the vehicle was parked, he had informed Operations Control by radio communication of their arrival at Neils Plantation after which he exited the vehicle in order to conduct a foot patrol in the company of the Second Defendant. He stated that the Second Defendant had exited the vehicle first and that he followed just a few seconds after. He explained that while walking ahead of the vehicle and behind the Second Defendant he noticed what he described in his witness statement as "*a sudden movement*" and in his testimony as "*a shadow*". It was his evidence that this movement or shadow caused him to glance back at which point he

observed MP-413 rolling slowly backwards and down the incline. He told the Court that he immediately alerted the Second Defendant by shouting for his assistance and then dashed towards the moving MP-413.

[27] According to the Claimant, he rushed to the driver's side of MP-413 as this was closer to him while the Second Defendant headed towards the passenger's side. When he reached his side of the vehicle, he said that he had pushed his hand through the open driver's window in an attempt to engage the handbrake. He was initially unable to say in cross-examination which hand he had used to do so, but finally admitted, somewhat reluctantly, that, given the injuries to his right hand, he was likely to have used his right hand. The Claimant said that in any event he was unable to reach the handbrake and the vehicle had therefore continued to roll down the incline. It was for this reason, he said, that he had then instinctively positioned his body to push against the vehicle so as to slow it down. According to the Claimant, the Second Defendant, by this time, had reached the passenger side of the vehicle and was able to push his hand through the open window on that side and engage the handbrake. MP-413, said the Claimant, then came to a halt.

[28] The Claimant asserted that MP-413 came to a halt due to the combined efforts of himself and the Second Defendant. He insisted that he was able to slow the vehicle down by using his body to push it back and that by doing so the Second Defendant was then able to engage the handbrake. He denied Mr. Barker's suggestion that that the vehicle had stopped because it had struck the curb and maintained that the vehicle had come to a stop not by the curb, but at least two (2) feet away from it.

[29] In cross-examination, the Claimant explained that he had reacted instinctively when he had pushed his body against the vehicle as he was concerned about preventing a vehicular collision and the questions that any ensuing investigation would cause. While he agreed that the vehicle posed no danger to life as no one was in its path, he insisted that the vehicle could have sustained damage or damaged property on the premises as there was, he said, a coconut tree to the back of the vehicle and the vehicle could have struck the curb, gone over it and collided with the tree.

- [30] The Claimant also testified that the vehicle had rolled backwards approximately 8 to 10 feet from its original parked position. He further testified that as soon as it stopped rolling back, the Second Defendant had gotten into the vehicle and driven it up the incline to its original parked position. According to the Claimant, he had then walked up the driveway and met the Second Defendant by the parked vehicle and together they had then proceeded to conduct a foot patrol of the residence. This evidence, the Court notes, is completely at variance with the evidence of the Second Defendant who stated in his witness statement that after getting into the vehicle, he had radioed the control room that he was leaving the residence.
- [31] The Claimant testified that after they completed the foot patrol, he and the Second Defendant returned to District 'A' Police Station. He said that he did not inform Sergeant 989 Bynoe, the SPO in charge of his shift, about the incident that had occurred at Neils Plantation. He further testified that at that time he had been in no pain.
- [32] The Claimant told the Court that on reporting for work two days later on or about July 21 2005, he was experiencing immense pain in his back and wrist. It was then that he had informed Sergeant 861 Beckles of the incident which had occurred two days previously on July 19, 2005 and the pain he was since experiencing. According to the Claimant, Sergeant Beckles had advised him to consult with the Medical Officer, which he proceeded to do.
- [33] At trial, the Claimant informed the Court that while he was not authorized to drive police vehicles, he had been licensed to drive both automatic and manual transmission motor vehicles for over 7 years. Based on his experience, he expressed the view that if its handbrake was not properly engaged, a manual motor vehicle which had been parked on an incline in first gear would move backwards more slowly than if it was in neutral gear. He opined, as a layman, that based on how MP-413 had rolled back the vehicle was likely to have been parked in first gear with the handbrake not properly engaged.
- [34] However, under cross-examination the Claimant was unable to say whether the vehicle had moved backwards in a straight line or whether it had done so in a zig zag manner. He insisted, however, that his hand had not touched the steering wheel of the vehicle as it

was moving back. He accepted that the Second Defendant had also not touched the steering wheel and that the vehicle had therefore moved back on its own without anyone steering it.

[35] The Claimant did not agree with Counsel for the Defendants that he had been, because of his earlier shift, tired during the shift in which the incident had occurred. He also steadfastly denied any suggestion that he had been asleep at any time during his with the Second Defendant, or that he had been asleep upon arrival at Neils Plantation.

[36] The only evidence adduced in support of the Claimant's case that there had been a defect in the handbraking system of MP-413 was the Claimant's testimony that the motor vehicle in question had been retired from use "*a few months after the accident*". What is more is that no evidence was adduced by the Claimant as to how and from whom the Claimant had obtained this information. Nor was any evidence led as to the reason why MP-413 had been retired from use or whether it had been off the road indefinitely, or only for some scheduled or routine maintenance. Indeed, the Claimant did not even give evidence as to the year and condition of MP-413.

[37] *The Second Defendant's version of events:* The Second Defendant also gave evidence by means of a witness statement filed April 1, 2011 in addition to oral testimony provided at trial.

[38] The Second Defendant explained that in the early hours of July 19, 2005, he and the Claimant had arrived at the residence of the then Chief Justice at Neils Plantation. He said that on arrival it was he, and not the Claimant, who had contacted the Control Room at Central Police Station, informing them that he was conducting a foot patrol of the premises. According to the Second Defendant, the Claimant had been asleep not only when they reached Neils Plantation, but had in fact been asleep for the entire shift. The Second Defendant testified that as a consequence he had not only driven the vehicle, but also undertaken the responsibility of maintaining contact with Operations Control and filling out the duty sheet.

[39] The Second Defendant agreed that he had parked the vehicle on a slight incline along the driveway of the premises. The Second Defendant, like the Claimant, described the

incline as slight. He, however, indicated that the incline had been high enough that a vehicle would roll backwards if the handbrake or gear was not engaged. He insisted that on parking the vehicle, he had placed the vehicle in first gear and had also applied the handbrake. He also indicated that he had not turned off the vehicle's headlights since the garage was unlighted.

[40] As to where precisely the vehicle had been parked, the Second Defendant in his witness statement agreed that he had parked the vehicle on a slight incline but stated that it had been parked facing the garage with the head lights on. In his oral testimony at the trial the Second Defendant told the Court that he had parked the vehicle close to the left sidewalk facing the kitchen area of the residence, which was located next to the double garage, with the headlights spotting underneath the garage. According to the Second Defendant, the vehicle had been parked approximately 18 feet away from the curb of a sidewalk which was directly behind the parked vehicle. He explained that the vehicle had not been parked directly in front of the garage, but that the garage was to the front of the vehicle, but more to its right. He told the Court that directly facing the garage was a tree growing inside a circle surrounded by a paved wall which was approximately 3 feet high.

[41] Under further cross-examination following the visit to the *locus in quo*, the Second Defendant clarified his earlier testimony that the vehicle had been facing the kitchen area of the residence. He explained that, in his opinion, the vehicle had been facing both the garage and the kitchen, since the kitchen and the garage were both located in the same general location.

[42] The Second Defendant told the Court that upon parking the vehicle and alerting Operations Control as to their location, he had exited the vehicle and removed his torchlight from the back seat, leaving the Claimant asleep in the front passenger seat. He said that he had shouted to the Claimant that he was leaving. The Second Defendant related that he then commenced his foot patrol of the premises alone beginning with the area near the mango trees. He recounted, however, that when he reached the back of the house, he heard the door of the vehicle slam. Not too long after that, he heard the Claimant shout for him. He immediately ran back to the garage area where he observed the vehicle rolling backwards at a slow speed. He said that at the time he saw MP-413, it

had been about a car length from the sidewalk behind. He also observed the Claimant jogging alongside the vehicle with his right hand on top of the door on the driver's side of the vehicle which had been closed.

[43] According to the Second Defendant, by the time he reached the vehicle it had already stopped, its back wheels having struck a curb 1½ to 2 feet in height which lay to the rear. He indicated that the area with the mango trees by which he had begun his patrol was located behind this curb, but was about 18 feet from the curb -a good distance away. There were also coconut trees in that area. The Second Defendant also told the Court that at the time there had been no property or any person near the curb or to the rear of the vehicle that was at risk.

[44] Under cross-examination, the Second Defendant strongly denied that he had at any time reached into the vehicle and engaged the handbrake of the moving vehicle or sought to do so. He insisted that it was the curb or sidewalk at the rear of the vehicle that had caused the vehicle's backward movement to come to a halt.

[45] The Second Defendant recounted that when the vehicle came to a stop, he had checked the vehicle to ensure that it had not been damaged. On entering the vehicle he found the gear shift in the neutral position and the handbrake down. He maintained that the gearshift and the handbrake had not been in those positions when he had parked the vehicle. The Second Defendant suggested that the Claimant had somehow caused the gear shift to be changed and the handbrake lowered, but conceded that he had not actually witnessed the Claimant doing so. He also mentioned that he had asked the Claimant whether he had moved the gear and the Claimant had denied doing so.

[46] The Second Defendant stated that after the accident he also checked the handbrake and gears of the vehicle, all of which seemed to be in working order. He then reported to Operations Control and the parties then proceeded to Shell Wildey and other locations on their tour with the Second Defendant still driving and the Claimant asleep. The Second Defendant pointed out that while he had parked the vehicle and conducted foot patrols in each of these subsequent stops, no similar incident had occurred. He further testified that subsequent to the incident he and other police officers had continued using the vehicle

but encountered no issue. They had also had no problems with the vehicle prior to the incident.

[47] According to the Second Defendant, he and the Claimant had specific roles to perform. He was the authorised driver whose duty it was to drive the vehicle, while the Claimant, as the Operator, had been responsible for deciding where they were going and communicating with Operations Control. However, the Second Defendant stated that as the Claimant had been asleep for most of the journey, he had to undertake those tasks himself. He also told the Court that as an authorised driver, he had been driving police vehicles for about 7 years and had been a licenced driver for over 10 years.

[48] The Second Defendant testified that aside from a problem with its power windows, MP-413 had been working well both before and after the incident. Under cross-examination, he further revealed that he would conduct checks on MP-413 in addition to, or together with personnel from Motor Transport (a department within the Police Force staffed with civilian and police mechanics and charged with responsibility for all police vehicles).

[49] The Second Defendant testified that an examination would have been conducted during the course of the day immediately before the incident. The examination in question would have entailed checking the water, lighting system, horn, gears and brakes of the vehicle. The gearbox, he said, would not have been disassembled, but the forward or reverse gears of the vehicle would have been checked by applying and using all the gears to make sure they were in good working order. Asked whether such a check would diagnose all problems likely to afflict the gearbox, the Second Defendant said that he was unable to say as he was not a mechanic, but said that the checks he had described were simply those he had been instructed to conduct.

[50] The Second Defendant was also cross-examined about the consequences of leaving a manual vehicle parked in neutral gear with the handbrake disengaged. He accepted that if he had parked the vehicle in such a manner it would have immediately begun to roll back, even before he exited the vehicle. On being asked about the speed at which such a vehicle would roll back, he responded that its speed would depend on the gradient of the slope

and the weight of the vehicle. He denied that the vehicle would necessarily have rolled back at a rapid speed.

[51] The Second Defendant denied Mr. Scott's suggestion that the Defendants' allegation in their Amended Defence that the Claimant had let down the handbrake and engaged the neutral gear had been a recent concoction. He disagreed with Mr. Scott's assertion that the gears in a manual vehicle could only be shifted if the clutch was engaged, but conceded that "*a considerable amount of force*" would have to be applied to change the gear without using the clutch. He also accepted that if the clutch were not engaged, "*it would rake, as they call it*" and one would hear a loud noise.

[52] Additionally, while the Second Defendant told the Court that he had only learned of the Claimant's injury approximately 4 weeks after the incident, he accepted that he was unable to say whether it had in fact actually been reported earlier.

[53] *The Evidence at the locus in quo:* At the request of both Counsel, the Court visited the *locus in quo* at the Neils Plantation residence of Sir. David Simmons where the Claimant and the Second Defendant respectively, pointed out the following locations to the Court:

(a) Firstly, the location where each of them said MP-413 had been parked initially upon their arrival at the residence in the early morning hours of July 19, 2005:

The Claimant: The Claimant pointed to a location near the top of the sloping driveway in front of the garage and stated, *inter alia*: "*Yes Ma'am, the vehicle was on an angle facing more this direction. It came up here and came and park this way, ma'am.*"

He later explained: "*It was on an angle facing more this direction....on an angle but more or less drove up here and stopped.... It was just parked in an angle because it was pointing a little bit to the garage, but still pointing to the other side as well.*"

The Second Defendant: The Second Defendant pointed to a location in the driveway parallel to the house and close to the left sidewalk and facing the garage

area. He told the Court: *“I parked the vehicle here...the front was about here or so. And the lights were spotting underneath the garage.”*

- (b) Secondly, the location where each of them said that the vehicle stopped/ended up after it had rolled back down the driveway.

The Claimant: In answer to questions put to him by Mr. Scott and by the Court, the Claimant pointed to a location near to a curb lower down the driveway at the bottom of the incline and around the paved circle with the tree inside and stated: *“It rolled back down just about here...two feet....The back of the vehicle would have ended up about two feet away from this curb, ma’am.”* In answer to a specific question from the Court as to whether he had touched the steering wheel at all, the Claimant stated: *“No, ma’am.”*

The Second Defendant: The Second Defendant pointed to the curb of a sidewalk lower down the incline of the driveway and directly in line with the location where he had said he had parked the vehicle. In answer to a question from the Court he said that the vehicle had ended up: *“Somewhere in this area here, the sidewalk in this area here. It struck the sidewalk of this area here... and stopped. It didn’t go up the sidewalk, it just hit the sidewalk and stopped.”*

[54] At the request of the Court, the Claimant also demonstrated on one of the police vehicles present at the *locus in quo*, the manner in which he had positioned his body and pushed against the vehicle in an attempt to slow it down.

[55] At the request of Counsel for the Defendants, Mr. Barker, the Claimant also identified the coconut tree which he had earlier stated under cross-examination had been to the back of the vehicle and which the vehicle could have collided with had it struck the curb and gone over the sidewalk. The Claimant also identified the tree which he had stated had been growing inside the paved circle of the little roundabout which faced the garage.

[56] Whilst at the *locus in quo*, and in keeping with section 142 of the *Evidence Act, Cap. 121 of the Laws of Barbados*, the Court made observations about the slope or incline of the

driveway in question, the location of the kitchen *vis-à-vis* the garage and the location of the mango trees and coconut trees mentioned in the evidence of the witnesses.

[57] *The Legal Submissions:* Counsel for the Claimant Mr. Alrick Scott, advanced a two-pronged argument in which he dealt firstly with the Claimant's case against the First Defendant for breach of its duty as an employer and secondly against the Second Defendant for negligence.

[58] Mr. Scott submitted that as an employer the First Defendant was obliged to take reasonable care for the safety of its employees during the course of their employment. This duty, he pointed out, included not only the provision of safe plant and equipment, but measures to inspect and maintain the equipment to ensure its safety and efficiency. Mr. Scott argued that as the police vehicle contained a defective handbrake system, the First Defendant was in breach of its duty to provide safe plant and equipment. Counsel also submitted that the First Defendant had failed to institute or enforce a system of inspection and maintenance of the vehicle which might have detected any defect in the vehicle. He relied on the dicta of **Parker LJ** in *Wilson v Tynesides Window Cleaning Co. [1958] 2 QB 110* at *124* and on extracts from the legal text, **Munkman on Employer's Liability (13<sup>th</sup> edition)** by **John Hendy & Michael Ford**.

[59] Turning to the case against the Second Defendant Counsel for the Claimant submitted that the Second Defendant owed a duty of care to the Claimant which, he said, had been breached and by reason of which breach the Claimant had suffered damage. He contended that the breach by the Second Defendant occurred by reason of his failure to take reasonable care to ensure that the handbrake of MP-413 had either been engaged or properly engaged when he parked the vehicle.

[60] Mr. Scott further argued that it was reasonably foreseeable that the Claimant, an active police officer charged with protecting life and property, would attempt to stop a police vehicle from rolling back and as such the Claimant's act and injury was the natural and probable consequence of the Second Defendant's negligence. He relied on *Haynes v Harwood [1935] 1 KB 146* and *Morgan v Ayles [1942] All ER 489*, as well as **Charlesworth & Percy on Negligence (Eleventh Edition)**.

[61] Mr. Scott also referred the Court to learning on the principle of *res ipsa loquitur* in **Charlesworth & Percy on Negligence** and to authorities, including *Parker v Miller*, *The Times Law Reports, April 23, 1926* and submitted that the facts had raised an inference of negligence on the part of the First or Second Defendant consistent with the principle of *res ipsa loquitur* and the case therefore fell within the ambit of this rule. He contended that the rolling back of a parked motor vehicle, as occurred here, was an unexplained occurrence which would not have happened in the ordinary course of things unless there had been negligence on the part of someone other than the Claimant. He submitted further that as the vehicle which caused damage to the Claimant had been under the management and control of the First Defendant or its servants and/or the Second Defendant, the Defendants had to positively disprove negligence or at least explain the circumstances in which it occurred so as to show how the incident had taken place without fault on their part. According to Mr. Scott, the Defendants had failed to do so and were accordingly liable.

[62] Counsel for the Defendants Mr. Roger Barker, conceded that the Second Defendant owed a duty of care as the driver of a vehicle to the Claimant as his passenger, but took issue with Mr. Scott's assertion that there had been a breach of that duty. Mr. Barker submitted that the Second Defendant had exercised reasonable care and skill by placing the said vehicle in first gear and engaging the handbrake when he had parked MP-413 at Neils Plantation on the day in question. He submitted that had the Second Defendant not done so, the vehicle would have started rolling back as soon as the Second Defendant had exited the vehicle. He pointed out that neither the Claimant nor the Second Defendant had testified that the vehicle had begun rolling back at that stage.

[63] Mr. Barker cited the case of *Cutler v United Diaries London Ltd [1993] 2 KB 297*, which, he submitted, was more relevant to the current case than *Haynes v Harwood (supra)* upon which Counsel for the Claimant had relied. He contended that a person could only be categorised (and receive damages for any injury obtained when acting) as a rescuer where the person acted reasonably so as to prevent injury or damage to life, limb or property in a situation where there was a risk to the same. Mr. Barker submitted that even if the Claimant's version of the facts were accepted, there had been in the

circumstances no reasonable apprehension of danger to life, limb or property and accordingly, the Claimant had could not be said to have acted as a rescuer.

- [64] Mr. Barker also relied on the defence of *volenti non fit injuria*, which he pointed out had been successfully applied in *Cutler (supra)*. He contended that as there had been no reasonable apprehension of danger to person or property, the risk undertaken by the Claimant to halt the moving vehicle with his own body was unnecessary in the circumstances. Accordingly, the Claimant had to be taken as having voluntarily assumed the risk which led to his injuries and had therefore consented to the same. Mr. Barker also submitted that in assuming the risk of injury in acting as he had where there was no risk to life, limb or property, the Claimant had been very clearly acting outside of the scope of his duty as a police officer.
- [65] Finally, Mr. Barker submitted that on the facts of this case the doctrine of *res ipsa loquitor* could not assist the Claimant. Citing *Easson v London and North Eastern Railway Company [1944] KB 421*, he argued that to take advantage of the doctrine, the Claimant had to show that the Defendant had been in control of the thing which caused the accident when the accident occurred. He submitted that the Claimant could not do so as the Second Defendant had only been in control of MP-413 up until he parked it in the driveway at Neils Plantation, leaving the Claimant within.
- [66] Counsel for the Defendants further submitted that the presumption was rebuttable and the Defendants had rebutted the inference of negligence by providing a plausible explanation of what had occurred. Accordingly, the onus of proof rested once again on the Claimant who was required to prove that the Defendants had not only been negligent, but that it was their negligence that had caused the Claimant's injuries. This onus, argued Mr. Barker, had not been satisfied.
- [67] In his rebuttal, Counsel for the Claimant addressed the *volenti non fit injuria* point raised by Counsel for the Defendants. He pointed out that the Court in *Haynes v Harwood (supra)* had discussed *Cutler's case* and concluded that the defence was inapplicable where a person had acted reasonably to protect life and property. Using **para 2.99** of **Clerk & Lindsell on Torts (Nineteenth Edition)** as authority, Mr. Scott also submitted

that a deliberate act of rescue could never constitute a *novus actus* breaking the chain of causation as the Defendant could not be permitted to absolve himself of responsibility for the consequences of the danger he created.

[68] The Issues: In the light of the evidence which was adduced, the pleadings, the issues identified in the respective Pre-trial Memoranda and the respective legal submissions, the Court found that it was called upon to resolve the following broad issues:

- i. Why did MP-413 roll backwards from its parked position? In particular, did the Second Defendant fail to apply the handbrake before alighting from the vehicle? Given the Second Defendant's evidence that he had engaged the handbrake and placed the vehicle in first gear when he parked it, how did the handbrake of MP-413 become disengaged and its gear lever move to the neutral position in which the Second Defendant later found it? Was the Second Defendant negligent as outlined in the particulars?
- ii. In addition and/or alternatively, was the handbrake defective as the Claimant alleged? And if so, is the First Defendant liable in negligence for the incident due to its failure to properly maintain the equipment used by its employees?
- iii. Even if the vehicle rolled back as a result of the failure by the Second Defendant to ensure that the handbrake had been engaged before alighting from the police vehicle, was it reasonably foreseeable that the Claimant in an attempt to effect a rescue, would have pushed his body against MP-413 in the manner that he did to stop it or to slow its backward course down the incline, when having regard to the curb bordering the driveway, the risk of damage either to the vehicle or to other property was negligible, if not highly unlikely?
- iv. Did the Claimant suffer personal injuries whilst reaching through the window of the vehicle or whilst pushing against the moving vehicle in his attempt to stop it or to slow it down?

[69] Issue No. 1 - Why did MP-413 roll back from its parked position? Did it roll back because the Second Defendant was negligent as outlined in the particulars?: The first

issue is a fundamental question of fact crucial to establishing liability on the part of the Second Defendant. As there were no independent eye-witnesses, the Court was faced with two diametrically opposed versions of the same incident and was left with the unenviable task of determining which seemed more probable.

[70] The two narratives before the Court cannot be reconciled. On the one hand, the Court has the evidence of the Claimant in which blame for the accident is placed squarely upon the Second Defendant. The Claimant's case is that while on a foot patrol with the Second Defendant at the residence of the then Chief Justice, the Claimant noticed motor vehicle MP-413 which the Second Defendant had parked on what was a slight incline, rolling backwards. Fearing the damage that would be caused by the rolling vehicle, the Claimant claimed that he rushed to the vehicle and attempted to engage the handbrake by sticking his hand through the window of the driver's door but when that failed, pushed his body against the moving vehicle in an attempt to stop or slow it.

[71] The Claimant further alleges that while he had rushed to the driver's side of the vehicle, the Second Defendant had hurried to the front passenger side and, assisted by the action of the Claimant in pushing against the vehicle and slowing its momentum, was able to do what the Claimant could not, namely, to reach through the window, raise the handbrake and bring the vehicle to a halt, some 2 feet before it reached the sidewalk.

[72] The Second Defendant, on the other hand, says that when he arrived at the residence he had indeed parked MP-413 on the slightly inclined driveway but had placed the vehicle in first gear and pulled up the handbrake before he exited the vehicle to conduct a foot patrol. He insisted that he left the Claimant asleep in the vehicle and sought to suggest that the Claimant, in his stupor, had somehow shifted the gear stick to neutral and disengaged the handbrake, causing the vehicle to roll back at a slow speed. On hearing a car door slam and the Claimant shout, the Second Defendant says he rushed back to the vehicle to find it rolling slowly backwards, with the Claimant by its side and his hand on the front door. The backward movement of the vehicle, according to the Second Defendant, only ceased when the vehicle struck the curb that lay to its rear. He insisted that he had not attempted to engage the handbrake of the moving vehicle and the vehicle

had not therefore stopped (as the Claimant alleges) because of the combined effort of the Claimant and himself.

- [73] It is clear that there is irreconcilable disparity between the two versions of what happened at the residence of the Sir David Simmons on July 19, 2005 as narrated by the Claimant in contrast to that narrated by the Second Defendant. The Court, having seen the demeanour of each witness and having visited the *locus in quo* pursuant to **Rule 39.7** of the **Supreme Court (Civil Procedure) Rules 2008**, is therefore required to make a finding as to which evidence it prefers and accepts and its reasons for doing so.
- [74] The Court started its evaluation of the evidence from the premise that it was an undeniable fact that MP-413 had rolled backwards from its parked position where the Second Defendant had left it. This is not disputed.
- [75] The Court also accepted the evidence of the Second Defendant that on checking the vehicle after it had struck the sidewalk and came to a stop, “*the gear shift/stick was in the neutral position and the handbrake was down*”.
- [76] Both at paragraph 5 of the Statement of Claim and in his legal submissions, Counsel for the Claimant has invited the Court to apply the doctrine of *res ipsa loquitur* and to draw from these facts what, he says, is a reasonable inference that the Second Defendant had carelessly alighted from the vehicle and left it with the gear shift/stick in the neutral position with its handbrake down and that, in the circumstances, he alone was responsible for it rolling backwards. The Court is therefore required to consider whether and to what extent *res ipsa loquitur*, on which the Claimant heavily relied, is applicable.
- [77] Translated loosely as ‘the situation speaks for itself’, the doctrine of *res ipsa loquitur* refers not to a principle of law but to what may be described as “*an approach to the assessment of the effect of evidence in certain circumstances*”. **Lloyde v West Midlands Gas Board [1971] 1 WLR 749 at 755 per Megaw LJ** cited in **Charlesworth & Percy on Negligence (Twelfth Edition) at para 6-100**.
- [78] The learned authors of **Clerk & Lindsell on Torts (19<sup>th</sup> Edition)** at paragraph 8-151 explain the operation of the doctrine in the following terms:

*“It is only a convenient label to apply to set of circumstances in which a claimant proves its case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result.”*

[79] When applied in an action for negligence, the mere fact that an event or incident occurred raises a rebuttable presumption of fact that the event or incident was caused by a breach of the Defendant’s duty of care toward the Claimant. The presumption arises because:

*“it is an inference which the reasonable man, knowing the facts, would naturally draw, and that is, in most cases, for two reasons, (i) that the control over the happening of such an event rested solely with the defendant, and (ii) that in the ordinary experience of mankind such an event does not happen unless the person in control has failed to exercise due care.”* **Mahon v. Osborne [1939] 1 All E.R. 535 at pp 540-1, per Scott L.J.** See also **Scott v London and St. Katherine Dock Co. (1865) 3 H & C 596.**

[80] The law therefore is that the doctrine of *res ipsa loquitur* only applies where: (i) the thing causing damage was under the sole management or control of the defendant or his servants or agents; and (ii) the accident was of such a kind as would not in the ordinary course of things have happened without negligence on the defendant’s part. It is because of this that the manner in which the accident occurred becomes in itself *prima facie* evidence of negligence.

[81] It appears that to these two conditions may be added a further negative condition namely: (iii) there must be no evidence as to why or how the occurrence took place. If there is such evidence, then reliance on the doctrine is inappropriate since the question of the defendant’s negligence must be determined on that evidence. **Clerk & Lindsell on Torts (19<sup>th</sup> Edition).**

[82] Where a Claimant establishes a *prima facie* case of negligence against a defendant, negligence will be proved unless the defendant adduces evidence showing a cogent or

reasonable explanation for the accident that does not involve any negligence on the defendant's part: *The Kite [1933] P. 154 at 170, per Langton J* cited in **Charlesworth and Percy on Negligence (Twelfth Edition) at para 6-123**. The defendant is not actually required to disprove negligence on their part: *Ibid*.

- [83] Where a defendant offers a reasonable explanation supported by evidence to rebut the inference of negligence, the Court is then required to evaluate this evidence to determine if an inference of negligence from the mere fact of the accident remains reasonable: *Ng Chun Pui and Others v Lee Chuen Tat and Another [1988] RTR 298 at pp 300-1 per Lord Griffiths*. Ultimately the Court will have to examine the entirety of the evidence and decide what facts have been proved and what inferences are reasonable and whether these facts and inferences are sufficient to establish negligence. *Ibid*.
- [84] In the Amended Defence, the Defendants alleged that the Claimant is wholly or in part responsible for the incident because unbeknownst to and unknown to the Defendants, but through his own actions, he had let down the handbrake and engaged the neutral gear; and further not being the authorized driver, he had caused the vehicle to roll backward from its parked position and to strike the sidewalk.
- [85] In amplifying his witness statement at the trial, the Second Defendant told the Court that the only way that the vehicle gear could have come out of place and the handbrake could have been released is if the Claimant had released them. Under cross-examination, the Second Defendant told the Court that while he did not see the Claimant release the handbrake or change the gear, “...*the only way it could have been done was if he did it himself.*”
- [86] Counsel for the Claimant suggests that the explanation offered by the Defendants by way of rebuttal to *res ipsa loquitur* is weak and incomplete and should therefore be disregarded. The Court is unable to agree. Crucial facts of the circumstances leading up to the accident are highly disputed and as far as the Court is concerned, the explanation offered by the Defendants appears, at first glance, equally as plausible as that proffered by the Claimant.

[87] The Court is satisfied that the evidence of the Claimant and the Second Defendant respectively also reveals that just prior to the point in time when MP-413 started rolling backwards, there was a brief period of time, the length of which is contested, in which the Claimant was alone in MP-413 and during which the vehicle could not be said to have been under the sole management and control of the Second Defendant. This is an important fact which cannot be overlooked or ignored. It has also not been denied. Indeed the Claimant himself says that he had remained behind in the vehicle for 2-3 minutes to contact Operations Control while the Second Defendant had gone ahead on the patrol.

[88] Although in the ordinary course of things, a vehicle which rolls backwards from its parked position on an incline would seem to be an occurrence which could not have happened without negligence on the defendant's part or without further explanation, the Court nonetheless finds that the Claimant's appeal to the doctrine of *res ipsa loquitur* is inappropriate in the context of this case for the following reasons: (i) the Court has accepted that MP-413 was not at all times under the sole management and control of the Second Defendant and that the Claimant had been left alone in the vehicle for a short period of time; and (ii) there is evidence from the Second Defendant as to why or how the vehicle could have rolled back. In the circumstances, despite the urging of Counsel for the Claimant, the Court is unable to draw an inference as to liability on the mere fact of the accident itself and must instead consider each version of the facts in light of all the evidence adduced, contradictory though aspects of this evidence may be.

[89] Having both heard and seen the respective versions of this incident which were given by the Claimant and the Second Defendant tested under cross-examination at the trial, and having also had the benefit of visiting the *locus in quo* and seeing in particular, the incline of the driveway and the locations where each of them said MP-413 had been parked initially upon their arrival at the residence, and where each witness had pointed out as the spot where the vehicle had come to a stop after rolling back, the Court was satisfied that the version given by the Second Defendant was the more probable.

[90] The Court was satisfied on the one hand that the location where the Second Defendant said MP-413 had "*hit the sidewalk and stopped*" was consistent with the vehicle having rolled backwards in a straight path down the slight incline of the driveway from the

position higher up the driveway facing the kitchen/garage area where the Second Defendant said he had parked it.

[91] On the other hand, having seen the layout of the driveway, the location of the paved wall encircling the tree in the middle of the driveway and the locations which were pointed out by the Claimant at the *locus in quo*, the Court was satisfied that it would have been highly unlikely, if not impossible, for MP-413 to have rolled backwards from the location where the Claimant had indicated it had been parked at an angle “*pointing a little bit to the garage, but still pointing to the other side as well*” and to have followed (of its own accord and without anyone steering it) what was essentially a circular path down the driveway and around the paved circle with the tree inside, ending up (according to the Claimant) 2 feet away from the curb at the bottom of the incline.

[92] In this regard, the Court noted that both the Claimant and the Second Defendant unequivocally denied touching, whether intentionally or inadvertently, the steering wheel of the vehicle as it rolled backwards and the Court is therefore satisfied that MP-413 could only have rolled backwards in a straight or almost straight line. It certainly could not have followed the curved trajectory that took it from where the Claimant said it was parked, around a corner, to where he said it ended up.

[93] The Court also accepts the Second Defendant’s evidence regarding his response to seeing the vehicle rolling back. The Court finds it highly improbable that the Second Defendant was able to bring the vehicle to a stop by reaching in to the vehicle and engaging the handbrake after the Claimant had attempted but failed to do so by reaching through the window on the driver’s side. The Court notes that both witnesses agreed, and it therefore finds, that the vehicle rolled back slowly. Such movement is in fact consistent with the evidence given by both the Claimant and the Second Defendant as to the gradient of the slope. Accordingly, given the speed at which the vehicle was moving on this very slight slope, the Court is satisfied that MP-413 came to a halt not because of the handbrake had been engaged by the Second Defendant, but by the wheels of the vehicle striking the curbed sidewalk which lay to its rear.

- [94] Although the Court accepts the Second Defendant's version of the events as more probable in so far as it relates to the manner in which the vehicle rolled back, the response taken by the Second Defendant to the rolling back of the vehicle and the reason why the vehicle came to a halt, it is unable to accept the Second Defendant's explanation as to what was the likely cause of the vehicle rolling back.
- [95] With respect to the reason why motor vehicle MP-413 rolled backwards, it is important to note that the fact the vehicle moved backwards at all suggests that at some point the handbrake of the vehicle was disengaged or not properly engaged, resulting in the backward movement of the vehicle down the slight incline. Both parties agree that the vehicle moved back slowly. The Claimant's evidence is that it could only have moved at this speed if the handbrake had been disengaged while the vehicle was in first gear and had it been in neutral it would have travelled more rapidly. The Second Defendant, however, firmly denied this.
- [96] In the absence of expert evidence as to how a vehicle in neutral gear would move backwards as opposed to one in first gear, and taking into account the contradictory evidence of the Second Defendant and the Claimant, based as this evidence is on their own general training and experience as drivers of manual motor vehicles, the Court does not find that a manual vehicle moving backwards as slowly as both parties say this vehicle moved was necessarily in first gear as opposed to neutral gear. It does not therefore accept the Claimant's suggestion that the Second Defendant must have left the vehicle parked in first gear without engaging the handbrake in order for it to have rolled backwards.
- [97] As it pointed out earlier, the Court accepts the evidence of the Second Defendant that he found the vehicle in neutral gear and the handbrake disengaged when the vehicle came to a halt. In his witness statement, the Second Defendant had described this position of the handbrake and gearshift as "*strange*". He maintained that on parking the vehicle he had engaged the handbrake and placed the gearshift in first gear and alleged that "*the only way that the vehicle gear could have come out of place and that handbrake will have been released is if Constable Boyce had released them himself*".

[98] The Court finds his evidence on this point to be speculative at best. By his own evidence, the Second Defendant left the Claimant sleeping in the front passenger seat of the vehicle, which the Second Defendant alleged is what the Claimant had been doing throughout the entire tour except when (according to the Second Defendant) he awoke briefly at Neils Plantation to disengage the handbrake and change the gear in which the vehicle had been parked. The Second Defendant conceded, however, that he did not actually see the Second Defendant change the gear or release the handbrake but alleged that this could be the only explanation (or at least the only explanation he could offer) for the vehicle rolling backwards from its parked position. The Court disagrees. It is unable to accept that this was the only plausible explanation for the vehicle rolling back.

[99] The Court notes that the Second Defendant conceded that in order for the gear to be shifted from first to neutral, “*a considerable amount of force*” had to be applied which would produce a very loud noise. The Court is unsure whether this raking noise would be louder than the slamming of the vehicle’s door and should therefore necessarily have been heard by the Second Defendant were the gear to have been changed without using the clutch. The Court is unable to accept, however, that the Claimant who was allegedly sleeping on the front passenger seat was able to not only disengage the handbrake but use considerable force to shift the gear while in slumber or partial slumber. The Court finds it more probable that the Second Defendant, in his preoccupation with his duties, may have inadvertently failed to place the vehicle in the correct gear and also to engage the handbrake properly or at all.

[100] Accordingly, the Court finds on a balance of probabilities that while the vehicle did not roll back from the location described by the Claimant, it was not satisfied that the actions of Claimant caused the vehicle to roll backwards and, thus, also the cause of the accident. To the Court’s mind, it is entirely possible and more likely, on a balance of probabilities that the vehicle rolled back in consequence of an action or omission on the part of the Second Defendant, namely his failure to engage the handbrake properly or at all, or to place the vehicle in first gear when he parked it on the incline at Neils Plantation. This is the Court’s impression of why the vehicle rolled back, informed by its observations of the

witnesses and its visit to the *locus* of the accident and buttressed by its conclusions on the second issue discussed below.

[101] Issue No. 2 - Was the handbrake defective as the Claimant alleged? And if so, is the First Defendant liable in negligence for the incident due to its failure to properly maintain the equipment used by its employees? The Claimant has also alleged that the First Defendant was liable for the incident due to its failure to properly maintain the equipment used by its employees. It has, according to the Claimant, breached its duty to do so by (i) failing to institute or enforce any adequate system for the inspection and maintenance of the vehicle which could have detected the existence of a defect in the handbrake and (ii) permitting the vehicle to be used upon the road when the hand braking system was defective. In the absence of any evidence of a defect in the handbrakes or gearbox of MP-413, the Claimant has again sought refuge in the principle of *res ipsa loquitor*.

[102] There is no doubt that an employer is under a legal duty to take reasonable care for the safety of his employees and that this duty encompasses an obligation to provide adequate material and equipment which is safe for use: *Wilson & Clyde Coal Co. Ltd v English* [1938] AC 57, *per Lord Wright*. This is not denied. Likewise, it is also clear that the equipment which the employer is legally required to maintain in safe working order includes motor vehicles provided to and used by his employees. Thus, the issue which has arisen in this case is whether there is any basis on which the Court can make a finding that the First Defendant has breached its duty as employer by reason of the accident of July 19, 2005.

[103] As it did for the negligence alleged against the Second Defendant, the Claimant has in its Statement of Claim relied upon *res ipsa loquitor* or “*the happening of the accident as evidence in itself of negligence on the part of the First Defendant its servants or agents*”. The doctrine of *res ipsa loquitor* was discussed earlier by the Court at paras 69-88 above, where it pointed out that this doctrine was an approach taken to the assessment of evidence that only applied where certain conditions had first been satisfied.

[104] The Court accepts that with respect to the Claimant’s case against the First Defendant, the first of these pre-requisites has in fact been satisfied. It is clear that the item causing

damage was at all material times under the management and control of the First Defendant, its servants or agents. Both the Claimant and the Second Defendant were servants or agents of the First Defendant and the vehicle was at all times under their management and control.

[105] While the Court is satisfied that the first condition has been met, it is unable to say the same for the remaining pre-requisites. The Court does not accept that the accident was of such a nature that it could be said that in the ordinary course of things it could not have happened without negligence on the part of the First Defendant its servants or agents. Indeed, an alternative explanation that does not involve negligence on the part of the First Defendant, its servants or agents has in fact been offered. Moreover, as both the Claimant and the Second Defendant have offered evidence as to how the accident occurred, the Claimant's reliance upon the doctrine to prove his case against the First Defendant is clearly not appropriate. Accordingly, *res ipsa loquitur* can offer the Claimant no assistance in establishing breach of the First Defendant's duty as employer to the Second Defendant.

[106] Regarding the Claimant's allegation that the accident was caused by the failure of the First Defendant to provide and maintain safe equipment by not properly maintaining MP-413, this allegation appears to have no foundation. It seems to be based solely on speculation. As the Court has already indicated, the only evidence adduced in support of this point is the Claimant's testimony that MP-413 was retired from use a few months after the accident. The Claimant did not indicate the source of his information. Moreover, even if the Court were prepared to accept that the vehicle had been retired from service as the Claimant testified, the Claimant has given no evidence as to the age and condition of the vehicle, the reason behind its retirement and it is therefore unclear whether it was retired because of a defect in the handbrake or gearbox. In short, the Claimant's evidence, standing alone as it is, appeared self-serving and offered little assistance. In any event, the inference which the Claimant urged the Court to draw about the un-roadworthiness of the vehicle in question also appears to contradict the evidence of the Second Defendant.

- [107] The Court notes that the Second Defendant's evidence that he and other officers had used the vehicle MP-413 before and after the incident without any complaints or incidents of malfunction was not challenged by the Claimant. Accordingly, as (i) the Second Defendant was an authorized driver; and (ii) the Claimant went on medical leave not long after the accident, the Court accepts the evidence of the Second Defendant that the vehicle continued in use after the incident without any problems.
- [108] The Second Defendant also gave evidence of regular inspections being conducted on the vehicle which, according to him, included applying and using all the gears to ensure they were in good working order without disassembling the gearbox. Counsel for the Claimant sought to persuade the Court that this evidence does not accord with common sense and ordinary experience as people did not regularly check the gears of the vehicle in the manner described by the Claimant and that this evidence should therefore be viewed with suspicion.
- [109] The Court accepts that it is possible that the Second Defendant may well have emphasized or exaggerated the tests conducted on the gears in an attempt to buttress his evidence in support of the First Defendant. It is equally possible, however, that when the Second Defendant spoke of applying and using the gears to ascertain whether they were working properly, he meant the conduct of some form of road test. The Second Defendant was careful to point out that he had no experience or training in auto mechanics and was simply doing as instructed to do. In the absence of any expert evidence to the contrary, the Court is unable to adopt the position suggested by Counsel for the Claimant in relation to the Second Defendant's evidence and on that basis to his credibility as a whole.
- [110] Even if the Court had found this aspect of the evidence to have been implausible or exaggerated, it does not take away from the fact that there is nothing upon which the Court can found a conclusion that the handbrake or gearbox of MP-413 suffered some inherent defect or was defective due to poor maintenance which in turn caused the vehicle to roll back on July 19, 2005.

[111] In light of the fact that: (i) evidence has not been adduced by the Claimant to demonstrate that the vehicle suffered from a mechanical defect, but that the unchallenged evidence of the Second Defendant in fact shows that it had not suffered from any such defect; and (ii) the evidence adduced in this case, by the Claimant as well as the Defendant, also establishes that the accident could have been caused not by a mechanical defect, but by human error on the part of either the Second Defendant or the Claimant, the Court can only find, on an analysis of all the evidence before it, that there has been no breach of any duty directly owed by the First Defendant as employer to the Claimant as its employee. In short, the case of negligence against the First Defendant has not been established.

[112] Issue No. 3 - Even if the vehicle rolled back as a result of the failure by the Second Defendant to ensure that the handbrake had been engaged before alighting from the police vehicle, was it reasonably foreseeable that the Claimant in an attempt to effect a rescue, would have pushed his body against MP-413 in the manner that he did to stop it or to slow its backward course down the incline, when having regard to the curb bordering the driveway, the risk of damage either to the vehicle or to other property was negligible, if not highly unlikely? The primary principles underlying the tort of negligence, established in the seminal case of *Donoghue v Stevenson [1932] All E.R. 564* and clarified by subsequent decisions, are not disputed. The tort of negligence obliges each person to take reasonable care to avoid acts or omissions where it is reasonably foreseeable that such acts or omissions are likely to injure any person so closely and directly affected by those acts or omissions that the person doing them ought reasonably to have that person in his contemplation as being so affected.

[113] Accordingly, in order for a defendant to be liable in negligence, there must exist (i) a duty of care owed by the Defendant to the Claimant; (ii) breach of that duty by the failure of the Defendant to attain the requisite standard of care; and (iii) damage in a form recognized by the Court and suffered by the Claimant as a result of that breach: *Charlesworth & Percy on Negligence (Twelfth Edition) para 1-34*.

[114] It is well-settled and undisputed that the driver of a motor vehicle owes a duty of care to other road users including his own passengers: *Bourhill v Young [1943] AC 92*. This

duty obliges the driver to operate the vehicle with the care of an ordinary skilful driver and in such a manner as to avoid the risk of injury to persons he can reasonably foresee might be injured by his failure to exercise reasonable care: *Bourhill (ibid) at p. 99, per Lord Thankerton*. The duty is clearly (and logically) not restricted to instances where the driver is operating on a public road.

[115] The existence of the duty by the Second Defendant to the Claimant is readily conceded by Counsel for the Second Defendant. The Court has also found that there has been breach of that duty by the failure of the Second Defendant to exercise reasonable care when parking at Neils Plantation the vehicle he was authorized to drive. Accordingly, in the instant case the critical question now to be decided is whether it was reasonably foreseeable that breach of that duty of care by the Second Defendant would result in the Claimant using his body to either slow the descent of the vehicle or prevent the vehicle from rolling back. This issue has to be determined in light of all of the available evidence, as well as the legal principles pertaining to rescuers. Should the Court find that the manner in which the Claimant reacted was reasonably foreseeable, it will then have to consider whether his ensuing injury was attributable to the Second Defendant's duty of care.

[116] It is well-settled that where a person by negligence creates a situation which places persons or property in danger, it is reasonably foreseeable that a third party may hasten to rescue the person or property in danger, at risk to their own safety and that the person creating the situation will therefore owe a duty of care to the rescuer, provided that the rescuer has acted reasonably in deciding to intervene: See, for example, *Haynes v Harwood (supra)* and *Cutler v United Diaries (supra)*.

[117] In *Morgan v Ayles (supra)* the Court held that in order for a plaintiff to recover damages from a defendant for injuries sustained in an attempt to save life or property, the Court has to consider not only whether there was a wrongful act or omission on the part of the defendant, but whether the act of the plaintiff was “*in the circumstances, natural and proper*”. In order to make such a determination the Court had to have regard to the circumstances as a whole and to determine whether the injury was a natural and probable consequence of the defendant's wrongful act or omission.

[118] Scrutton LJ pointed out in p. 305 of his judgment in *Cutler (supra)* that “[i]t does not follow that the negligence of a person...must make him liable for everything”. Accordingly where in the circumstances the behaviour of the rescuer was not reasonable and, thus, not reasonably foreseeable, his conduct may be regarded as a *novus actus* and any ensuing injury “the result of a new cause intervening” rather than the negligence of the Defendant: *Cutler (supra) at p. 305, per Scrutton LJ*.

[119] In arguing that the Claimant had acted reasonably to protect property and the Second Defendant was therefore liable for any injury caused, Counsel for the Claimant directed the Court to **para 2-99** of **Clerk & Lindsell on Torts (Nineteenth Edition)**, the first line of which reads as follows:

*“Rescuers On analogous principles a deliberate act of rescue will virtually never constitute a novus actus.”* [Emphasis added]

[120] The footnote attached to that statement continues:

*Unless the reaction of the rescuer is so grossly foolish and disproportionate to the danger as in effect to be a “sham rescue”: See Cutler v United Diaries (London) Ltd. [1933] 2 KB 297 explained via Haynes v Harwood [1935] 1 KB 146 and see Crossley v Rawlinson [1982] 1 WLR 369, but query whether this case, in which the defendant was held not liable for injuries sustained by the claimant when running to a fire on the defendant’s vehicle is correctly decided; cf Bridge v Jo [1999] 3 W.W.R. 167.*

[121] In **Charlesworth & Percy on Negligence (Twelfth Edition)** it was pointed out at **para 2-263** that where the rescuer in question is motivated solely by a need to protect property rather than life or limb, that need to intervene must be particularly acute and the risk in intervening sufficiently outweighed by the nature and value of the property being protected in order for the Defendant to be liable:.

[122] The Court agrees that it would be reasonable to expect that a police officer vested with a duty to protect life and property to put himself in harm’s way to prevent injury or damage

to life or property. The Court accepts that, as Maugham LJ pointed out and as Counsel for the Claimant submitted, a police constable has a general duty to protect the life and property of citizens and was morally and legally obliged to intervene where there was “*a reasonable chance of preventing the most serious accident*”: ***Haynes v Harwood (supra) at p. 162***. However, the Court finds that it would only be where the danger (to property in particular) was so grave and imminent that the officer could not merely standby and observe but was moved by his moral and legal duty to assist that it could not be said that he consented to take any risk upon himself and so the defence of *volenti* could not apply. ***Ibid at p 166-7, per Roche LJ***.

[123] Despite the Claimant’s submissions, the Court is not persuaded that such an occasion existed on July 19, 2005 when the Claimant chose to push a moving vehicle with his body in circumstances where there was no reasonable risk whatsoever that life or property was in danger of harm caused by that vehicle.

[124] Following the Claimant’s testimony at the *locus in quo* regarding the location of the coconut tree which the Claimant had earlier testified had been to the back of the vehicle and with which the vehicle could have collided, had it struck the curb and gone over the sidewalk, the Court was satisfied that even if the Claimant’s version of events were to be accepted, the coconut tree in question was situated out on the open lawn of the residence and at such a distance beyond the sidewalk as to have been in no imminent danger of any damage whatsoever from MP-413. Nor, in the Court’s view, would the coconut tree which the Claimant identified necessarily have been in the path of the slowly rolling vehicle were it somehow to have mounted the sidewalk and run out onto the adjoining lawn.

[125] In the Second Defendant’s version of how the vehicle rolled back, which was the more plausible version and the one accepted by the Court, that there was also a cluster of mango trees and other coconut trees situated beyond the sidewalk and closer to the house but these were also at such a distance from the driveway as to have also been in no imminent danger of any damage whatsoever from the slowly rolling vehicle.

- [126] The Court has already found that motor vehicle MP-413 rolled backwards at a slow speed on what was a very slight incline. The Court is also satisfied that there was no person and no property immediately to the rear of the vehicle in danger of being struck as the coconut tree mentioned by the Claimant, as well as the fruit trees referred to by the Second Defendant, were some distance away and therefore separated from the path of the slowly moving vehicle by a curb or sidewalk and an expanse of lawn. The Court, accordingly, finds that there was in the circumstances clearly no danger to any life or property (including damage to MP-413) which justified the Claimant placing his body behind the slowly rolling vehicle to prevent it from going back. The Court finds that a reasonable man, even taking into account the adrenalin rush and instinctive responses aroused by sudden and unexpected incidents of this nature, would not consider the Claimant to have acted reasonably.
- [127] In the view of the Court, the risk to property in this instance was quite simply non-existent. In the circumstances, the Court is satisfied that the Claimant's alleged 'rescue attempt' was so grossly foolish and disproportionate to the danger of damage to property as the Claimant perceived it as to constitute, what the learned authors in **Clerk & Lindsell** describe as, "*a sham rescue.*"
- [128] In any event, the Court is also satisfied that despite the Second Defendant's breach of duty in failing to apply the handbrake or to leave the vehicle in first gear, the attempted 'rescue' of MP-413 by the Claimant in the particular circumstances of this case and on the facts which the Court has earlier found, was not reasonably foreseeable.
- [129] In short, the Court finds that the Claimant's conduct in pushing his body against the slowly moving vehicle was so grossly foolish and disproportionate to the danger of damage to property as to be regarded as a *novus actus* and any ensuing injury "*the result of a new cause intervening*" rather than the negligence of the Defendant.
- [130] Issue No. 4 - Did the Claimant suffer personal injuries whilst reaching through the window of the vehicle or whilst pushing against the moving vehicle in his attempt to stop it or to slow it down? Based on the foregoing discussion the Court has found: (i) that the Claimant did not act reasonably in attempting a 'rescue' in using his body to stop a

moving vehicle where there was no imminent danger of risk to life, limb or even property; (ii) that the attempted ‘rescue’ in the particular circumstances of this case, was not reasonably foreseeable; and (iii) the Claimant’s behaviour as a ‘rescuer’ was so grossly foolish and disproportionate to the danger of damage to property as to be regarded as a *novus actus* and any ensuing injury “*the result of a new cause intervening*” rather than the negligence of the Defendants.

[131] In the circumstances, the Court finds that (notwithstanding the Second Defendant’s failure to apply the handbrake or to leave MP-413 in first gear) that the injuries in question were not reasonably foreseeable and cannot in law be attributed to any breach of duty on the part of the Second Defendant.

[132] *Disposal*: In the result, the Claimant’s Writ of Summons filed on June 10, 2008 by which this action against the First and Second Defendant was instituted is hereby dismissed with costs to the Defendants to be agreed or assessed.

**Maureen Crane-Scott**  
Judge of the High Court