BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. CV0052 of 2012

BETWEEN:

DAVID FOSTER **CLAIMANT**

AND

CONTAINER SERVICES LIMITED **FIRST DEFENDANT**
DWAYNE MARSHALL **SECOND DEFENDANT**

Before Dr. The Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 25 June 2020

Ms. Lydia Farley for the Claimant

Ms. Destinie A. D. Simmons Beckles in association with Ms. Tamara Simmons and Ms. Aesha Nassar for the First and Second Defendants

DECISION

INTRODUCTION

[1] The date is 13 January 2009. The claimant ("Mr. Foster") owns a public service vehicle which bears registration number ZR-135 ("ZR-135"). Today, ZR-135 is driven by Mr. Deong Griffith ("Mr. Griffith"). At approximately 7:30 a.m., it is heading north on Heywoods Main Road, St. Peter when it

collides with another vehicle, a Suzuki Jimny bearing registration number MB-9211 ("the Jimny"). The Jimny is owned by the first defendant ("Container Services Ltd") and driven by the second defendant ("Mr. Marshall"). The front of ZR-135 is damaged and has to be replaced. The Jimny is a total loss.

[2] Eleven years later, this is not a forgotten matter. A dispute lingers as to which party is liable. In his claim against the defendants, Mr. Foster seeks compensation for the costs of repairs to his vehicle and loss of profits. The Defendants counterclaim against Mr. Foster. However, there is no averment that Mr. Marshall has suffered any injuries, loss or damage. His counterclaim must be dismissed. Container services Ltd. claims damages in respect of the loss of the Jimny.

[3] The parties have reached a consensus on the issues of damages and interest. The terms of their agreement are embodied in paragraphs 2 and 3 of a Consent Order made by this Court on 25 July 2018. Those paragraphs read:

> Without prejudice to the issue of liability, the damages of the Claimant are agreed at $24,030.00. Any interest payable to the Claimant, is agreed to be at the rate of 6% per annum to be applied from the date of the issue of the Claim Form and Statement of Claim on the 12th day of January, 2012 until payment of any judgment awarded.
>
> Without prejudice to the issue of liability, the damages of the First and Second Defendant are agreed at $11,704.50. Any interest payable to the First and Second Defendants is agreed to

be at the rate of 6% per annum to be applied from the date of the issue of the Defence and Counterclaim on the 15th day of February, 2012 until payment of any judgment awarded.

[4] It now falls to this Court to resolve the issue of liability. Having considered the evidence and the submissions made by Counsel, it has determined that the defendants are solely liable. The reasons for that decision are set out below.

THE PLEADED CASES

[5] It is common ground that immediately prior to the collision both vehicles were travelling in the same direction with the Jimny ahead of ZR-135. The defendants claim that there were vehicles between them. Mr. Foster disputes this. At paragraph 4 of his amended statement of claim filed on 28 November 2014 and further amended by Order of the Court on 28 March 2018, he avers that the accident occurred in this way:

> [The Jimny] was travelling in the same direction ahead of [ZR-135]. As both vehicles approached Port St. Charles the driver of [the Jimny] started to make a left turn into Port St. Charles. The driver of [ZR-135] started to overtake [the Jimny] when [Mr. Marshall] suddenly swerved [the Jimny] to the right thereby causing a collision between the said vehicles.

[6] In the next paragraph, Mr. Foster avers that the accident was caused solely by Mr. Marshall's negligent driving while acting as "servant and/or agent" of Container Services Limited. He asserts that Mr. Marshall was negligent in that he (i) failed to keep a proper look-out for his, Mr. Foster's, vehicle, or to heed or observe its presence on the road; (ii) failed to apply his brakes in time

or at all, or to steer or control the Jimny so as to avoid the collision with ZR-135; and (iii) attempted to make a right turn across the path of ZR-135 when it was unsafe to do so.

[7] At paragraphs 4 to 6 of their defence and counterclaim, the defendants state:

> The Defendants aver that [ZR-135] … was in a line of traffic behind [Mr. Marshall] travelling in the same direction as [Mr. Marshall].
>
> The Defendants deny that [Mr. Marshall] started to make a left turn into Port St. Charles. The Defendants aver that at all material times, [Mr. Marshall] intended to park in the staff parking lot which is located on the right hand side of the road, opposite Port St. Charles. The Defendants aver, that [Mr. Marshall signalled his intention to turn right, by the use of his right indicator.
>
> [Mr. Griffith] overtook the line of traffic which included [the Jimny] … which was turning right into the staff parking lot. As [Mr. Marshall] turned right, [ZR-135] collided with the rear right of [the Jimny].

[8] In their counterclaim, the defendants assert that the accident was caused by Mr. Griffith. They particularise the alleged negligence as:

a. Failing to keep any or any proper look out or to have any or any sufficient regard for users of the said road;

b. Failing to observe or heed in time, adequately or at all, [the Jimny], the signs markings and lay out of the road ***(sic)***;

c. Driving when it was unsafe to do so;

d. Failing to accord precedence to [the Jimny];

e. Failing to stop, to slow down, to swerve, so to manage or control the vehicle so as to avoid the accident (*sic*);

f. Overtaking when it was unsafe to do so;

g. Driving at a speed excessive in the circumstances;

[9] In his defence to the counterclaim, Mr. Foster disputes that the accident happened as alleged by the defendants. He repeats his version of the events as set out in the amended statement of claim; and avers that the accident was caused "… wholly or in part" by Mr. Marshall's negligence.

THE EVIDENCE

[10] I will now review the evidence. Mr. Griffith, Mr. Tyrone Boyce ("Mr. Boyce") and Ms. Arlene Nicholls ("Ms. Nicholls") gave evidence for Mr. Foster. Mr. Foster also gave evidence on his own behalf. Mr. Marshall was the sole witness for the defendants.

[11] Mr. Foster also tendered a police accident report dated 10 August 2009 ("the Police Report"), a photograph depicting the damage to ZR-135 ("the photograph"), and an estimate dated 28 January 2009 from "GARVIN'S AUTOBODY REPAIR" ("the estimate of repairs"). These were admitted into evidence without objection.

Mr. Foster's evidence

[12] Mr. Foster's evidence is uncontroverted. He stated that Mr. Griffith worked for him and had been driving ZR-135 for two years. He went to the scene of

the accident after receiving a telephone call from Mr. Griffith. He indicated that the police came and took statements; and that ZR-135 sustained damage to its front, the entirety of which had to be removed and replaced.

[13] The photograph which was tendered by Mr. Foster depicts what appears to be a van with a damaged front. The estimate of repairs states that it related to the removal and replacement of the "complete front" of ZR-135 and the painting of damaged areas. I will now detail the Police Report.

THE POLICE REPORT

[14] The Police Report states the date, time and location of the accident, the vehicles involved, the names and addresses of their respective owners and drivers, the damage to the vehicles, and the names and addresses of the persons who were injured. It identifies Ms. Nicholls and Mr. Boyce among those persons. It describes the road conditions as "Dry" and states the speed limit to be 60 km/h. This is as set out at ***regulation 87.1(d)*** of the ***Road Traffic Regulations, 1984***.

[15] At paragraph 5, the Police Report records various measurements under the caption "**MEASUREMENTS TAKEN AT THE SCENE OF ACCIDENT**". That paragraph reads:

> Width of road at point of impact – 6.90 metres
>
> **ZR-135**

Right front wheel to right side – 2.40 metres
Right rear wheel to right side – 2.30 metres
Left rear wheel to left side 3.30 metres
Left front wheel to left side – 3.00 metres
Width of ZR-135 - 1.70 metres
Brake mark of ZR-135 to right rear wheel – 27.9 metres
Brake mark to left rear wheel – 28.6 metres

[16] Paragraph 8 of the Report is headed "BRIEF STATEMENT OF PARTICULARS OF ACCIDENT". It reads:

> Both vehicles were travelling along Heywoods Road, St. Peter going towards the direction of Six Mens. The motor van MB-9211 was ahead of ZR-135. The route taxi was enroute to Crab Hill and was transporting passengers at the time. As these vehicles approached the entrance to Port St. Charles, the driver of MB-9211 started to make a left turn into the said entrance where he is employed. Simultaneously, the driver of ZR-135 started to overtake him. Whilst executing the manoeuvre, the driver of MB-9211 changed his intentions and made a sudden right turn across the path of the overtaking motor van ZR-135 and they collided resulting in mentioned damages to the vehicles and the injuries to persons in both vehicles. Both drivers were interviewed. Driver of ZR-135 said "I was coming down the stretch, a vehicle was in front of me, he indicated to turn through the front gate by Port St. Charles. The vehicle started to turn and I started to overtake, and the vehicle turn back across the road and that is when they collided." The driver of MB-9211 was interviewed on the 26th January he said, "I was driving along Heywoods Road heading towards Six Mens, I indicated to turn right onto the open main, I heard some tyres behind me and felt a sudden impact to the right rear of the jeep." (***sic***) Investigations revealed that the driver of motor van MB-9211 caused the accident by turning right without due care. Charges of (1) driving without due care and attention and (2) driving without reasonable consideration have been preferred against her ***(sic)***.

Mr. Griffith's evidence

[17] I come now to Mr. Griffith. He adopted the contents of a witness statement filed on 14 September 2012 as his evidence-in-chief. Paragraphs 3 to 12 of that statement read:

> 3. On the 13th January, 2009 I was employed by Mr. David Foster as a public service driver. I drove ZR-135 on the Speighstown to Crab Hill St. Lucy Route.
>
> 4. I have had my driver's licence since 2003 and became licenced (***sic***) to drive public service vehicles in 2006.
>
> 5. On the 13th January, 2009 I was driving ZR-135 along my regular route. It was around 7.30 am and it was a clear sunny day.
>
> 6. I was travelling along Heywoods Main Road when I stopped at the bus stop in front of the Almond Beach Hotel to drop off a passenger.
>
> 7. After I dropped off the passenger and moved off, I noticed a red Suzuki Jimny Jeep registration number MB-9211 travelling in front of me.
>
> 8. As I approached the Port St. Charles Marina the red Suzuki Jimny Jeep put on its left indicator as if it was heading into Port St Charles.
>
> 9. The red Suzuki Jimny Jeep began to make its turn. At this point the road was clear and I turned on the right indicator and began to overtake the red jeep.
>
> 10. Suddenly and without warning the red Suzuki Jimny Jeep made a right turn across the path of my van. I pressed the brakes but could not avoid the collision.

11. My van collided with the right side of the red Suzuki Jimny.

12. The police were called to the scene and I gave them a statement.

[18] Mr. Griffith was cross-examined by Ms. Destinie A. D. Simmons-Beckles who appeared for the defendants in association with Ms. Tamara Simmons and Ms. Aesha Nassar. The cross-examination focused on how the accident occurred, and the length and position of brake marks attributed to ZR-135. Mr. Griffith's evidence in respect of the first area is as follows:

> he was travelling at approximately 40 to 45 kilometres per hour, and there were no vehicles between ZR-135 and the Jimny. He was five car-lengths behind the Jimny when he saw its left indicator come on. He slowed down and started to overtake the Jimny when it turned off to go into Port St. Charles. At that time, he was about two and one-half car lengths away from the Jimny. The Jimny "… made a U-turn, well not a complete U but when it swing back to the right it came directly into the path of [his] vehicle". He blew his horn before attempting to overtake but he could not explain why he did not say so in his witness statement. The Jimny had not completed the right turn when the collision occurred. It was in the middle of the road moving from left to right. He was not speeding nor was he driving without due care and attention.

[19] In respect of the brake marks from ZR-135, Mr. Griffith said that he had observed them on the road after the accident but that he was unsure of their length. He said that he could not estimate the length of the marks since he was sitting on a pasture awaiting the ambulance. In response to a suggestion that the brake marks were "long" and that he was speeding, the witness stated that he was not speeding, and that the marks started from the point he was at when the Jimny started to turn across the road. He gave that distance as two and one-half car lengths but said that he could not be sure about it and that "... it could be less or more...".

[20] Ultimately, using markers in the courtroom, Mr. Griffith pointed to distances measuring 19 feet (5.79 metres), 9 feet, 10 inches (2.10 metres) and 19 feet (5.79 metres) respectively when asked to point out the length of two and one-half car lengths, the length of the brake marks, and the distance he was from the Jimny when he saw it commence its turn across the road. He said that he was not sure whether the marks were all on the right side of the road since he was sitting on the pasture. His evidence is that the police came to him there.

Ms. Nicholls' evidence

[21] Ms. Nicholls adopted her witness statement filed on 14 September 2012 as her evidence-in- chief. The material portions of that statement reads:

1. ...

2. I only know the Second Defendant by travelling on the van to work.

3. I … often travel on his van.

4. On the 13th of January 2009 I took the van from Speighstown to go to work in St. Lucy. I was sitting behind the driver.

5. When the van I was in got by Port St. Charles I saw a red van that was ahead turn like to go into Port St. Charles on the left.

6. All of a sudden I saw it make a swift turn to come back out. That was when the two vehicles collided. The impact threw me forward and I hit my head into the rail of the van and burst my forehead.

7. …

8. The Driver of the van I was in was driving normal, not at an excessive speed.

9. It would not be true to say that the red van was only turning right. It pulled to the left first as if to go into Port St. Charles.

10. I gave a statement to the Police.

11. …

[22] Ms. Nicholls indicated that the reference to the "Second Defendant" at paragraph 2 of her witness statement was intended to be to Mr. Griffith. Under cross-examination, she was questioned about a written statement which she gave to the Police on 13 January 2009. She acknowledged it records her as having told the police that she "saw a red vehicle in front of the van [which]

looked as though it had come from Port St. Charles and was in the middle of the road." She admitted that she signed the statement but said that she could not remember saying those words to the Police. She said that she signed the statement but it appeared to be something different to what she said.

[23] Ms. Nicholls' further evidence is that she sat directly behind the driver of ZR-135 but she could not recall whether looking directly ahead she could only see the driver's seat. In response to the suggestion that she was saying two different things since she was sitting behind the driver's seat and could not have seen what had happened, she replied: "I saw the red van make a turn to Port St. Charles and then it aint went inside. It make a quick turn back in front the van. That is what I saw" (***sic***).

[24] Questioned further, Ms. Nicholls said that she was sitting by a window and that she could see. She acknowledged that the window was on her right while Port St. Charles was on her left. She maintained that she was able to see what was on her left, and that she was not lying when she said that ZR-135 was not speeding. She stated that she caught ZR-135 every day and that she knew Mr. Griffith "by catching the van". She denied that they were friends.

Mr. Boyce's evidence

[25] Mr. Boyce did not file a witness statement. His evidence-in-chief was led by Ms. Lydia Farley who appeared for Mr. Foster. He was not cross-examined. He stated:

> I recall 13 January 2009. I was involved in a motor vehicle accident on that date. I was travelling in motor vehicle ZR-135. I was seated in the front passenger seat of that motor vehicle. The accident was before 8 o'clock in the morning. ZR-135 was travelling in a northerly direction going towards Heywoods. A van was in front of ZR-135 turned on the left indicator to turn into Port St Charles (***sic***). He started to turn left and then he turned right and the ZR ran into the back of the van. The van that was travelling in front ZR-135 was a blue van. I do not recall the registration number of that vehicle. I cannot remember if I spoke to any police officers at the scene. I cannot remember if I spoke to any police officers after the accident.

The evidence of Mr. Marshall

[26] This brings me to Mr. Marshall's evidence. He filed no witness statement. He stated that he is a self-employed marine mechanic and that on 13 January 2009, he was working at Port St. Charles. He also said that he was the holder of a driver's licence since 2004. He described the accident in this way:

> I was on my way in a notherly direction to work at Port St. Charles. As I was approaching where I would normally park, I put on my right indicator. I looked in my rearview mirror and saw two cars. While I was making my turn, I heard the screeching of tyres. Then I was struck by a vehicle. A ZR vehicle struck me. The registration number was ZR-135. My vehicle was struck on the right rear. My vehicle was red. We always park on the right-hand side of Port St. Charles because we are not allowed to park inside Port St Charles. The ZR van was not immediately behind

my vehicle. I knew that because I looked in my rearview mirror when I indicated to turn right. I saw two cars behind me. I recall where my vehicle came to rest after the collision. It was on the right-hand side of the road facing an easterly direction. The ZR van came to rest on the right-hand side of the road facing north. … The damage to my vehicle was not repaired. The vehicle was written off.

[27] Under cross-examination by Ms. Farley, Mr. Marshall stated that he was not employed by Port St. Charles but that, like Port St. Charles' employees, he was supposed to park "… on the right-hand side of Port St. Charles". His evidence is that, at the time of the accident, he had been working at Port St. Charles for seven months. He stated that there was an open field opposite Port St. Charles on which they parked. He said that there is a right turn opposite Port St. Charles but agreed with counsel that there was no road there. His evidence is that he was scheduled to report to work at 7.30 a.m. and that the accident happened at 7.30 a.m. However, he disagreed with counsel's suggestion that he was late, stating that "Our work begins at 8 a. m. We had a grace period of half hour."

[28] A summary of the remainder of the evidence given by Mr. Marshall in cross-examination follows:

he was about 9 feet away from the entrance to Port St. Charles travelling at 30 kilometres per hour when he indicated to turn right. The turn-off point is "a little" past the entrance. He looked in his rear-view mirror

immediately before making the right turn. It is not true that the last time he looked into the mirror was when he was 9 feet away from the entrance to Port St. Charles. He did not turn on his left indicator. There was no need for him to do so since he was not entitled to park in Port St. Charles at any time. When he heard the loud screeching noise, he "just braced". There was no sound of a horn immediately preceding the accident. His vehicle was struck on the right-hand side of the road. The front of his vehicle was more over to the right-hand side. His entire car was on the right-hand side of the road. His vehicle did not travel to the right side of the road after the impact. He was charged with offences arising out of the accident, but the cases were dismissed without a trial.

[29] Under re-examination by Ms. Simmons-Beckles, Mr. Marshall said that by the loud screeching of tyre-marks, he meant the loud screeching of tyres; and that immediately before he was struck, he was already on the right side of the road. Further, he stated that he did not mean to say that he had proceeded to turn into Port St. Charles because he was not allowed to park in there at any time. In response to the Court, he said that the two vehicles which he saw in his rear-view mirror did not pass him before he turned and that he was unsure what happened after the impact. He also said that the Jimny is owned by the Container Services Ltd.

BURDEN AND STANDARD OF PROOF

[30] Before assessing the evidence, it is convenient to direct myself as to the burden and standard of proof. Counsel on both sides reminded the Court that he who alleges must prove. That principle is not in doubt. Ms. Farley referred me to ***paragraph 49.40*** of ***Blackstone's Civil Practice 2014*** which commences with the following statement:

> As to the incidence of the legal burden at common law, the general guiding principle to be derived from the precedents is that 'he who asserts must prove, not he who denies' (*Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, per Lord Maugham at p. 174.

[31] Accordingly, both Ms. Farley and Mrs. Simmonds Beckles submitted that the claimant must prove that Mr. Marshall was negligent; and Ms. Farley submitted that with respect to the counterclaim, the defendants must prove that Mr. Griffith was negligent. I accept those submissions.

[32] In respect of the standard of proof, both sides referred me to ***section 133*** of the ***Evidence Act Cap 121***. ***Section 133(1)*** stipulates that "In a civil proceeding, a court shall find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities." ***Section 133(2)*** mandates that in determining whether the Court is satisfied that the standard has been met, the matters of which it must take account include the nature of

the cause of action or the defence, the nature of the subject-matter of the proceedings, and the gravity of the matters alleged.

[33] Ms. Simmons Beckles also cited ***Re H (Minors) [1996] AC 563***. In that case, Lord Nicholls explained, at ***page 586***, that "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not". He went on to provide the following useful guidance:

> When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. ... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established

[34] In this case, both the claim and the counterclaim sound in negligence. The assertions and counter-assertions are of events that are not highly improbable. Negligent driving is a common feature of our modern reality. I must take account of this when weighing the probabilities.

ASSESSMENT OF THE EVIDENCE

[35] I now turn to my assessment of the evidence. I find it convenient to begin with the Police Report. There was no indication from Mr. Foster in his witness statement or his oral evidence that this document was produced for any limited purpose. Therefore, it constitutes evidence in this case and I must give its contents such weight as I see fit.

[36] A significant feature of the report is the recorded measurements of the brake marks from the rear wheels of ZR-135. These are stated as 27.9 metres to the right rear wheel and 28.6 metres to the left rear wheel. Ms. Farley submitted that this Court ought not to put much weight on that evidence since no member of the Police Force gave evidence, and none of the witnesses corroborated the measurements.

[37] I disagree with that submission. Mr. Foster produced the Police Report. It was attached to his witness statement on 13 December 2012. His evidence is that he was present when the police came to the scene of the accident. There is no evidence that those measurements were not taken by the Police, or that he ever challenged their validity.

[38] Mr. Griffith suggested in his evidence that the break marks were considerably shorter than the measurements reflected in the report. I found his evidence in that respect to be unreliable. He shifted from being unsure of the length of

the marks because he had moved away to sit on a pasture, to being able to provide an estimate after it was put to him that the marks were long because he was speeding. The situation was compounded by the conflicting evidence he gave while pointing out the various distances in the courtroom. He indicated two car lengths to be 5.79 metres and the length of the brake marks 2.10 metres, having stated previously that the brake marks would have started when he was two and one-half car lengths from the Jimny.

[39] In the circumstances, I reject this aspect of Mr. Griffith's evidence. I accept the measurements contained in the report. I also accept that Mr. Griffith and Mr. Marshall made the oral statements to the Police that are attributed to them in paragraph 8 of the report. There was no rebuttal evidence from either driver in respect of them.

[40] However, the Court is not influenced by the statement in the report that "Investigations revealed that [Mr. Marshall] caused the accident by turning right without due care". This Court does not know the full extent of the "investigations" to which the report refers, or the basis on which the author of the report was able to prefer one version of the events to the other.

[41] Ultimately, it is for this Court to exercise its own judgment as to the allocation of liability for the accident, after due consideration of the evidence. In doing so, I will also disregard the evidence that Mr. Marshall was charged with road

traffic offences, and that those charges were dismissed without a trial. The Court draws no inference from that evidence.

ASSESSMENT OF THE ORAL EVIDENCE

[42] I will now assess the oral evidence. I have already indicated that I reject Mr. Griffith's evidence in respect of the length of the brake marks attributed to ZR-135. Also, I cannot accept that he was only two and one-half car lengths from the Jimny when he started to overtake it, or when he applied brakes. That evidence is inconsistent with the evidence as to the length of the brake marks as shown in the Police Report. When one makes allowance for the fact that there must have been some reaction time before he braked, it is more probable than not that Mr. Griffith saw the impending danger ahead from a greater distance than 28 metres away.

[43] These findings cause the Court to approach the rest of Mr. Griffith's evidence with caution. However, he was resolute that the Jimny started to turn into Port St. Charles after indicating to do so, then without warning turned right into the path of ZR-135. He was unshaken in this aspect of his evidence despite rigorous cross-examination by Ms. Simmonds-Beckles.

[44] Mr. Marshall was equally resolute as to how the accident occurred. However, there were also aspects of his evidence that caused me some unease. First, there was the question as to how many times he checked his rear-view mirror

before commencing the right turn. In his evidence-in-chief, he spoke to doing so when he was nine feet from the entrance to Port St. Charles when he saw two cars behind him.

[45] Having carefully considered Mr. Marshall's responses to Ms. Farley, I do not accept that he checked his rear-view mirror on two occasions. It is difficult to understand why he would not have seen ZR-135 had he done so. In the Police Report, Mr. Griffith referred to the roadway as a "stretch". There is no evidence that the layout of the road was such that he ought not to have seen ZR-135 had he checked his mirror immediately before turning right.

[46] Equally, the Court was unconvinced by Mr. Marshall's evidence about what time he was scheduled to start work. His initial evidence was that work started at 7:30 a.m. and that it was around that time that he approached the entrance to Port St. Charles. It was only when Ms. Farley suggested to him that he was late, that he stated that he had a grace period of half of an hour and that work started at 8 a.m. This evidence appeared to this Court to have been contrived as was his evidence about checking his rear-view mirror a second time.

[47] I must also state that this Court was not stirred by Mr. Marshall's refrain that he was not permitted to park inside Port St. Charles. Even if that were so, it does not give rise to any particular inference as to what he did on the morning of the accident.

[48] Fortunately, there is other eye-witness evidence in this case. This brings me to Ms. Nicholls and Mr. Boyce. I accept that they were passengers on ZR-135. There is nothing to refute their evidence to that effect. Ms. Farley described these witnesses as "independent witnesses". There is no evidence that they were not, despite Ms. Nicholls' familiarity with Mr. Griffith from travelling on ZR-135 regularly.

[49] Both these witnesses stated that the Jimny signalled to turn left and commenced a turn into Port St. Charles before turning right across the road into the path of the overtaking ZR-135. Ms. Nicholls' evidence is that there were no vehicles between the Jimny and ZR-135. Mr. Boyce's evidence is that the van that was involved in the collision was in front of ZR-135.

[50] Ms. Farley highlighted the consistency between the evidence of these witnesses and that of Mr. Griffith and urged the Court to reject Mr. Marshall's account. She underscored the fact that Mr. Boyce was not cross-examined. She submitted that Ms. Nicholls was unshaken in cross-examination; and that she maintained she was able to see what happened when the accident occurred.

[51] Ms. Simmons-Beckles submitted that only minimal weight should be placed on Ms. Nicholls' evidence. She pointed to the inconsistency between the statement attributed to her in her statement to the Police and her evidence in

respect of what she saw immediately before the collision. Counsel also urged that Ms. Nicholls could not have seen anything given her statement that there was a window to her right.

[52] The varying accounts given by Mrs. Nicholls raise an issue of credibility which casts serious doubt on the reliability of her evidence. That reliability is not enhanced by her failure to explain how she was able to see what occurred on the left side of the road. Were this the only evidence adduced by Mr. Foster, this Court would not have been prepared to hinge a finding of negligence on it.

[53] However, there is also Mr. Boyce's evidence. Ms. Simmons-Beckles submitted that I should also give it little weight. She highlighted that (i) he stated that the colour of the van that was involved in the accident was blue, when all the evidence points to the Jimny being red; (ii) he could not recall the number of the van that was involved in the accident, or whether he had spoken to the Police; and (iii) that he had stated that ZR-135 ran into the "back" of the van. The uncontroverted evidence is that the Jimny sustained damage to the rear of its right side.

[54] I am not persuaded that I should reject Mr. Boyce's evidence in its entirety on account of the matters identified by Mrs. Simmons Beckles or that his evidence is as useless as she suggests. He was not cross-examined. There was

no suggestion that he did not witness the accident. It is understandable that a witness might not correctly recall every detail about an incident which occurred so long ago. However, his evidence is clear and unchallenged that there was a van ahead of ZR-135; and that it turned on its left indicator, started to turn left, and then turned right.

[55] Only one van was involved in a collision with ZR-135 by Port St. Charles on the morning of 13 January 2009 at a time when both Mr. Boyce and Ms. Nicholls were in that vehicle. There is no evidence of a second accident. Clearly, Mr. Boyce's evidence as to the colour of the Jimny was incorrect. Clearly, he could not recall its registration number. However, that does not make the rest of his evidence useless.

[56] In the circumstances, I accept Mr. Boyce's evidence as to the movements of the Jimny just before the collision. It follows that I reject Mr. Marshall's evidence and accept Mr. Griffith's in this respect. I am also persuaded by Mr. Griffith's evidence that there were no vehicles between ZR-135 and the Jimny. There is nothing in Mr. Boyce's account about ZR-135 overtaking any other vehicles. I therefore understood his evidence to be that the Jimny was directly in front of ZR-135. Mrs. Nicholls' evidence is also to that effect. That aspect of her evidence was not discredited.

WAS MR. GRIFFITH DRIVING AT AN EXCESSIVE SPEED?

[57] Thus far, I have eschewed discussion in respect of the speed of ZR-135. The onus is on the defendants to prove that Mr. Griffith was driving at a speed that was excessive in the circumstances and that had he been driving more slowly he would have been able to avoid the collision.

[58] Mr. Marshall did not see ZR-135 prior to the impact and, therefore, could offer no opinion in respect of the speed at which it was travelling. The only direct evidence of speed comes from Mr. Griffith and Ms. Nicholls. Her evidence that Mr. Griffith was "driving normal" and "not speeding" was vague and unhelpful. The Court has no idea what she regards as "normal" driving or "speeding". She gave no opinion as to a rate of speed and no evidence to enable me to assess the basis on which she could competently estimate speed.

[59] Mr. Griffith was a licensed driver of six years' experience at the date of the accident. However, I approach with caution his evidence that he was travelling at approximately 40 to 45 kilometres per hour and that he reduced his speed before attempting to go pass the Jimny. The manner in which he gave his evidence about the brake marks lead me to think that he might have understated the speed at which he was travelling. Also, given the distance that ZR-135 was away from the Jimny when it indicated to turn left into Port St.

Charles, I doubt that he would have reduced his speed to go pass it. If he changed his rate of speed, it is more likely that he would have increased it.

[60] There is no other evidence in this case to assist me in determining the speed at which Mr. Griffith was travelling. The Court has reflected on the length of the brake marks, the fact that the road was dry, and the nature and extent of the damage to the two vehicles. However, I do not have the benefit of expert evidence as to the likely speed at which ZR-135 was travelling. I cannot speculate.

[61] In the circumstances, while I find that ZR-135 was travelling at a speed in excess of 45 kilometres per hour, I am unable to find the extent to which it exceeded that rate, or that it was travelling at a speed that was excessive in all the circumstances. The defendants have failed to discharge the burden on them in that regards.

FINDINGS OF FACT

[62] Therefore, I find that there were no vehicles between ZR-135 and the Jimny as the two vehicles travelled northbound along Heywoods Road on the morning of 13 January 2009. I also find also that ZR-135 was more than 28 metres behind the Jimny when Mr. Marshall employed his left indicator and commenced a left turn into Port St. Charles. Observing this, Mr. Griffith began to overtake the turning Jimny as the road ahead was clear. At that time,

he was travelling at a speed greater than 45 kilometres per hour. Mr. Marshall then suddenly and without warning turned the Jimny right across the road into the path of ZR-135. He did not check his rear-view mirror immediately before making that turn or otherwise try to ascertain whether any vehicles were approaching from behind him. Mr. Griffith applied his brakes but he was unable to avoid the collision.

[63] There is no issue that Mr. Griffith was driving as the servant or agent of Mr. Foster. Their evidence as to the relationship between them supports that conclusion. I find also that a like relationship existed between Mr. Marshall and Container Services Ltd. The is evidence that Container Services Limited owned the Jimny. There is nothing to rebut the presumption which arises from the fact of ownership that Mr. Marshall was driving as Container Service Limited's servant or agent. That presumption has been articulated in a number of cases including ***Barnard v Sully (1931) 47 TLR 557***, ***Rambarran v Gurrucharran (1970) 15 WIR 212***, and ***Barbados Automobile Appliances Ltd. v Williams et al Civ App No 19 of 1990, date of decision 29 September 1993***.

LIABILITY

[64] The basic principles of law that are relevant to liability are not in dispute. Ms. Farley referred me to ***paragraphs 1-34*** of ***Charlesworth & Percy on***

Negligence 12th ed. for general guidance on the tort of negligence. There the editors note that the essential components are recognised as (i) "the existence of a duty to take care, which is owed by the defendant to the complainant; (ii) the failure to attain that standard of care, prescribed by law, thereby committing a breach of such duty; and (iii) damage, which is both causally connected with such breach and recognised by the law, has been suffered by the complainant.

[65] At ***paragraphs 10-187*** to ***10-191***, the same text sets out the following principles:

> 1. … the duty of a person who either drives or rides a vehicle on the highway is to use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the highway.
>
> 2. Reasonable care means the care which an ordinarily skilful driver or rider would have exercised, under all the circumstances, and connotes an "avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on" (*Bourhill v Young [1943] A. C. 92* at 104, per Lord Macmillan).
>
> 3. Primarily, the person who either drives or rides a vehicle on the highway owes a duty to all other road users … .
>
> 4. A road user must not assume that others on the highway will themselves behave with reasonable care, which common experience has shown to be a false assumption.
>
> 4. The duty of care is owed to "persons so placed that they may reasonably be expected to be injured by the omission

to take such care" (*Bourhill v Young* [1943] A. C. 92 at 104).

5. It is essential always to bear in mind … that each decision turns on its own individual facts.

[66] Ms. Farley submitted that on the balance of probabilities, the actions of Mr. Marshall were negligent in all the circumstances. She referred me to **paragraph 10-207** of **Charlesworth and Percy** for the proposition that "A driver should use reasonable care while being overtaken, and must not swerve outwards, so as to get in the way of the vehicle overtaking him".

[67] Counsel submitted further that there was no evidence of negligence on Mr. Griffith's part. She also contended that if the Court attributed any blame to him, the degree of culpability should be minimal since Mr. Marshall's right turn without warning was the proximate cause of the accident.

[68] Ms. Farley cited ***Clark v Wakelim (1965) 109 Sol Jo***, ***Brown v Paterson [2010] EWCA Civ 184*** and ***Whittle v Bennett [2006] EWCA Civ 1538*** in the course of her submissions. ***Clark v Wakelin*** is summarised in **Bingham & Berrymans' Motor Claims Cases** at **paragraph 10.68** in this way:

> The claimant on a pedal cycle turned right from the nearside of the road and was struck by the defendant who was about to overtake a motorcycle. The claimant's statement to the police was 'I looked behind me, let a car go by, put out my hand and turned right.' The defendant said that he was about to overtake when the claimant put out his hand, turned and never gave him a chance to avoid the accident. The claimant said in his evidence that the car he let go was coming towards him from the opposite

direction. He relied on the provision in the Highway Code 'Never overtake unless you know you can do so without danger to yourself and others.'

The judge said the defendant's version of the accident was to be accepted. A driver was entitled to assume that he could overtake without danger if what he was overtaking gave not the slightest sign that it was going to do something other than what another ordinary careful motorist or motorcyclist might expect. The claimant was solely to blame.

[69] The summary of ***Brown v Paterson*** is set out at **paragraph 10.71** of **Bingham & Berrymans' Motor Claims Cases**. It reads:

The claimant (a motor cyclist) was involved in a collision at night, with a BMW car driven by the defendant on the A420. The claimant's motor cycle did not have any indicators, as it was an off road bike.

Both vehicles were travelling in an easterly direction, with the claimant positioned on the nearside of the carriageway. It was pitch black as there were no street lights. The claimant intended to execute a right turn, and moved from the left of the carriageway towards the centre line. It was found that he did not indicate or do anything to alert the defendant of his intention and it was the defendant's evidence that "it was clear that the claimant was going to go straight ahead."

At first instance the judge entered judgment in favour of the defendant on the basis that the defendant was not in breach of the provisions of the Highway Code, in terms of his decision to overtake the claimant, and that the accident was caused, when the claimant suddenly moved across the carriageway into his path, without indication or warning resulting in a collision. The claimant appealed.

Held, on appeal:

> That there was no absolute prohibition to overtaking when approaching a junction, and it was for a court to determine whether it was negligent by consideration of all the circumstances. On the evidence, the court was satisfied that the defendant was not in breach of the Highway Code and there was nothing in the circumstances, namely the claimant's position in the road, speed and lack of indication, to suggest to the defendant that he was going to make a right turn. The court was therefore satisfied that a reasonably careful driver would have undertaken the limited overtaking manoeuvre in these circumstances, and dismissed the appeal.

[70] In ***Whittle v Bennett***, the Court of Appeal of England and Wales upheld the decision of the trial judge who had determined that the appellant had caused the accident by making a U-turn in the path of the defendant in circumstances in which the defendant could not avoid the collision. The claimant had accepted some negligence on his own behalf. However, he claimed that the defendant was negligent in that he was driving too fast and too close behind another vehicle that had successfully overtaken the claimant's vehicle. The trial judge rejected that contention. The Court of Appeal considered that the judge came to a proper conclusion which was open to him on the facts as he found them to be. At first instance, (***Whittle v Bennett [2006] All ER (D) 166 (Feb)***), the trial judge held in the alternative that if he was wrong in his finding that the defendant's driving was not a cause of the accident, he would have apportioned liability "80% claimant and 20% defendant". I understood that to be the basis on which Ms. Farley submitted that if this Court determined

that Mr. Griffith was culpable, the degree of blame should be "minimal". Counsel also underscored the following passage found at ***paragraph [21]*** of the judgment of the trial judge and referred to without adverse comment by the Court of Appeal at ***paragraph [16]***:

> Drivers of motor vehicles are, of course, expected to anticipate carelessness by other road users. To expect them to anticipate a U-turn on a A road into the path of following vehicles would be, in my judgment, an 'unattainable counsel of perfection'.

[71] Ms. Simmonds Beckles submitted those cases were distinguishable from the instant case. She urged that Mr. Griffith was negligent. She contended that he had begun to overtake Mr. Marshall after Mr. Marshal had indicated his intention to turn right. She urged that the Court should grant judgment in favour of the defendants. Counsel cited ***Burton v Evitt [2011] EWCA Civ 1378*** which Ms. Farley urged was inapplicable.

[72] In ***Burton v Evitt***, Mr. Evitt was turning right into a car park. There was a line of traffic behind his motor car. Mr. Burton was riding a motorcycle in the same direction. He overtook the line and collided with the car being driven by Mr. Evitt as he turned into the car park. The trial judge determined that both drivers were negligent, Mr. Burton for riding at a speed that was not safe and in such a way that he could not deal with an emergency; and Mr. Evitt for failing to travel across the centre line "inch by inch" given that there was an area which he could not see. The Court of Appeal upheld the trial judge's

finding that Mr. Evitt was partly to blame for failing to "inch out" when he came to a point where he could not see what might be coming up on his offside. However, it altered the trial judge's apportionment of liability from 66/33 to 80/20 in favour of Mr. Evitt.

[73] I have considered these cases. However, each case must turn on its own facts. I have determined that Mr. Marhsall turned right across the path of ZR-135 after signalling to turn left and beginning a left turn into Port St. Charles. He failed to keep a proper look out and to observe the presence of ZR-135 on the road. This amounted to negligence on his part and I consider his actions to be the sole cause of the accident.

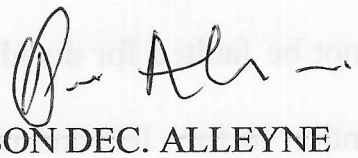
[74] The defendants have not established that Mr. Griffith was negligent. They did not discharge the burden of proving that he was driving at a speed that was excessive in the circumstances. I am satisfied that he was keeping a proper lookout. He cannot be faulted for deciding to move pass the Jimny after it indicated an intention to turn left and commenced a left turn into Port St. Charles. Also, I do not think it is material whether Mr. Griffith sounded his horn or not, as the Jimny was turning left off the roadway.

[75] A driver must not assume that other road users will themselves behave with reasonable care. However, as Lord Uthwatt stated in ***L. P. T. B. v Upson [1949] A.C. 155 at 173***, he is not "... bound to anticipate folly in all its

forms"…". Mr. Griffith could not reasonably have been expected to anticipate that having commenced a left turn into Port St. Charles in accordance with his signalled indication, Mr. Marshall would have suddenly and without warning turn across the roadway. The fact that there is no evidence of a road opposite Port St. Charles, or that Mr. Griffith was aware of any practice whereby workers in Port St. Charles parked on the pasture to which Mr. Marshall referred strengthens that proposition. I can attribute no causative fault to Mr. Griffith.

DISPOSAL

[76] Accordingly, the Court holds that the defendants are solely liable for the accident. I will hear the parties in respect of costs and the terms of any further orders which the Court ought to make to give effect to this decision.



OLSON DEC. ALLEYNE

JUDGE OF THE HIGH COURT