

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 134 of 2011

BETWEEN

**KATHAREEN DRAKES on behalf of
the minor child CHARELLE CARROLL**

CLAIMANT

AND

ANDREW ARCHER

DEFENDANT

**Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the
High Court**

2019: April 18

**Mr. Douglas Trotman, Mrs. Kathy-Ann Trotman and Mr. Wilfred
Estwick, Attorneys-at-law for the Claimant.**

**Ms. Stephna Greenidge and Ms. Jessica Ashby, Attorneys-at-Law for
the Defendant.**

DECISION

Introduction

[1] The Claimant is the legal guardian of Charelle Carroll. On 04

February 2008, Charelle was involved in an accident on the Cummins

section of the ABC Highway, between the Hinds Hill junction and the Warrens Roundabout. Charelle was eight years old at the time, and a student of the Eden Lodge Primary School. She was struck by a Toyota Corolla motor car, registration number J1117, driven by the Defendant.

- [2] The parties have agreed that the only issue before the Court at this time is the determination of liability for the accident.

Background Facts

- [3] Charelle was in the habit of returning home from school in the evening by bus. She would exit the bus in Lodge Hill by the Heineken shop and walk through a track to the ABC Highway. At that point the young child had to traverse three traffic lanes on the Cummins section of the ABC Highway. Her home was on the other side of the Highway.
- [4] On the evening of 04 February 2008, Charelle was accompanied on the journey home by two school friends, Shantia President and Tiara Davis. Shantia and Tiara were nine and six years of age respectively. It was a bright and sunny afternoon. The children reached the sidewalk to the ABC Highway around 3.30 p.m. Thereafter, a series of unfortunate events occurred.

- [5] Before detailing what occurred, it would be appropriate to set the scene. The children were standing on the Lodge Road part of the Highway waiting to cross over. They were facing north. To the west further down was the Hinds Hill junction; and towards the east was the Warrens roundabout. There were no traffic lights or pedestrian crossing where they were standing.
- [6] To get to the other side of the Highway required the traversal of three traffic lanes. Traffic was flowing from east to west on the first lane immediately in front of the children. This single lane was separated from the other two lanes by a double yellow line. The two lanes beyond the yellow lines accommodated traffic flowing from west to east.
- [7] As the children waited to cross, a white car was being driven from west to east in the middle lane which was also the right lane of the dual lane carriage way going from west to east. The driver of the white vehicle stopped to allow the children to cross over. Another driver in a vehicle travelling in the lane closest to the children, going east to west, also stopped after seeing the white car stop.
- [8] Charelle moved first to pass in front of the two vehicles, the first one to her right in the first lane and the second, the white vehicle, to her

left in the second lane. The child moved quickly, but as she attempted to cross over the third lane from in front of the white car which was to her left, she was struck by the car driven by the Defendant in the third lane, or the left lane of the east bound traffic.

[9] Charelle sustained serious life altering injuries to her head and upper body as a result of the impact with J1117. The claim is for general and special damages, interest, costs, and such further or other relief as the court deems fit. The Claimant alleges that Charelle was seriously injured because of the Defendant's negligence. The particulars of negligence as pleaded are that the Defendant:

1. failed to keep any or any proper look-out;
2. failed to have any regard for other traffic;
3. was speeding and driving without due care and attention;
4. failed to stop, to slow down or swerve or in any other way so to manage or control the motor car to prevent a collision; and
5. collided with Charelle.

[10] The Defendant denies that he was negligent. Instead he asserts that the collision was caused by, or contributed to, by Charelle's negligence. He lists the particulars of the child's negligence as:

1. failing to keep any or any proper lookout;

2. failing to observe or heed the presence or approach of the Defendant;
 3. suddenly and without warning entering the road immediately into the Defendant's path; and
 4. crossing or attempting to cross the road when it was unsafe to do so, and without regard for traffic.
- [11] The driver of the white car left the scene of the accident, and has never been identified or located.

The Evidence

- [12] For convenience, the witnesses may be placed into five groups. These groups are Charelle's two school friends; the driver and passenger of the car in the east-west lane closest to the children while they were waiting to cross the Highway; the police witnesses; the vehicle examiner; and the Defendant.

(1) The Two School Friends

- [13] In her witness statement filed on 09 January 2014, Shantia President described how the collision occurred as follows:

“4. We were standing on the sidewalk next to the Highway with Warrens on our right and the Hinds Hill/Cave Hill junction on our left waiting to cross. We were waiting for a minute or two to cross when a white car

driving in the middle lane which was the lane closet to the double line going in the direction of Warrens stopped to allow us to cross. The car was driven by an old black man with a white beard.

5. Charelle stepped off the sidewalk first and ran across the road. I looked and saw a dark car was driving fast in the middle lane coming behind the white car, the driver of the dark car then overtook the white car and went into the outer lane. As Charelle passed the white car Tara and I started to shout Charelle's name to warn her but the dark car was driving fast and struck her.....When the dark car struck Charelle she only had two more steps to take to reach the sidewalk on the other side of the Highway”.

[14] In her oral evidence Shantia said that :

“I live across the Highway. My practice is to cross the Highway every evening....Most times this Highway is busy. When you get a chance to cross you would have to travel fast. We were waiting a while before the white car stopped....When the man stopped I did not cross right away. When I was about to move I saw the dark car coming up behind. I determined that it was not safe to move at that point. Charelle had already gone past the white car”.

[15] Tiara Davis was the youngest of the three children. Her witness statement was also filed on 09 January 2014. It is similar in content to Shantia's. All she recalled was that the white car was driven by a man

(para.4). And in Tiara's estimation, Charelle only had to take one or two more steps before reaching the other side of the Highway (para.5).

[16] Tiara did not confirm Shantia's version that Charelle ran across the road. She agreed that Charelle moved first but stated that Charelle walked quickly across the road. Tiara and Shantia were behind Charelle. In Tiara's words:

“I saw Shantia lean back and then quickly took a few steps back onto the sidewalk, I followed Shantia and look a few steps back on to the sidewalk and then I looked to see why she stepped back and I saw a dark car driving fast in the middle lane coming from behind the white car. The driver of the dark car then overtook the white car and went into the outer lane”. (Para.5).

[17] In her oral evidence, Tiara asked to amend a part of her witness statement. She changed her reference to a white car as she could not recall the colour of the car. Tiara insisted that Charelle was not running across but walking quickly. And she confirmed that Charelle had passed the car in the middle lane when she was struck by the Defendant's vehicle.

[18] Shantia and Tiara are agreed that the Defendant was driving behind the white car in the middle lane, when he moved over to the left or

outer lane going east. The white car had stopped to allow the children to cross over. Shantia and Tiara were behind Charelle, and they did not see the Defendant's vehicle before they stepped off the pavement. Shantia saw the Defendant's car and stepped back on to the sidewalk. Tiara noticed this car after she too returned to the sidewalk. And according to their evidence, Charelle was about two steps away from the sidewalk on the other side of the Highway when the collision occurred. Their evidence is that Charelle had passed the white car. The reasonable inference is that Charelle was struck when she reached the outer eastbound lane.

(2) The Occupants of the Vehicle in the Westbound Single Lane

[19] Florotene Trotman was driving a motor car in the east to west lane when Charelle and her two school friends reached the Highway. She saw the children standing on the sidewalk in the distance. She said in her witness statement that:

“6. There was a white car coming towards me in the middle of the Highway heading towards Warrens. When the driver of that white car reached the area where the children were standing he stopped his car and beckoned them to cross. I could see the children. They were about 50 feet away from me at this time.

7. As the children started to cross the Highway I stopped to allow them to cross. I was not far from the driver in the white car when I stopped.

8. The little girl had crossed in front of my car and crossed in front of the white car and was attempting to cross the outer lane next to the sidewalk when she was struck by the oncoming vehicle. That oncoming car was in the outer lane heading towards Warrens.

9. I did not see the oncoming vehicle until it struck the little girl

[20] Ms. Trotman expanded thus in her oral evidence:

“When he stopped I was surprised and I stopped too. I had a good view of the children.... When the little girl passed in front of my car, the other children were behind her. They followed her...I would say the little girl was moving quickly. I am not sure if quick step or running. She was moving to get to the other side. I think the other children saw the collision and they turned back.... She ran into the side of the car. I did not see the car in the right lane until she was in to it, so I can't say if she struck the car or the car struck her”.

[21] Ms. Trotman was accompanied in her vehicle by her adult son Lindley Trotman. He sat beside her in the passenger seat. Whereas Ms. Trotman gave evidence for the Claimant, her son gave evidence on behalf of the Defendant. His witness statement was filed on 24

January 2014. In it he expressed familiarity with the stretch of the Highway where the accident occurred. He was at that time learning to drive, and he and his mother were on the way home. They were regular users of the Highway.

[22] Mr. Trotman's account continued as follows:

“5. We had passed the junction at Clermont and Lodge Hill, St. Michael and continuing along the Highway, when I saw about 3 or 4 school children standing on the sidewalk on our side of the Highway.

6. I could see straight ahead, as the road ahead was clear. I could also see cars coming towards us on the other side of the road as they came over the incline. Along that stretch of the Highway there are three lanes – one heading westward and two eastbound lanes.

7. I saw a white car approaching from the opposite direction travelling in the lane closest to the centre of the road, that is, the eastbound lane.

8. The white car appeared to be stopping and I made a remark to my mother that “that person is doing foolishness”. I was referring to the white car stopping at that part of the Highway.

9. The children started to cross the Highway, and when the driver of the white car stopped at the top of the incline, the children continued on their way by running

across the Highway. I did not take note of the registration number nor the driver of the white car.

10. While the children were crossing, I saw one of the children, a little girl, run directly into the right side fender of a green car which was travelling on the left side of the Highway; closest to the side walk. I saw the little girl collide with the car...I do not recall seeing the children checking to see if any other vehicles were coming.

11. I did not see the green car until the actual collision....

15. The driver of the green car got out of his car after a while. He appeared to be shaken. He kept saying that he did not see the girl and she come out of nowhere. I tried to calm the driver.

16. I did not see any brake marks at the scene of the accident. I did not see his car skid and it did not appear to me that he was speeding. I did not hear any screeching sound to indicate speed”.

The Court understands the “green” car to be the vehicle driven by the Defendant.

[23] During cross examination, Mr. Trotman admitted that he was in no position to indicate whether or not the Defendant was speeding. He also accepted that the police report revealed the presence of skid marks. He told the Court that:

“By speeding I mean not going beyond the speed limit. I would tell speed limit by my observation....Normally, in my opinion, a car would have skidded or made some screeching noise. That is how I would have been able to tell if it was speeding although I did not see the car before the collision. I am not aware that there were skid marks. I believe that if you showed me the police report I would have to accept that there were skid marks. I don't believe that skid marks would indicate that he was speeding. I agree that I was in no position to indicate whether or not the driver was speeding”.

[24] This witness was shown his mother's witness statement during his cross examination. He did not challenge her assertion that the driver of the white car stopped and beckoned the children to cross the road. He did not recall his mother coming to a complete stop, rather, after the collision she pulled to the left side of the road and stopped. In relation to his own witness statement, Mr. Trotman insisted that all the children ran across the Highway when the white car stopped. But he was unable to say if the other children made it across the Highway after the collision.

[25] Mr. Trotman, like his mother, was surprised by the appearance of the Defendant's vehicle. His oral evidence was that:

“I did not see any other vehicles in the east bound lane going to Warrens. The children

had started to cross the road. It is fair to say that when the children started to cross the road was clear. I was surprised by the appearance of the green car”.

(3) The Police Witnesses

[26] Three police officers who went to the scene of the accident gave evidence in this case. They are Sergeant 549 Cameron Gibbons, Police Constable 1503 Fabian White, and Sergeant 498 Roger Mayers. These officers did not provide witness statements, but they gave oral evidence at the trial.

[27] Constable White recorded a statement from the Defendant at the scene of the accident. The Defendant said:

“I left from the traffic lights going straight. I indicated to the left lane. As I continued I saw a car in the right lane slow and stop. As I got close to that vehicle I was about to pass. A young girl ran from in front that vehicle and I struck her”.

[28] PC White took another statement from the Defendant later on the evening of the accident. The salient parts of the statement are as follows:

“...On Monday the 4th day of February 2008 about 3.45 pm I left [UWI] to go to Warrens Saint Michael to get a snack to eat. Whilst driving along Hinds Hill Saint Michael after leaving the traffic lights going towards

Warrens Saint Michael I was the driver of a grey toyota corolla registration number J1117... and I was driving in the right lane along the highway. However I was going straight towards Warrens Saint Michael so indicated to the left by the use of the left indicator and changed lanes. As I continued driving a white car which was being driven in the right lane ahead of me slowed and stopped. I then saw a young girl run across the road FROM IN FRONT OF THE WHITE CAR at the time I applied brakes she was right before me and I collided with her". (See also para. [62] infra).

[29] This police officer also took measurements at the scene of the accident. He observed debris in the road and determined that that was the point of impact. His measurement from the debris to the rear of the Defendant's car, where that car eventually stopped, was 82 feet 2 inches. White was unable to recall whether the Defendant showed him the point of impact.

[30] Although Sergeant Gibbons was at the scene of the accident, he did not speak to the Defendant there. At a later date he took another statement from the Defendant, when the file with the statement recorded by White could not be found. The statement is dated 04 February 2008. However, Gibbons says that was a typing error, and that the correct date is sometime in April 2009 when he submitted the

file.

[31] The statement recorded by Gibbons says in part that:

“My mother...is the owner of a Grey Toyota Corolla motor car registration number J1117...I am a student at the [UWI] Cave Hill Campus and my mother normally allows me to use her vehicle as a means of transportation to and from the campus. On Monday the 4th of February 2008 I left the Campus around 3.05 pm and was driving my mother’s car. I was travelling along the Cummins section of the ABC Highway. On reaching the section of Lodge hill there was a white motor car travelling about fifty (50) metres ahead of me. I cannot remember the speed I was travelling at the time but it was within the 80 kmp speed limit and I was either in the right lane or inner lane. The motor car in front of me stopped and I changed to the left lane or outer lane. As I was passing the motor car, a school girl ran from the right side of the road directly in front of the white motor car and collided with the right front of my mother’s motor car and was thrown forward. This was the first time I saw her. There was no pedestrian crossing or warning [signs] to indicate that persons are crossing at the location where she attempted to cross. I then stopped a few meters away and a vehicle stopped next to me...I waited until the Police arrived and had a conversation with them as to how the collision occurred...I later gave the Police a written statement and I was served with a notice”.

[32] The statements taken by White and Gibbons will be revisited when the Defendant's evidence is considered.

[33] Sergeant Roger Mayers gave evidence as an expert in collision reconstruction. He prepared a report dated 12 March 2014, in which he outlined his "findings of fact and conclusion" relating to the 2008 collision. (Exhibit RM1). His critical findings were that:

1. the weather was fine at the time of the collision, with no rain;
2. there were visible skid marks on the roadway leading up to the rear wheels of the Defendant's vehicle;
3. after the collision, the Defendant's vehicle skidded a distance of 76 feet before coming to a stop;
4. the driver of an unknown white motor car stopped in the right eastbound lane to allow the three young children to cross in front of his vehicle;
5. the Defendant switched to the left eastbound lane because he saw the driver of the white motor car stop in the right eastbound lane;
6. the children were waiting to cross the road while standing on the southern sidewalk next to the westbound lane. Their

position was just over the brow of the hill before the western downhill incline to Hinds Hill;

7. the children, led by Charelle Carroll, had stepped on to the Highway and were in the process of crossing the roadway;
 8. Charelle emerged from in front of the white car and collided with the car driven by the Defendant;
 9. Charelle was catapulted backwards in the direction she was previously travelling and simultaneously into the air by the momentum of the Defendant's vehicle;
 10. Charelle landed approximately 15 feet from where she impacted the vehicle;
 11. the Defendant's line of sight of the pedestrians was obscured, and he applied brakes after the impact;
 12. the Defendant was travelling at approximately 59 kp/h, and, having applied brakes, skidded for 2.8 seconds before coming to a stop; and
 13. the collision was caused by Charelle who was heedless to the Defendant's oncoming vehicle.
- [34] While giving evidence, Mayers revealed that he had spoken with the Defendant at the scene of the accident. However, he made no notes of

this conversation. He relied on the two statements recorded from the Defendant. The only other person he interviewed was Ms. Trotman. He had no interaction with Ms. Trotman's adult son, or with the two other children who accompanied Charelle.

[35] The Court encountered a few challenges with Mayers' report and oral evidence. The first photograph on page 4 of the report was taken by Mayers while he was in a car travelling in the right east bound lane. He was approximately 60 feet behind a vehicle ahead of him. Mayers explained that this picture "shows an unobstructed view of where the pedestrians were attempting to cross". In other words, Mayers was able to see, from the vehicle he was in, the area further up to the right side of the Highway where the three children were standing.

[36] The second photograph on page 4 was also taken by Mayers from the same lane, and even closer to where the children were standing. Again he had an unobstructed view as there was no traffic passing in the westbound lane to his right, when this photograph was taken.

[37] Despite these two photographs, Mayers did not offer an opinion as to whether the Defendant should have been able to see the children either while they were waiting to cross the road, or when they started to cross the road. Instead, Mayers concluded that the Defendant's line

of sight was obscured. (Page 21 of report). When questioned by counsel for the Claimant, Mayers responded that “In terms of revisiting the location and observing, that would not necessarily allow me to determine a line of sight”.

[38] Sergeant Mayers spoke to the Defendant at the scene of the accident.

It was possible for him to ascertain from the Defendant the position of his vehicle on the right eastbound lane before he changed to the left eastbound lane. From this position, it would have been possible to determine whether the children were in the Defendant’s line of sight at any time before the collision. The question for this Court is not if the Defendant actually saw the children, but whether they were ever in his line of sight. The report was lacking in this respect.

[39] The distance the Defendant’s car travelled after impact was measured

by Mayers at exactly 76 feet. Mayers said in his report that he took and recorded measurements with the assistance of Sergeant Gibbons.

(Pages 17-18). This measurement differs from that taken and recorded by PC White. White recorded a measurement of 82 feet 2 inches from the point of impact up to the rear of the Defendant’s vehicle; an additional 6 feet 2 inches more than the measurement taken by Mayers.

[40] Neither counsel for the parties asked for a rationalization of the different measurements given by the two police witnesses. The Court views this as a critical omission, bearing in mind that Mayers used the distance he recorded to ascertain the speed of the Defendant's vehicle at 52 kp/h at the time of impact. Two questions remain unanswered. The first question is which measurement is correct. The second question, assuming White's measurement to be the correct one, is whether the additional 6 feet 2 inches would make a significant difference to Mayers' calculation of the Defendant's speed.

[41] Mayers informed the Court that he was able to determine the Defendant's speed by "using a scientific formula ". In his words:

"The calculation was based on the length of the skid mark in relation to the co-efficient of friction, the resistance of the tyre when it interfaces with the roadway. A different formula was used to determine how long the driver took to come to a complete stop".

[42] Neither of the two formulae applied by Mayers were given to the Court, nor referred to in his report. Therefore, it was not possible to determine whether these formulae were applied correctly. Also of interest to the Court is the fact that Mayers stated in his oral evidence that it was also possible to determine the Defendant's speed from the

distance Charelle's body was propelled before she landed on the Highway. Unfortunately, Mayers did not use this methodology to confirm the result of the formula he applied to ascertain the Defendant's speed.

[43] The Court is aware that Mayers' report was prepared somewhat hurriedly. When he first gave evidence on 05 March 2014, about 6 years after the accident, he had not yet prepared the accident report. When he resumed his evidence on 19 March 2014, he was able to present his report to the Court. Perhaps an indication of the hurriedness of the report is the fact that on page 5 the arrow on the picture indicating where the children were standing on the sidewalk is in the wrong position.

(4) The Vehicle Examiner

[44] Mr. Hewitson Chase examined the vehicle driven by the Defendant. He found damage to the right front fender, the windscreen, and the right front indicator. The hand and foot brakes were in good condition. Chase concluded that the collision occurred at the side of the vehicle because the fender and front indicator were damaged at the side. There was no damage to the headlamps.

(5) The Defendant

- [45] This witness had credibility issues.
- [46] The Defendant's first statement was given to PC White at the scene of the accident. (See para. [27] supra). It was a short simple statement. This is how the Court understood that statement. After going through the traffic lights at Hinds Hill, the Defendant changed from the right eastbound lane to the left eastbound lane. While driving in the left lane he noticed a vehicle in the right lane slow down and then stop. As he was about to pass the vehicle, Charelle ran from in front of the same vehicle, which was to his right, and his vehicle struck the child.
- [47] The second statement PC White recorded from the Defendant, later on the same evening of the accident, was more fulsome than the first statement. (See para. [28] supra). This statement gave more particulars about where the Defendant was going, the car he was driving, and the car that stopped on the Highway. However, the content was not significantly different from that of the first statement. What this statement clarifies is that even if his vehicle and the white car were travelling in different lanes, the white car was ahead of him when it slowed and stopped.

[48] The Defendant's third statement recorded by Sergeant Gibbons is lengthier than the previous two statements. (See para. [31] *supra*). This third statement placed the white car at about 50 meters ahead of the Defendant before it slowed down and stopped. The Defendant expressed uncertainty about his speed or whether he was in the left or right eastbound lane, but he was sure that he was not exceeding the 80 kp/h speed limit for the Highway. However, he does convey in this statement that he changed to the outer eastbound lane after the vehicle in front of him in the right eastbound lane came to a stop. The Defendant also confirmed that he spoke to the police at the scene of the accident about how the collision occurred, and that he later gave a written statement to the police.

[49] These three statements are consistent in relating that the Defendant saw Charelle for the first time when she ran from in front of the white car into the side of the vehicle he was driving. But it is in the third statement that the Defendant asserts that he was in the right eastbound lane behind the white car when it stopped. This was one of the reasons why he switched lanes. The other reason offered in the second statement was that his destination was Warrens. The left eastbound lane went straight through to Warrens, whereas the right lane

required a right turn off the Highway. The three statements taken by the police do not refer to any other vehicles or pedestrians on the road at the time of the collision.

[50] The next recital of the events by the Defendant was in his witness statement filed on 24 January 2014, almost six years after the event.

That witness statement says, inter alia, that:

“5...I passed the traffic lights at the junction of Hinds Hill and Cave Hill and proceeded in an easterly direction along the Highway, driving in the right side lane of the two lanes leading to Warrens, over the incline.

6. I am aware that the speed limit on that stretch of the Highway is 80 Km per hour. There is a traffic sign indicating the speed limit on the incline. I cannot recall the exact speed at which I was travelling but I was driving within the speed limit.

7. The area of the Highway along which I was driving has an incline which starts after passing the traffic lights at the Hinds Hill/Cave Hill junction. I did not see any other vehicles immediately ahead of me going away from the traffic lights.

8. On approaching the top of the incline I saw a white car a short distance ahead of my vehicle. I continued driving a little further on before switching to the left lane designated for traffic proceeding directly to Warrens. I then saw that the white car had come to a halt. It did not have any hazard

lights, nor did the driver give any indication that I should stop.

9. I cannot say exactly what speed I was travelling at but I am sure I was within the speed limit of 80 Km per hour when I switched lanes.

10. I proceeded in the left lane until I got parallel with the white car and then I noticed two girls standing in front of the white car towards its right side. They were standing in the road and were in my peripheral vision.

11. As I barely got ahead of the white car I caught a glance of a third girl who had apparently been running towards my vehicle and she collided with the right front side of my vehicle. I had not seen her before then. I had still been in motion when the collision occurred.

12. I brought the car to a halt a little further along, the collision having caught me by surprise. I did not expect that anyone would have been crossing the Highway especially since there are no traffic lights or pedestrian crossings in that area, nor any indication of their presence.

....

16. I gave an oral statement to one of the Police officers at the scene of the accident.

....

18. Police officers came to my home sometime after the accident and I gave them a statement about what had happened. A copy of the said statement is hereto attached and marked “**Exhibit AJA1**” for identification.

....

21. I have never seen any pedestrian crossing at or near to the section of the Highway where the accident occurred. I believe that the driver of the white car was responsible for the accident. He stopped without any indication, and allowed children to cross a busy three-lane Highway, at a point where there are no traffic lights or pedestrian crossings. I am sorry that she received injuries, but I believe that the little girl was also responsible for the accident. She ran across the three-lane Highway and collided with my car”.

[51] At paragraph 7 of the witness statement, the Defendant asserts that the uphill incline in the road began after he passed through the traffic lights at the Hinds Hill/Cave Hill junction. This is not strictly correct. The Highway begins its uphill trajectory from its most western end at the Black Rock junction, and continues upward through three sets of traffic lights. The road flattens briefly midway between the second and third set of traffic lights. The Highway continues its upward ascent before the third set of traffic lights at the Hinds Hill/Cave Hill junction.

[52] The crest of the incline or the brow of the hill is shown clearly in the two photographs on page 4 of Sergeant Mayers’ report. The nearest lamp pole to the right of both pictures is in the area where Charelle

and her friends were waiting to cross the Highway. Mayers in his oral evidence described this lamp pole as being “just over the brow of the hill”, in an easterly direction, or “just before the downhill incline to Hinds Hill” in a westerly direction.

[53] Whereas in his first two police statements the Defendant sees the white car slow down and then stop, both in his third statement and the witness statement he only mentions that the white car stopped. There is no reference in the latter two statements to the Defendant observing the white car slowing down before it stopped.

[54] For the very first time the Defendant mentioned seeing Charelle’s two school friends. As he drew level with the white car that was to his right, he noticed the other two girls standing in front of the white car towards the right side of that vehicle. [Para.10 of witness statement]. The children were in the Defendant’s “peripheral vision”, and they were stationary.

[55] From this account, the Court reasonably infers that having moved from the sidewalk to cross over the road, the two children accompanying Charelle stopped walking when they reached the right front of the stationary white vehicle. With only a peripheral view the Defendant was able to ascertain the position of the two girls in

relation to the white car, and to determine that they were in a standing position, that is, not moving in any direction.

[56] It is interesting that Ms. Trotman and her son, who both had a better view of the accident, could not say definitively where Charelle's friends were when she was struck by the Defendant's car. Ms. Trotman thought that the children saw the collision and turned back. Her son did not pay attention to the other children after Charelle was struck. Ms. Trotman places Charelle in front of her friends and moving quickly. Mr. Trotman said that they all ran across the highway but he did not know if the others made it to the other side of the road. Amazingly, the Defendant saw the two friends before he saw Charelle, and he was able to say exactly where they were standing.

[57] The Defendant mentioned two statements that he gave to the police. He confirmed that his first statement was an oral statement at the scene of the accident. The second statement, an exhibit to his witness statement, was said to be given to the police sometime after at his home. This statement was recorded by PC White who said that it was taken at the District 'A' Police Station.

[58] There is no reference to the statement recorded by Sergeant Gibbons in the Defendant's witness statement. This third statement would have mentioned his oral statement and the first recorded statement. (See para.[31] supra). The witness statement also indicates that the Defendant gave an accident report to his mother's insurer. However, a copy of this report was not annexed to the witness statement or produced at trial.

[59] Interesting things occurred when the Defendant gave his oral evidence on 19 March 2014. Having asked the Court to adopt his witness statement, he proceeded to disavow part of the statement recorded by PC White. He contended that the words "I then saw a young girl run across the road", which appear at lines 17 and 18 on the second page of the statement, are incorrect. He told the Court that:

"I saw the girl. I did not see her running in front of the white car....The evidence tendered on my behalf contains an incorrect statement....I am saying that the statement I gave at the scene of the accident is incorrect".

[60] The recorded statement annexed to the Defendant's witness statement and the oral statement given by him at the scene of the accident, are not the same statements. However, he describes the statement

recorded by PC White later on the evening of the accident, as the statement given at the scene of the accident. The inaccuracies alleged by the Defendant appear in PC White's recorded statement.

[61] The Court is not persuaded that PC White made the mistake as alleged. The Defendant was given an opportunity to read and correct the recorded statement after it was written by PC White. He made two corrections and initialled them. The first correction appears at the second line on the first page, where the words "eight (8)" are deleted, and the words "thirteen (13)" are inserted.

[62] The second correction is on page two of the document at line 19. The original sentence beginning at line 17 reads "I then saw a young girl run across the road way ahead of me and at the time I applied brakes she was right before me and I collided with her". The words "way ahead of me and" are deleted, and the words "FROM IN FRONT OF THE WHITE CAR" inserted. This is the very sentence which the Defendant asserted at trial was recorded inaccurately.

[63] When cross-examined by counsel for the Claimant, the Defendant offered the following incredulous explanations:

"I read over PC White's statement and I made corrections. I am asking the Court to believe that there are other things in there

that are not true. I am telling the truth about not seeing the pedestrian that I hit. The next time I saw that statement was probably January this year. I prepared a witness statement in which the exhibit appeared. I read over all the documents before I signed the witness statement. The witness statement was filed in the Registry and it was tendered this afternoon as my evidence under oath.

I sat in court when the exhibit was tendered by PC White. My lawyers had sight of the document. I did not say to them that the document was inaccurate. I am now saying that I did not know that this document was attached to my witness statement. I did not know that this document would be before the court as part of my evidence. Now that I know that it is a part of my evidence I am denying a portion of it”.

[64] When re-examined by his counsel, the Defendant said that he signed his oral statement at the scene of the accident. He did not recall signing anything at the police station.

[65] The account of the accident that the Defendant offered at the trial is as follows:

“I was heading to Warrens to get something to eat....I was hungry. I got to the top of the hill and saw a white vehicle in the same lane ahead of me. I remained in that lane for a little while after the incline; a little more than four seconds. I was in the right lane, the lane designated to turn right. I was

going to Warrens so I needed to change into the left lane. I could have changed before.

I did not notice anything about the white car except that it was ahead of me. No vehicles were behind me. The vehicles on the road were just my vehicle and the white car....

I did not see the white car until I got over the hill. As soon as I got over the hill I saw the vehicle in the same lane I was in. I travelled behind the car for a while. I did not observe the children standing on the side of the road.....

When I got to the brow of the hill I did not see the school children ahead of me on the right side of the road. I did not see [Charelle] move from the side of the road in front of the white car....

I did not see the children standing at the side of the road when I came over the brow of the road. I saw the vehicle ahead of me start to slow. I switched lanes intending to go to Warrens....I did not see the children. I did not slow down. I did not stop.

I found it unusual that the vehicle stopped there but I did not know why he stopped and I saw no reason why he stopped. I should have been cautious but I did not see any reason to stop. Yes, you should be observant. I had one hundred and sixty something feet to observe. When I decide to switch lanes I should be cautious.”

Findings of Fact

[66] The Defendant was driving behind the white car, and both vehicles were in the eastbound right lane. The Defendant then observed the white car slow down and stop while they were both in the same eastbound lane. He switched to the left eastbound lane. In the second statement that was recorded by Sergeant Gibbons, the Defendant stated that the white car in front of him stopped and he switched from the right lane to the left lane. Although the Defendant was heading to Warrens, he changed lanes at that point in time because the white car had stopped in his path. In order to get past the white car, the change of lane was inevitable.

[67] Sergeant Mayers also concluded in his report that the Defendant switched to the left eastbound lane because he saw the driver of the white car stop in the right eastbound lane. (See para. [33] supra). This expert evidence was not challenged by the Defendant or his counsel. In addition, Charelle's two school friends also testified to seeing a vehicle driving fast behind the white car, and overtaking the white car on the outer eastbound lane. This placed the Defendant behind the white car before he changed lanes. The two children were not challenged on this aspect of their evidence. It was never

suggested to them that their recollection was faulty or their version untrue.

[68] The driver of the white car stopped to allow the children to cross the road. Not only did this driver stop, but he beckoned to them to cross. This is Ms. Trotman's unchallenged evidence. And, at the time the children attempted to cross the road, it was safe for them to do so. This too is Mr. Trotman's unchallenged evidence.

[69] Charelle and her school friends accepted the invitation to cross over the Highway. Charelle moved quickly ahead of them. She passed Ms. Trotman's vehicle to her right in the single westbound lane. Then she passed in front of the white car to her left in the right eastbound lane. And as she hurried on to the left eastbound lane to complete her traversal of the Highway, the young child collided with the right front side of the Defendants vehicle, as he was about to pass the white car to his right.

Negligence

[70] In an assessment of the components of the modern law of negligence, the learned authors of "**Charlesworth & Percy on Negligence**" posit that:

“Whatever form of words is adopted the essential components are recognized as three: “duty”, “breach” and “resulting damage”, that is,:

1. the existence of a duty to take care, which is owed by the defendant to the complainant;
2. a failure to attain the standard of care prescribed by the law, thereby committing a breach of such duty; and
3. damage, which is both causally connected with the breach and recognized by the law, has been suffered by the complainant....

If a claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence. It will then be necessary to identify the extent of damage referable to the breach of duty, before assessing its value in money terms”. (13th ed, 2014 at paras. 1-34 to 1-35).

[71] Undoubtedly there was severe damage to the minor child in this case.

The questions for this Court are whether the Defendant owed a duty of care to the child, and if so, did he breach that duty of care when she was struck by a vehicle under his control. **Charlesworth & Percy** further state that:

“It is the duty of the driver or rider of a vehicle to keep a good look out. A failure to notice in time that the actions of another

person have created a potential danger is negligent. [See **Foskett v. Mistry [1984] R.T.R. 1 CA**]... When passing a standing vehicle or other obstruction, which prevents a clear view of oncoming traffic or pedestrians, a good look out should be kept". (Para.10-221).

[72] The Defendant found it "unusual" that the driver of the white vehicle stopped in the right eastbound lane ahead of him on the Highway. He conceded that he should have been cautious, but he maintained that "there was no indication why he stopped, nor did I see anything or any reason for him to stop Ma'am". The Defendant also conceded to counsel for the Claimant that he should have been cautious when he switched lanes, and that he should have been observant when he came over the brow of the hill.

[73] There was no pedestrian crossing, no traffic lights and no traffic warden in the immediate area, or at the point where the children attempted to cross the Highway. From the Defendant's perspective there were only two vehicles on the road in the area at the time, his vehicle and the white car ahead of him. There was no traffic behind him, and he did not observe Ms. Trotman approaching in the westbound lane. He thought it "unusual" that the white car slowed

and stopped where it did. And yet the Defendant chose not to exercise any caution when he changed lanes in order to pass the white car.

[74] Even if the Court accepts the expert evidence that the Defendant did not exceed the speed limit, and that his line of sight was obscured; and also accepts that the Defendant did not see the children waiting to cross or crossing the road, the Court finds that the Defendant was driving too fast in circumstances where the vehicle ahead of him had slowed and stopped, and where there was no immediately obvious reason why the driver of that vehicle had executed such a manoeuvre.

[75] Had the Defendant exercised caution, by significantly reducing his speed until he was able to assess the situation ahead of the white vehicle, he could either have avoided the accident or minimized its damaging effect. Charelle was moving quickly, and she might have made it safely across the Highway. Because of his failure to exercise caution, the Defendant did not notice in time that the action of the driver of the white car had created a potential danger.

[76] The Court is mindful that in his witness statement the Defendant admitted that he had seen Charelle's two friends standing in front of the white car. They were in his peripheral vision when he drew alongside the white car. (See para. [50] supra). A reduction in his

speed and a cautious approach would have allowed the Defendant to keep a proper look out, to see Charelle, to appreciate that she was about to cross his path, and to attempt evasive action.

[77] The driver of the white vehicle may have stopped for any number of reasons, including an immediate danger inside or outside of his vehicle. It is only on hindsight that we know that the danger was the school children crossing the Highway. But the peculiarity of the white car slowing and stopping in the middle of the Highway, for no apparent reason, called for extreme caution on the part of the Defendant until he was able to assess that it was safe to continue beyond the white car. His failure to exercise caution led to the unfortunate accident.

[78] The Court finds that the Defendant owed a duty of care to Charelle, that he was in breach of his duty of care, and that Charelle was severely injured as a result of the breach.

Contributory Negligence

[79] **Charlesworth & Percy** inform us that the phrase “contributory negligence”:

“....applies solely to the conduct of a claimant. It means that there has been some act or omission on a claimant’s part which

has materially contributed to the damage caused and is of such a nature that it may properly be described as negligence. For these purposes “negligence” is used in the sense of careless conduct rather than in its sense of breach of duty. It means “negligence materially contributing to the injury”, the word “contributory” being regarded “as expressing something which is a direct cause of the accident”. It connotes a failure by the claimant to use reasonable care for the safety of either himself or his property, so that to some extent, he becomes blameworthy as the “author of his own wrong” ”. (Para.4-03).

[80] The Defendant alleged in his defence that the collision “was caused by, or contributed to” by Charelle’s negligence. He placed the plea of contributory negligence on her part before the Court. Pedestrians owe a duty of care to other highway users to move with proper care. (**Charlesworth** at para.10-277). However, a driver must be particularly vigilant for the safety of vulnerable pedestrians such as children. (**Charlesworth** at para. 10-273).

[81] Although a finding of contributory negligence may be made against a child, a court takes into consideration the child’s age and understanding. According to **Charlesworth**:

“...that test is modified to the extent that the degree of care to be expected must be proportionate to the age of the child. The

conduct of a child claimant cannot amount to contributory negligence if it is no more than could be expected of a child of that age. The degree of care it is appropriate to expect of a child is a matter of fact for decision on the evidence of the particular case”. (Para.4-36).

[82] In the Court of Appeal decision in **Gough v. Thorne [1966] 1 WLR 1387**, Lord Denning MR commented that:

“A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety: and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense or the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy”. (Page 1390).

[83] More recently in **Ellis v. Kelly [2018] 4WLR 124**, Yip J observed that:

“There is no hard and fast rule as to the age at which a child may be held to be guilty of contributory negligence. In judging the actions of a child, the standard of care is to be measured by that reasonably to be expected of a child of the same age, intelligence and experience”. (Para.48).

[84] What evidence is there about Charelle’s age, intelligence and exper-

ience at the time of the collision? It is not disputed that she was eight years old at the time of the collision. This is incidentally the same age as the claimant in the **Ellis** case. Kathareen Drakes, Charelle's guardian, testified that it was the usual practice for the children to cross the Highway as it was the only way home. Ms. Drakes normally came out to escort the children across the road, but no adult was there to assist them on the afternoon of the accident. She would have instructed Charelle to look left and right before crossing the Highway that was always busy.

[85] Shantia President confirmed that no adult was there that afternoon. It was their habit to cross the highway every evening. In her words the Highway was busy most of the time, and "when you get a chance to cross you would have to travel fast". Although she was the same age as Charelle, she did not move immediately when the white car stopped. Charelle was in front and she ran across. Shantia described Charelle as "the one with more energy". Tiara Davis, the youngest of the three children, agreed with these events. She added that she had never crossed the Highway alone.

[86] Charelle was accustomed to crossing the Highway. However, she was usually accompanied by her guardian. Ms. Drakes' evidence in this

regard was not challenged. There was no evidence of what was to be expected of a child of Charelle's age, intelligence and experience. Indeed, there was no evidence as to her level of intelligence.

[87] In the **Gough** case the child was 13½ years of age. A lorry driver had stopped to allow her to cross the road. Salmon LJ assessed her situation in this way:

“The question as to whether the plaintiff can be said to have been guilty of contributory negligence depends on whether any ordinary child of 13½ could be expected to have done any more than this child did. I say, “ordinary child.” I do not mean a paragon of prudence; nor do I mean a scatterbrained child, but the ordinary girl of 13½. I think that any ordinary child of 13½, seeing a lorry stop to let her cross and the lorry driver, a grown-up person in whom she no doubt had some confidence, beckoning her to cross the road, would naturally go straight on, and no one in my view could blame her for so doing. I agree that if she had been a good deal older and hardened by experience and perhaps consequently with less confidence in adults, she might have said to herself: “I wonder if that man has given the proper signal to traffic coming up? I wonder if that traffic has heeded it? I wonder if he ought to have beckoned me across when he did and whether he looked behind him before doing so?” She might not have gone past the front of the lorry without verifying for herself that it was safe to do so. But I think it would be quite wrong to hold that a

of child of 13½ is negligent because she fails to go through those mental processes and relies unquestionably on the lorry driver's signal". (Pages 1391-1392).

[88] There is no evidence that Charelle was mature enough to engage in the mental process outlined by Salmon LJ. She placed her trust in the adult male driver who stopped and beckoned the children to cross the Highway. She relied unquestionably on his signal, and made haste to cross over. On the persuasive authority of **Gough** she should not be found to have contributed to the accident.

[89] **Andrews v. Freeborough [1967] 1 QB 1** concerned an eight year old girl who the Court of Appeal found did not step into the road in front of a car, but was swept off the kerb. Davies LJ said that:

“...the little girl was only eight years of age, and in my judgment it is not possible to say that she was guilty of contributory negligence in the circumstances of this case. It is true that she was taught by her parents to be sufficiently trained and traffic-conscious to be fit to be trusted not only to cross highways safely herself but also to be put in charge of her four-year-old brother on such a journey. But even if she did step off into the car, it would not be right to count as negligence on her part such a momentary, though fatal, act of carelessness”. (Page 16C).

[90] The Court of Appeal decisions in **Gough** and **Andrews** are more than

sixty years old. However, by 2018 Yip J was agreeing that a finding of contributory negligence against a child of eight is uncommon. (See **Ellis** supra para. [83] at para. 51). One such uncommon case is **AB v. Main [2015] EWHC 3183 (QB)**. There a child of eight years ten months was found to be contributorily negligent to the extent of twenty percent.

[91] Yip J set out the facts and findings in **AB** as follows:

“In **AB** the child was walking along a busy main road, where the speed limit was 40 mph. The defendant was travelling at 30 mph or just under. The claimant and his friends were picking up glass bottles and a passing motorist had the impression the claimant might throw one. The claimant then saw another bottle on the other side of the road, told his companion he was going to get it and ran into the road without looking. He was described as being completely unaware of the traffic behind him. The judge said at [61]:

“This is not a case where a boy is aware of an oncoming car and runs at high speed into the road in the misplaced belief that by running as fast as he can he can cross safely before the car arrives.”

In making a finding of contributory negligence, he concluded at [95]:

“I am satisfied that an ordinary child of between 8 and 9 could reasonably be expected to have sufficient knowledge and experience of crossing roads such as Hale Road to know of the importance of looking right and left to check for oncoming traffic before crossing.”

I note that **AB** was a case in which the primary issue of liability remained live and in which there was a serious argument as to whether the defendant was responsible at all. The defendant was travelling at significantly under the speed limit for the road. However, the judge found that she should have anticipated the risk of one of the boys running out and keeping them under close observation and taken other precautions such as covering her brake, changing position and/or sounding her horn”. (Paras. 52 to 53).

[92] Yip J went on to distinguish **AB** from the facts before him in **Ellis**.

The child in **Ellis** was an eight year old boy who was struck while attempting to cross a road on his own. The accident occurred in a quiet residential estate in the vicinity of a zebra crossing. The defendant was found to have driven at excessive speed for that location. Yip J reasoned that:

“...it seems to me that the facts of **AB** are really quite far removed from this case. **AB** ran out into a busy road where cars travelling significantly faster than the

defendant's were to be anticipated. By contrast, I find that Mr. Kelly was travelling in a manner that was outside [the child's] experience and anticipation. AB did not look towards the traffic at all. According to Mr. Henry, [the child] looked straight at the car but carried on running. The inference is that he misjudged the car's speed and/or distance. The fact that [the child] was crossing in the vicinity of a crossing is also an important distinction. [Para.54].

....[the child] had not previously experienced being out on the roads alone. It was a very great misfortune that the first time he found himself unaccompanied, he encountered a car being driven in a way that was wholly outside his experience. [Para.58]

...This was an eight-year-old boy, trying to cross at a zebra crossing, who encountered a speeding car whose driver had just been warned that he might hit someone". [Para.61].

[93] The case of **AB** may also be distinguished from the present facts. Although Charelle was in the habit of crossing the Highway, she usually did so in the company of an adult and with adult supervision. The afternoon of the accident was not the norm for Charelle. Also, the child relied on the kindness of another adult who stopped his vehicle to allow her to cross the Highway. Unfortunately her trust was misplaced. The Defendant, on seeing the white car slow down

and stop, changed lanes but did not reduce his speed to allow him to assess properly why the white car had stopped. The Defendant admitted his imprudence and lack of caution.

[94] It is significant that the Trotmans, who were facing oncoming traffic, did not see the Defendant before he collided with Charelle. Shantia President saw the Defendant's vehicle after Charelle had cleared the white car. In her estimation the Defendant was driving fast. Tiara Davis also saw the Defendant's vehicle after Charelle was on her way across the Highway. She agreed that his vehicle was moving fast. Counsel for the Defendant never suggested to these two witnesses that they were too young to appreciate whether or not his vehicle was moving quickly. (See para. [67] supra). Therefore, the Court infers that their evidence in that regard was accepted.

[95] There is no evidence that Charelle either saw or was in a position to see the Defendant's car before the collision. And even if she did see the car, it is unlikely that she was equipped, at the age of eight, to judge both his distance and speed in the seconds before the collision. (See the Canadian case of **Sumur v. Antoniak 2015 ONSC 2380**, per Ramsay J at para. [77]; affirmed by the Court of Appeal in **Sumur v. Antoniak 2016 ONCA 851**).

[96] The Court finds that in the circumstances of this case there was no contributory negligence on the part of Charelle Carroll.

Disposal

[97] Judgment is entered for the Claimant, with damages, interest and costs to be agreed or determined by the Court.

Sonia L. Richards
Judge of the High Court