

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. CV 1319 of 2004

BETWEEN:

EUDINE CLARKE

PLAINTIFF

AND

JANICE WHITE

DEFENDANT

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

Date of Decision: 25 June 2020

Mr. Lorimer Denny in association with Ms. Tya Atwell for the Plaintiff

Mr. Frederick Alleyne for the Defendant

DECISION

INTRODUCTION

[1] The plaintiff commenced these proceedings on 3 September 2004. They arise out of a motor vehicle accident which occurred on 17 December 2002 on the ABC Highway. The plaintiff alleges that the defendant is legally responsible. The defendant denies liability.

- [2] The parties have agreed that if the plaintiff succeeds, she is entitled to \$13,636.83 which she claims for the loss of her motor vehicle. Hence, the sole issue for the Court's determination is whether the defendant is liable.

THE PLEADED CASE

- [3] In the third paragraph of a re-amended statement of claim filed on 21 October 2014, the plaintiff avers that the accident happened in this way:

On or about the 17th day of December 2002, the Plaintiff was driving motor vehicle registration number X-1471 along the ABC Highway from the Garfield Sobers Roundabout and proceeding towards the Errol Barrow Roundabout when the Defendant or her servant and/or agent whilst travelling in the opposite direction so negligently drove, managed and controlled motor vehicle registration number X-1473 across the path of the Plaintiff that he/she caused the Plaintiff as driver of the motor vehicle registration number X-1471 to veer off the said highway and into a ditch.

- [4] At paragraph 4, the plaintiff particularises the alleged negligence as:
- (i) Driving at a speed which was excessive in the circumstances;
 - (ii) Failing to keep any or any proper look out or to have any or any sufficient regard for the users of the said road, particularly on-coming traffic on the road, to wit the Plaintiff.
 - (iii) Failing to heed the presence or approach of the motor vehicle registration number X-1471 in which the Plaintiff was driving;
 - (iv) Failing to stop, or to wait on the ABC Highway until the Plaintiff passed her in safety before turning or attempting

to turn onto her right into the minor road which leads to Warners;

- (v) Failing to give any or any sufficient or timely warning or signal of her intention to turn right across the path of the Plaintiff;
- (vi) Turning or attempting to turn from the ABC Highway onto a minor road across the path of the Plaintiff when it was unsafe and dangerous to do so;
- (vii) Driving motor vehicle registration number X-1473 across the path of the Plaintiff.

THE EVIDENCE

[5] The parties gave evidence on their own behalf. Mrs. Ursel Farier, formerly Castillo (“Mrs. Farier”) and Sergeant Philmore Hall (“Sgt. Hall”) also testified for the plaintiff. The defendant called no witnesses.

The Plaintiff’s evidence

[6] The plaintiff adopted the contents of a witness statement filed on 31 January 2011 as part of her evidence-in-chief. She set out her account of the accident at paragraphs 2 to 4 in this way:

On the 17th December 2002, at or around 6.15 p.m., I was driving on the “ABC Highway” coming from the direction of the Garfield Sobers Roundabout going towards Graeme Hall Roundabout.

As I approached the junction which takes traffic into Warners and towards Tino Terrace, a blue motor vehicle travelling in the opposite direction, that is, coming from Graeme Hall Roundabout, suddenly and without warning dashed across the road in front of my motor vehicle.

In an effort to avoid hitting the motor vehicle, I swerved and applied my brakes as my vehicle was now heading across the other side of the road. I pulled my steering wheel but my motor vehicle spun around and then came to a stop in a ditch at the side of the highway. After the impact my motor vehicle turned and faced up the embankment.

- [7] At paragraph 5, the plaintiff stated that a witness, Mrs. Farier, informed her that that the registration number of the vehicle that had suddenly crossed in front of her was X-1473. In response to her counsel Mr. Lorimer Denny who appeared in association with Ms. Tya Atwell, she said that she did not know Mrs. Farier before. She also stated that at the time of the accident, it was bright and that she “had good visuals”.
- [8] Under cross-examination by the defendant’s counsel Mr. Frederick Alleyne, the plaintiff stated that she was travelling between 55 to 60 kilometres per hour in the left lane of a dual carriageway. She said that the road was dry; there were no vehicles beside or behind her; and hers was the only vehicle travelling eastwards at that time. She could not recall if the street lights were on or if there was sunlight. She stated that she had on her vehicle lights and that she could see the colour of the cars on the road.
- [9] Questioned further, the plaintiff stated that she could not indicate the distance between her and the blue car when it started to turn right into Tino Terrace. She maintained that she saw the vehicle and that the manoeuvre was sudden.

She admitted that she was going home after a long day at work but denied that she had a lot on her mind. She stated that she was fully focused on the road conditions and her surroundings. Her evidence is that when she saw the blue car appear suddenly in front of her, she did not blow her horn. She also stated that she did not recognise the make of the vehicle or its registration number, and that she is not familiar with vehicle makes.

[10] Still under cross-examination, the plaintiff stated that after her vehicle came to rest, she walked back to the junction and observed that the blue car had stopped. She said that as soon as she got there it sped off and she did not recognise a registration number. Her evidence is that Mrs. Farier then came over and gave her some information; the police came to the scene; and she used that information to tell the police the make, model and registration number of the blue car. She denied that she had been driving inattentively, negligently or fast. She could not recall the age of her vehicle but stated that she would have it service as the need arises.

[11] Re-examined, the plaintiff stated that when she said that it was bright, she meant that it was bright enough that she could see the vehicles on the road. She said that the events had unfolded quickly and that it had not taken her long to walk to the junction which was not far away. She stated that it took her “a minute or two” to get there when she observed that the blue car had

stopped. Her evidence is that it was about 25 feet away from her and that she can see clearly from that distance.

Mrs. Farier's evidence

[12] Mrs. Farier's evidence as to how the accident occurred is found at paragraphs 2 and 3 of her witness statement filed on 1 December 2010. She stated:

On the 17th December 2002, around 5:45 pm., I witnessed an accident which occurred on the ABC Highway near the Graeme Hall Roundabout. I was driving from Graeme Hall Roundabout going towards Garfield Sobers Roundabout. I was third in line waiting to turn into Tino Terrace.

A blue Toyota was the first motor vehicle in the line waiting to turn. The driver of that motor vehicle suddenly made the turn and dashed across the road in front of the Claimant's vehicle, X-1471, a white Toyota which was heading towards the Graeme Hall Roundabout. The Claimant lost control of her motor vehicle, and it veered off the road and into the ditch on the side of the highway closest to Tino Terrace.

[13] Mrs. Farier's further evidence as set out at paragraph 4 follows:

I immediately stopped my vehicle, and exited my vehicle. I noticed that the driver of the blue vehicle, which bore registration number X-1473 stopped for a moment along the incline at the start of Tino Terrace. He turned his head and looked out through the driver's side window of his motor vehicle for a moment. I shouted and tried to cross the road to tell him to wait. Before I could reach him, he quickly left the scene of the accident.

[14] The witness stated further in her statement that after the driver of motor vehicle X-1473 left, she crossed the road and ran to the plaintiff's assistance; called the police and the ambulance; and told the plaintiff the registration

number, make, model and colour of the vehicle. Her further evidence is that she could not await the arrival of the police, and that she later wrote a letter dated 17 January 2003 in which she outlined what she had seen and attached a diagram to it. She stated that she sent the letter to Insurance Corporation of Barbados (“ICBL”), the plaintiff’s insurers. The letter and the diagram were admitted into evidence by agreement.

[15] Mrs. Farier was permitted to amplify her witness statement. She said that she was able to see the motor vehicle X-1473 because it was first in line; and she could see its registration number. She said that Tino Terrace would have been to her right. She stated that the street lights and her vehicle lights were on and that “... outside it was the last light before it gets dark”. Her further evidence is that she was trying to flag down oncoming cars while shouting across the road “to the person in the vehicle to stop but they drove off. They looked out and drove off.” She stated that when she saw that the vehicle had stopped, she was about two or three car lengths across the road and the registration number was clear to her. She said that she wrote the number down on a piece of paper after calling the police; and that she wrote the letter of her own volition when the events were still fresh in her mind.

[16] Mrs. Farier’s letter is part of the evidence in this case. It is addressed “To whom it may Concern”. It reads:

Dear Sir/Madam,

This letter is to state that on the 17th December 2002 around the hours of 5:45-6:15 pm I ... witness (*sic*) an accident which occurred on the right hand side of the junction approaching Graeme Hall round-about. I was at the junction waiting in line to turn to Tino Terrace while X1473 a blue Toyota was in the same lane waiting to turn off in front of me. The person driving the vehicle Reg. X1473 dashed across to Tino Terrace in front of X1471 a white Toyota giving the driver of X1471 little time to act or respond. She avoided hitting the vehicle and lost control of her vehicle which ended up in the ditch and came out on the righthand side of the road. ... The driver of X1473 stopped and gazed, but quickly left the scene after everyone was trying to get him/her to stay on the scene. This letter was written to the best of my knowledge and a diagram of the accident is also submitted.

- [17] The drawing is not to scale. It depicts a roadway running from a circle designated "Greame Hall ROUND-A-BOUT" with a junction identified as "Turn off to Tino Terrace Sheraton" on the right of the diagram and four motor vehicles. On the left of the diagram, depictions of vehicles identified as "X 1473 Blue Toyota", "White car" and "My Car XA2480 at the time" are shown one behind the other, in that order, on the section of the roadway opposite the entrance to what is shown as Tino Terrace. "X 1473 Blue Toyota" is positioned directly opposite the area shown as the entrance to the minor road with its left side in line with the right side of the two vehicles depicted behind it. It is positioned in the area of a break in the centreline of the roadway. This vehicle is shown a second time on the other side of the road as if entering the minor road, and a third time on the left side of the minor road with the notation

“X1473 waited for a while But left the scene (*sic*)”. “X1471” is depicted twice. It is shown on the right side of the diagram on the main roadway by the entrance to the minor road at a right angle to “X1473” as shown entering the minor road. In the second depiction, “X1471” is positioned pass the mouth of the junction, partly on the roadway on the right side of the diagram and partly in an adjoining area identified as “Ditch”.

[18] Under cross-examination, Mrs. Farier said that she looked at her watch when the accident occurred. She stated that the vehicle that was between her car and the vehicle that turned across the road was white in colour. She could not remember the registration number or make of that vehicle but thought that it might have been a Subaru. Her evidence is that she was only focusing on the blue car. She stated that she was wearing contact lenses since she is nearsighted and denied that her vision was obstructed. She maintained that she could see the number of the vehicle at the head of the queue.

[19] Ms Farier’s further evidence is that the road was dry, and that as she was waiting to turn, four or five vehicles came towards her before the plaintiff’s car “... but not all ... at the same time ... [t]hey had breaks in between”. She stated that she heard a horn being blown and that it was possibly from the plaintiff’s vehicle. Her further evidence is that her car remained where it was before the blue car turned. She reiterated that when she first observed the blue

car on the incline, she was standing by the actual turn-off point but had not crossed over the road. She stated that the distance between where she was standing and the blue car was about two car lengths. She admitted that she was trying to call the police and the ambulance, flag down vehicles and stop the man from leaving at the same time. However, she said that she would not state that it was “sensory overload” and that she can multitask. She stated that she had not recorded the information relating to the white car that was ahead of her, and that she did not think that she was mistaken as to the registration number of the blue car.

[20] Re-examined, Mrs. Farier said that she was focused on X1473 since it was the first vehicle to turn into Tino Terrace. She stated that she was sure about the number and colour of the vehicle. She said that it had passed her “... between the round-a-bout at Top Rock and Graeme Hall where he stopped at the junction”.

The evidence of Sgt. Hall

[21] Sgt. Hall adopted the contents of a witness statement filed on 31 January 2012 as his evidence-in-chief. This is a summary of his evidence:- at the date of the accident, he was a Police Constable of 20 years’ experience. On 17 December 2002, he attended the scene of an accident where he saw a white Toyota motorcar bearing number X-1471 in the ditch on the left-hand side of

the highway facing in an easterly direction. The plaintiff identified herself to him as the driver of that vehicle. Asked by him to give an account of what happened, she said "I was coming up the Highway, and a car turned 'cross me, I press brakes and lost control of the car". He said that he subsequently created an accident file and a Police Report was issued.

[22] The Police Report was admitted into evidence without objection. It is dated 3 September 2010. It states that the accident occurred on 2 December 2017 at 18:15 hours; that it was dark at the time; and the road conditions were dry. It identifies no vehicle other than X-1471 as being involved in the accident. Under the caption "BRIEF STATEMENT OF PARTICULARS OF ACCIDENT", it states:

Investigations revealed that the driver of X-1471 was travelling towards the east along the Barrow Section of the A.B.C. Highway. Another vehicle was travelling in the opposite direction towards the Sir Garfield Sobers Roundabout. As the vehicle X-1471 reached the junction of the A.B.C. and Warners Road, the driver of the second vehicle turned right across the path of X-1471. The driver of X-1471 applied brakes and lost control of her vehicle, which veered off the road into a gutter on the left side of the road. The driver of X-1471 said, "I was coming up the highway and a car came out and turn cross my path, I press the brakes and loss control of the car". The driver of the second vehicle is at fault due to turning right without due care and attention. The second vehicle is unknown.

[23] Under cross-examination, Sgt. Hall stated that he was accompanied by another police office but he, Sgt. Hall, was the "lead officer". He said that X-

1471 was the only motor vehicle he saw that was involved in the accident. He stated further that the plaintiff spoke to him but she did not tell him the make, model or registration number of the vehicle which she said had crossed her path.

[24] Sgt. Hall's further evidence is that no later than one month after, he prepared an accident file which included a written report based on the information from his notebook. He could not recall discussing the matter with the officer who had accompanied him to the scene, and he did not receive his assistance in preparing the accident file. He stated that he did not prepare the Police Report but that the information for it would have come from his notebook.

[25] The witness' further evidence is that it is not possible to determine whether a driver is acting without due care on the evidence of one driver; and that one should speak to the other driver and other witnesses. He said that he did not identify any witnesses. He did not request that the plaintiff's vehicle be inspected by an inspector from the Ministry of Transport and Works. He agreed with counsel that he did not know whether the accident was caused by a mechanical failure. He said that he had followed the procedure applicable where there is a "one-car collision". He could not recall what time he arrived at the scene, and said that the plaintiff had told him the time of the accident.

He was re-examined by Ms. Atwell.

The defendant's evidence

[26] The defendant's evidence-in-chief comprised, in part, the contents of a witness statement filed on 27 January 2011. That statement reads:

1. ... at all material times I resided at ... Maxwell Main Road, Maxwell in the parish of Christ Church.
2.
3. I am the holder of a Barbados Driver's license (*sic*) for the past 25 years.
4. I am the owner of a Toyota Starlet Motor car bearing the registration number X 1473 and I have owned this vehicle for the past 12 years.
5. During the time that I owned this motor vehicle it was always registered as X – 1473.
6. I have had this car insured with Co-operators General Insurance Company Limited from around the year 1998.
7. I recall receiving a letter from the Insurance Corporation of Barbados Limited informing me that my motor vehicle was involved in an accident.
8. I cannot remember the exact date when I received this letter ..., but it was sent some while after this incident was alleged to have occurred.
9. In fact the first time I had any knowledge of this incident was when I was received this letter ... (*sic*).
10. On receipt of this letter ...; I attended the offices of [my insurers] and I completed a claim form. A copy of the completed claim form is hereto annexed and marked "JW1".

11. On the date when this incident is alleged to have occurred I cannot recall being in the area of Graeme Hall.
12. I did not have nor did I cause any collision with the car owned by the Claimant.
13. There is no other person who would have driven my car on the date in question.

[27] The defendant gave additional evidence-in-chief. She stated that she received the letter from the plaintiff's insurers in 2004, and that she went to her insurers about a week after receiving it. Her further evidence is that on the date of the accident, she was employed part-time at a business in Newton. She indicated various addresses in Christ Church at which she previously resided. These included Maxwell Main Road.

[28] The letter and the insurance claim form to which the defendant referred were admitted into evidence without objection. The letter is dated 18 February 2004. The second and third paragraphs read:

Our insured has reported to us that on the 17th December 2002 at around 6:15pm, she was driving her vehicle along the ABC Highway when you so negligently managed your vehicle as to cause our client to lose control of her motorcar. As a result, Ms. Clarke has suffered loss and damage, for which she seeks compensation.

We are told by your insurers, ... that you are yet to report this matter. This letter serves to advise that unless this matter is reported by you to your insurers on or before the 8th March 2004, we will commence legal proceedings on behalf of our client without further reference to you.

[29] The form is dated 27 February 2004. It states the plaintiff's address as Maxwell Main Road, Christ Church. In section 2 after stating that she is the owner of X-1473 which she described as a Toyota Starlet, the plaintiff responded "Yes" to the question "Was the vehicle being used with the owner's consent". She inserted her name and address in section 4 which bears the caption "THE DRIVER", and in section 5 she provided the following responses under the caption "THE ACCIDENT OR LOSS":

Date 17-12-02; Time: 6-15 – 630 pm; Place: ABC Highway
Did the Police go to the scene? Yes
Policeman's name/No PC Hall Police station to which
reported: Worthing.

[30] The third page of the statement is captioned "Statement (to be completed by Driver)". It comprises a number of lines on which there is an invitation to "Give details of the accident or loss as it occurred" The end of the statement contains a declaration "... that the foregoing particulars by me/us are true in every respect ...". This is followed by provision for the affixing of the "Driver's signature" and the "Insured's signature". Both areas were signed by the defendant. The handwritten statement reads:

I received a letter from ICBL ..., informing me, Janice White, that my vehicle caused an accident along ABC highway on December 17, 2002. I wish to inform you that the reason I did not report any accident was because I was not aware of any accident and I don't have any recollection of such accident. The only other person who could have possibly been driving my vehicle have (sic) no recollection of such accident. I am sorry

that this matter took so long to get to my attention, because I am not aware of all the facts.

[31] Mr. Denny's cross-examination of this witness probed a number of distinct areas. The first was whether she was living in Maxwell Coast Road on the date of the accident. She said that she was unsure and that it was not her evidence that she had lived there in 2002. She was then directed by Mr. Denny to paragraph 1 of her witness statement where she stated that "at all material times" she resided at Maxwell. She stated that she did not understand the import of the quoted phrase when she signed the statement. She acknowledged that Maxwell was close to the Errol Barrow section of the ABC highway. She also stated that it would not have been strange to see her vehicle in the area of the accident since prior to living in Maxwell, she lived in Durants.

[32] The defendant was then asked to reconcile the statement on the insurance form that "The only other person who could have possibly been driving my vehicle have (sic) no recollection of such accident" with paragraph 13 of her witness statement. In that paragraph, she stated that there is no other person who would have driven the car on the date of the incident. She stated that the statements did not appear to her to be contradictory. She said that she made the statement in the witness statement "... based on the fact that [she] would have asked [her] son and [her] husband if they were driving and they would

have indicated not". She said that, in her opinion, the statement at paragraph 13 is true.

[33] The witness was questioned at length about the use of her vehicle by her husband and her son. I will come back to that evidence. She was also asked how she came by the information which she inserted on the insurance form in the area under the caption "THE ACCIDENT OR LOSS". She said that she was not sure but that it is possible it was in the letter sent to her by ICBL. Initially, she repeated this uncertainty when re-examined by Mr. Alleyne but then stated that the information was in the letter.

DISCUSSION

[34] Three issues arise for consideration in this case. These are (1) was the defendant's car present at the scene of the accident; (2) if so, (a) did it negligently cross the path of the plaintiff's car causing it to sustain damage; and (b) was it being driven at the time by the defendant or her servant or agent? If the plaintiff is to succeed, each of these questions must be answered in the affirmative.

THE BURDEN AND STANDARD OF PROOF

[35] He who alleges must prove. The plaintiff bears the burden of proof in this case. In his submissions, Mr. Denny reminded the Court that the applicable standard of proof is the balance of probabilities. *Section 133(1)* of the

Evidence Act Cap. 121 (“the *Evidence Act*”) provides 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.”

[36] *Section 133(2)* mandates that, in determining whether that standard has been attained, “the matters that [the Court] shall take into account include the nature of the cause of action or defence, the nature of the subject-matter of the proceeding and the gravity of the matter alleged”. I remain mindful of that non-exhaustive list of factors.

[37] Mr. Denny referred me to *Re H (Minors) (sexual abuse: standard of proof) [1996] AC 563* at 586 for the meaning of the term “the balance of probabilities”. There, Lord Nicholls explained 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”. Lord Nicholls 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

[38] This is a negligence suit arising out of a motor vehicle accident. Mr. Denny submitted that the facts as asserted by the plaintiff are very probable. Negligent driving is a common feature of our modern reality, and the inherent probability of an accident occurring in the manner alleged by the plaintiff can hardly be said to be miniscule.

[39] Mr. Denny submitted further that it was "... a very common practice for vehicles to make this turn onto Tino Terrace". No evidence was adduced in support of that assertion; and no consideration was given at the hearing to whether it is a matter of which this Court can take judicial notice. Hence, the defendant would have had no opportunity to make submissions in relation to it, as is required by *section 118(4)* of the *Evidence Act*. I must therefore reject that submission.

GENERAL ASSESSMENT OF THE WITNESSES

[40] Before turning to the three issues which I have identified, I will make some general comments in respect of the witnesses and the evidence. Having observed them carefully as they gave their evidence, I am satisfied that each

of the witnesses made a genuine effort to assist the Court. None of them were so discredited as to merit the rejection of the entirety of their evidence.

[41] Mr. Alleyne did not suggest in cross-examination or submit that the plaintiff or her witnesses deliberately lied to the Court. He submitted that Mrs. Farier may have been a mistaken witness. I consider that submission later and find her evidence in respect of the particulars of the motor car which she states turned across the plaintiff's path to be reliable. Counsel's only submission in respect of the plaintiff was that she was unable to positively identify the car.

[42] Mr. Alleyne submitted that I should reject Sgt. Halls' evidence since the Officer admitted that the findings stated in the report were not his findings. Counsel also urged that Sgt. Hall's investigations were incomplete since, according to Counsel, the Officer had failed "... to conduct inquiries as to the information given to him concerning the registration number of the offending motor-vehicle". Counsel seem to have overlooked the fact that Sgt. Hall's evidence was that the plaintiff gave him no details about the vehicle.

[43] Sgt Hall gave evidence at the trial which was largely consistent with the contents of the Police Report. He stated that the Police Report was compiled from information he provided. I see no reason to reject his evidence. The real issue seems to be how much weight I should give to the particulars of the accident as set out in the police report, given that they were based solely on

an interview of the plaintiff conducted in the absence of the driver of the second vehicle referred to.

[44] It seems to me that a statement secured in the circumstances outlined would attract less weight than if both drivers were interviewed in the presence and hearing of each other. However, it is for this Court to determine the defendant's liability based on all the evidence before it. That evidence includes the eye-witness accounts of the plaintiff and Mrs. Farier which have been properly tested by Mr. Alleyne's cross-examination.

[45] Mr. Denny submitted that the defendant ought not to be deemed a credible witness since, in his view, she contradicted herself in the statements provided in the insurance form and the witness statement in respect of whether there was any one else who could have driven her vehicle on the date of the accident. I disagree. I found the defendant's explanation as to why she made the statement to be plausible. Therefore, I reject that as a basis on which I can disregard her evidence entirely.

[46] The defendant came over as a witness who did her best in the difficult position in which she found herself, having only been notified of the accident over a year after it occurred. Alluding to her evidence under cross-examination as to where she was residing on the date of the accident, Mr. Alleyne submitted that she did not set out to deceive the court. I accept that submission as there

was no hint of any such intention as she gave her evidence. She candidly admitted that, at that time, it would not have been unusual for her car to be seen in the area of the accident.

[47] There is also some conflict between the defendant's declaration on the insurance form that she was the driver of the car, and her evidence that she had no recollection of the accident and did not cause any collision. The defendant was not asked for an explanation as to this contradiction and Mr. Denny did not allude to it in his submissions. I note that on the insurance form, the defendant also stated that she was not aware of the accident and had no recollection of it. Considering the evidence as a whole, it seems to me that the defendant may not have been as careful as she ought to have been in completing the insurance form. I do not see that her evidence should be rejected because of that discrepancy.

[48] I have also reviewed the defendant's evidence in respect of the source of the particulars which she provided on the insurance form in relation to the date, time, and location of the accident and the name of the police officer who attended the scene. It remains unclear how she obtained those details since not all of them were in the letter sent to her by ICBL. What is clear, though, is that this Court cannot draw the inference that she must have been at the scene of the accident from her possession of that information. The undisputed

evidence is that the driver of the second vehicle did not wait and was not present when Sgt. Hall arrived. The defendant must have come by his name by some other means.

[49] Mr. Denny submitted that the evidence for the plaintiff "... was void of inconsistencies". That is not so. There were discrepancies and inconsistencies in the case for the plaintiff, as much as there were inconsistencies in the defendant's evidence. I will address some of these later. It suffices to note that I found none so fundamental as to compel me to say that the credibility of any witness was completely shot. The Court must therefore determine what evidence it accepts and what it rejects in respect of the witnesses.

WAS THE DEFENDANT'S CAR PRESENT?

[50] I will now consider whether the defendant's car was present at the scene at the time of the accident. The defendant's evidence that at the date of the accident, she owned a Toyota Starlet motorcar bearing registration number X-1473 is unchallenged. I accept that evidence and so find.

[51] The defendant did not state the colour of her car. However, the plaintiff and Mrs. Farier testified that a blue car turned across the highway. I have found nothing to discredit that evidence and I accept it. While the defendant does not bear the burden of proof, it is reasonable to expect that if her car was not blue in colour, she would have said so. After all, if found to be true, such

evidence would completely rebut the plaintiff's case. It is therefore open to this Court to draw an inference that any evidence which she might have given as to the colour of her car would not have helped her case.

[52] However, colour alone is insufficient to identify a motor vehicle. My attention has been drawn to two criminal cases which discuss the sufficiency of identification evidence relating to motor cars. In *Bond v MacFarlane [1990] ACTSC 141* Higgins J stated at *paragraph 51*:

The evidence of identification witnesses must be approached with extreme caution. The identification of mass-produced goods such as motor vehicles is no less difficult than identification of suspects by appearance or voices (see, eg *Alexander v R (1981) 145 CLR 395*; *R v Hallam (1985) 18 A Crim R 221*; *R v Coleman (1987) 87 FLR 175*.) The voice identification warning has some guidance to offer in the case of chattel identification. **If the points of identification are very distinctive, such as identification numbers or symbols, they would be good evidence of identity as also if the object is itself distinctive such as an original oil painting.** It is particularly necessary to look for such points when no "identification parade" is possible (see, eg *R v Smith (1984) 1 NSWLR 462*; *(1987) 7 NSWLR 444*; *R v Brownlowe ((1987) 7 NSWLR 461)* [my emphasis].

[53] The second case is *R v Browning (1991) 94 Cr App Rep 109; [1991] Lexis Citation 3491*, a decision of the Court of Appeal of England and Wales. In that case, the prosecution relied on evidence that the appellant's motorcar had been seen in the vicinity of a murder scene to link him to the crime. At his appeal against conviction, the appellant contended that the trial judge ought to have given the jury a direction as to the identification of the car along the

lines of the direction given in respect of the identification of persons as set out in *R v Turnbull [1976] 3 All ER 549*. The appellate court rejected this submission. As summarised by the UK editors of LexisNexis, it held:

A Turnbull direction was not needed as regards identification of a motor car since the appearance of a car remained constant, unless it was deliberately altered by having its colour changed or by having some pieces added to it, whereas a human being's facial expression, bodily position and appearance altered constantly. **Identifying a particular car depended upon, first, the witness being sufficiently knowledgeable about makes of car to be able to clearly distinguish one from another; secondly, being able to recollect the make and colour of the car he had seen; and thirdly, being able to observe and then recollect the most important of the individual distinguishing features which every car carried with it, the registration number.** It was necessary for the judge to draw the jury's attention in relation to each witness to, firstly, the opportunity which the witness had to identify the car; secondly, the witness' ability or inability to distinguish between makes of car; and thirdly, the need for the jury to decide how far the witness was genuinely recollecting what he had seen and how far his mind had invented or had absorbed information from somewhere else and then transmuted that into making him think he had recollected something that he had not actually recollected. ... [my emphasis].

[54] This is a civil case. I must determine whether it is more probable than not that the blue car which turned across the highway was the defendant's car. I have found the guidelines set out in *Browning* to be useful in evaluating the reliability of the identification evidence in this case. The evidence should disclose some distinctive points of identification or individual distinguishing

feature sufficient to link the vehicle the plaintiff and Mrs. Farier saw to the defendant's vehicle.

[55] Apart from the colour, the plaintiff gave no first-hand evidence of any of the features of the vehicle which turned across the highway. She did state in her evidence that Mrs. Farier had given her the vehicle's number as X-1473. That corresponds with the number of the defendant's vehicle. Were that the only evidence, I might have been disinclined to consider it sufficient to be determinative of what is a critical issue in this case.

[56] There is though Ms. Farier's evidence. In addition to stating the colour of the motor car, she identified its make as a Toyota and its registration number as X-1473. The Court notes that she gave no evidence as to the model of the vehicle. However, the registration number is a sufficient point of distinction by which the motor car can be identified as the defendant's. There is no assertion by the defendant, or evidence, that the use of fraudulent number plates is so wide spread in this country as to render such information useless as a distinguishing feature of motor cars.

[57] Mr. Denny submitted that Mrs. Farier had ample opportunity to observe the vehicle in good light, and that the Court should accept her evidence as sufficiently identifying it as the defendant's vehicle. On the other hand, Mr. Alleyne submitted that the Court ought not to put much weight on Mrs.

Farier's evidence. He urged that (1) the identification may have taken place in poor light; (2) the witness had the vehicle under observation for a "relatively short period"; and (3) her view was obstructed and her vision defective. He said that she may have been mistaken.

[58] I do not agree with Mr. Alleyne. Despite his strident cross-examination, Mrs. Farier's evidence in respect of the identifying characteristics of the motor vehicle stood firm. I found it to be credible. She had ample opportunity to see the motor vehicle. Her evidence which I accept is that (i) she first saw the car before it had arrived at the junction to turn off to Tino Terrace; (ii) she was able to see the registration number when it was stationary at the junction before it turned across the road; (iii) she saw the vehicle as it turned across the road; and (iv) it stopped briefly after turning off the highway when she again had an opportunity to observe it. I accept her evidence that she could see the registration number from where she stood and that her ability to see was not impaired by any vision condition.

[59] I am also satisfied that the light was sufficiently good for Mrs. Farier to see the colour, make and registration number of the vehicle. The plaintiff stated that it was bright enough that she, the plaintiff, could see the colour of the vehicles on the road. She had on her vehicle's lights but could not recall if the street lights were on. Mrs. Farier's evidence is that the street lights were on as

were the lights on her motor vehicle. She was able to correctly state the colour of the plaintiff's vehicle and she also gave evidence that the vehicle immediately ahead of her was white. Though unhelpful as to the lighting conditions at the time of the accident, Sergeant Hall's evidence confirms that the area was equipped with working street lights.

[60] Mrs. Farrier was not directly tested as to her knowledge about the makes of cars or her ability to distinguish one from the other. However, she correctly identified the plaintiff's motorcar as a Toyota. Though she could not recall the make of the vehicle ahead of her, she proffered that it might have been a Subaru. There was nothing to verify that this description was accurate. However, I am satisfied that there was some evidence from which this Court can infer that Mrs. Farrier was capable of distinguishing one make of vehicle from another.

[61] Finally, there is no indication that Mrs. Farrer invented the details she gave in her evidence or that she absorbed them from elsewhere. Her evidence which I accept, is that she wrote down the number of the vehicle on a piece of paper and later included it in a written statement she prepared. I find that in respect of the particulars of the vehicle, she accurately recalled what she saw.

[62] I have considered whether my assessment of this aspect of the evidence ought to be affected by the inconsistencies in the evidence of Mrs. Farrier and the

plaintiff. There were three primary areas of concern: (i) the evidence as to the time at which the accident occurred; (ii) Ms. Farier's evidence in respect of the gender of the driver of the vehicle; and (iii) the question as to whether Mrs. Farier told the police the particulars of the vehicle which she and the plaintiff stated had been given to her by the plaintiff.

[63] The plaintiff stated that the accident occurred around 6.15 p.m. In her letter to the plaintiff's insurers, Ms. Farier gave the time as around 5:45 to 6:15 p.m. and in her witness statement she said that it happened around 5.45 p.m. In response to Mr. Alleyne, she said she checked her watch when the accident occurred. These variations are not sufficiently vast as to impact negatively on the veracity of Ms. Farier's evidence in respect of the identification of the vehicle. Persons often do not state or recall the time of events with pinpoint accuracy.

[64] Mrs. Farier's evidence in respect of the gender of the driver of the blue car is more concerning. In her letter to ICBL, she referred to the driver as "him/her" while in her witness statement she purported to identify the driver as a male person. Her evidence indicates that her opportunity to see the driver of the car was limited to an undefined "moment" when the person turned a head and looked through the window on the driver's side.

[65] I will deal more fully with this evidence when I come to consider whether the car was being driven by the defendant, or her servant or agent. It suffices to note at this stage that the evidence in respect of the identification of the vehicle was different and vastly superior in quality to that in respect of the identification of the driver. It is open to the Court to find one set of evidence to be reliable but not the other. The evidence in relation to the gender of the driver does not impact my assessment of the evidence in relation to the identification of the motor car.

[66] There is some uncertainty in the evidence as to whether or not the plaintiff gave the particulars of the second vehicle to the police. The plaintiff said she gave the information to “the police”. Sgt. Hall said she did not give it to him. However, his evidence is that he was accompanied by another Officer. One would expect that if the plaintiff had information relating to the vehicle that she would have given it to the police. Equally, one would expect that if she had given the information to the police, there would have been some notation of it in the police report and some follow-up investigations by them.

[67] These questions could eventually lead to the spectre that Mrs. Farier had not gathered the information about which she gave evidence. However, there has been no suggestion that Mrs. Farier did not witness the accident, or that she could have come by the details set out in her letter to ICBL and on her diagram

other than by her presence at the scene. I remain persuaded that she observed the features of which she gave evidence.

[68] I find that the defendant's vehicle was at the scene of the accident. I find also that it was at the junction of the ABC Highway and Warners and that it turned across the highway from left to right and entered the road which leads to Tino Terrace. I will now go on to consider whether the driver of that vehicle was negligent in making that turn.

Was the driver of X-1473 negligent?

[69] The tort of negligence is commonly conceptualised as comprising three components: (i) a duty of care owed by the defendant to the plaintiff; (ii) a breach of that duty; and (iii) loss and damage to the plaintiff as a consequence of that breach.

[70] Mr. Denny submitted that a driver of a motorcar is under a duty to take proper care not to cause harm to other road users whom he or she could reasonably foresee as likely to be affected by his acts or omissions. He cited *Bourhill v Young [1943] AC 92* in support of that proposition of law. It is not in doubt.

[71] Therefore, the question is whether the required legal proximity existed between the plaintiff and the driver of the defendant's motorcar, and if so, whether he, or she, breached that duty with resultant loss to the plaintiff. The plaintiff's pleaded case, is that the driver of X-1473 turned across her path,

without warning, and when it was dangerous to do so, causing her car damage as it veered off the highway into a ditch.

[72] I have already found that the car turned across the highway. I am also satisfied that the plaintiff has proved the other elements necessary to establish negligence on the part of the driver of that car. I accept the plaintiff and Mrs. Farrier's account of how the accident occurred. Both individuals were able to see what happened. It is true that the plaintiff gave no evidence as to the distance between her car and the defendant's car when it turned across her path. However, the inference is clear that the plaintiff's vehicle was too close to the junction in order for the defendant's car to execute that turn without putting the plaintiff at risk.

[73] The plaintiff was travelling at about 55 to 60 miles per hour along that highway when the driver of the defendant's car dashed across in her path. Mrs. Farrier's evidence as contained in her letter to the plaintiff's insurer is that the plaintiff had little time to react, but she avoided hitting the vehicle. I accept the plaintiff's evidence that she did so by swerving and applying brakes. She lost control of her vehicle and it came to rest in the ditch.

[74] Given these facts, I hold that the driver of X-1437 owed the plaintiff a duty of care; and that the duty was breached when the driver suddenly turned across the plaintiff's path. That dangerous action put the plaintiff at risk and caused

Was the defendant's car driven by the defendant, her servant or agent?

[75] The plaintiff's pleaded case is that X-1473 was being driven by "the defendant or her servant and/or agent". An individual is liable for his own negligence. He is also liable for the negligent driving of his agent or employee acting in the course of employment. In *Barbados Automobile Appliances Ltd. v Williams et al Civ App No 19 of 1990, date of decision 29 September 1993*, Husbands CJ (ag), as he then was, stated at *parargraph 4*:

In order to fix liability on the owner of a vehicle for the negligence of the driver of that vehicle, it is necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as his agent. See *Hewitt v Bonvin* [1940] 1 K. B. 188; *Morgans v. Launchbury and Others* [1972] 2 All E.R.

[76] As that passage indicates, agency only arises if the driver is driving wholly or partly for the owner's purpose. The mere fact that he or she was driving with the owner's permission is insufficient. Lord Wilberforce expressed that proposition clearly in *Morgans v Launchbury and Others* [1973] A. C. 127 at *page 135*. He stated:

... I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. ... it has never been held that mere permission is enough to establish vicarious liability.

[77] This brings me back to the issue of the gender of the person who was driving the defendant's car. In this respect, I note the inconsistencies in the plaintiff's pleaded case as well as those in Mrs. Farier's evidence. In the third paragraph of the re-amended statement of claim, the driver is referred to as "he/she", thus reflecting the same uncertainty demonstrated by Ms. Farier in her letter to ICBL. However, at paragraphs (iv) and (v) of the particulars of negligence, the driver's gender is identified as female. On the other hand, in her witness statement, Mrs. Farier's purported to identify the driver as a male person. Added to this confusion is the fact that the letter from ICBL to the defendant states that the plaintiff reported to them that the defendant was the driver of the car.

[78] I am not satisfied that the plaintiff has established the gender of the person who was driving the defendant's car. She gave no evidence in respect of it, and I found Mrs. Farier's evidence in that respect to be unreliable. She acknowledged that when she wrote her letter to ICBL, the events were fresh in her mind. There is no explanation as to what gave rise to ability to be specific by the date on which she made her witness statement. Her evidence that the driver looked through the car window "... for a moment" suggests that she had but a fleeting glance.

[79] I am persuaded by the defendant's evidence that she had no knowledge of the incident until she received the letter from the plaintiff's insurers. She denied that she caused the accident. I accept that evidence and find that she was not driving her vehicle at the time of the accident. Mr. Denny submitted that the plaintiff need not prove who the driver was. Citing *Barnard v Sully (1931) 47 TLR 557*, counsel urged that if it is found that the defendant's car was at the scene, it is deemed to have been under her control or that of her servant or agent.

[80] The position is not quite that rigid. *Barnard v Sully* is a decision of the Divisional Court of the King's Bench division of the High Court of England and Wales. In that case, it was accepted that the defendant was not driving his motor vehicle at the material time. He denied that the driver was his servant or agent. In the absence of any evidence contradicting this denial, the County Court judge withdrew the case from the jury. The divisional court allowed the appeal. Scrutton LJ with whom the other members of the Court agreed stated at *page 558*:

No doubt, sometimes motor-cars were being driven by persons who were not the owners, nor the servants or agents of the owners ... But, apart from authority, the more usual fact was that a motor-car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motor-car was being driven by the owner of it or by his servant or agent.

But it was evidence which was liable to be rebutted by proof of the actual facts.

[81] It is hardly arguable that the principle for which *Barnard v Sully* stands is not part of our law. It has been referred to in the High Court decisions of *Cory-Davis v Maingot & Ors. date of decision 6 September 1974*, *Williams et al v Barbados Automobile Appliances Ltd High Court Suit No. 1364 of 1986, date of decision 24 September 1990*, and *Stevenson v Slumberest Sleep Products (Barbados) Ltd CV no. 170 of 1985 date of decision 2 March 1993*. More importantly, it was mentioned without disapproval by the Court of Appeal in *Barbados Automobile Appliances Ltd. v Williams et al* and endorsed by the Privy Council in *Rambarran v Gurrucharran (1970) 15 WIR 212*.

[82] In *Barbados Automobile Appliances Ltd. v Williams et. al*, the Court of Appeal upheld the decision of Chase J in *Williams et al* who determined that the second defendant was driving as the servant or agent of the first defendant. The Court stated at *paragraph 16* that whether or not the relationship of servant or agent existed was a question of fact for the trial judge and there was no justification to interfere with his assessment of the evidence. At *paragraph 15*, the Court accepted that there is an inference of service or agency based on ownership. It summarised and explained *Rambarran* in this way at *paragraphs 13 and 14*:

In that case due to the negligent driving of the appellant's son of the appellant's car, there was an accident in which the respondent's car was damaged. The appellant himself had no direct responsibility for the accident. The respondent brought an action alleging that on the occasion in question the son was driving the appellant's car as the latter's servant or agent and that the appellant was thus vicariously liable to pay damages for the loss sustained by the respondent. The trial judge accepted that the son had general permission to use the car.

He also accepted the appellants' (*sic*) evidence which established that at the material time his son was not driving the car as the appellant's servant or agent or for some purpose of the appellant. He concluded that he did not feel there was any evidence on the whole of the case from which he could properly say the appellant's son was at the material time acting as the appellant's agent nor did he feel that the son was a servant whether ad hoc or otherwise of the appellant. On appeal to the Guyana Court of Appeal, that court by majority decision, held that the appellant had not rebutted the prima facie case of agency which had been established on the whole of the evidence. On further appeal to the Privy Council, the Board held that it was impossible to assert, merely because the appellant owned the car, that the son was not using it for his own purpose as he was entitled to do, and that the question of service or agency was ultimately a question of fact.

[83] In *Rambarran*, after referring to the statement of Scrutton LJ in *Barnard v Sully* which I reproduced at paragraph [80] above, Lord Donovan posited at *page 214*:

Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence.

[84] In *Brown v Stamp & Ors (1968) 13 WIR 146*, at *page 149*, the Court of Appeal of Jamaica rejected a submission that *Barnard v Sully* only applied where the owner of the vehicle is known but the driver is unknown. In a masterful judgment in which he explained that “The only fact upon which the presumption can be made is ‘ownership’”, Fox JA concluded in this way:

In our view of the law, the position is clear. Where there is no evidence as to the relationship between the owner and the driver at the material time, there is a *prima facie* presumption that the driver was the servant or agent of the owner. This was the situation in *Barnard v Sully* ... Where there is evidence as to this relationship, such evidence may either, (a) strengthen rather than displace the presumption, as in *Mattheson v Soltau* ((1933), JLR 72); or (b) displace the presumption, as in *Hopkinson v Lall* [(1959) 1 WIR 382], and *Hewitt v Bonvin* ([1940] 1 KB 188, 109 LJKB 223, CA).

[85] In *Rambarran*, the Privy Council cited *Hewitt v Bonvin [1940] 1 KB 188* and *Manawatu County v Rowe [1956] NZLR 78*. In the latter case, the New Zealand Court of Appeal determined that the wife of the owner of a vehicle was not driving as his servant or agent merely because she was driving with his consent. The New Zealand court was noted at *page 215* in *Rambarran* to have deduced the following principles from *Barnard v Sully*, *Hewitt v Bonvin* and other relevant Australian and New Zealand authorities:

- (1) The onus of proof of agency rests on the party who alleges it.
- (2) An inference can be drawn from ownership that the driver was the servant or agent of the owner, ... This inference

may be drawn in the absence of all other evidence bearing on the issue, or if such other evidence as there is fails to counterbalance it.

- (3) It must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his own concerns.

[86] At *page 199* in *Rambarran*, Lord Donovan considered it an interesting observation that in *Manawatu County*, Hutchinson J stated "... that the fact that the wife had the right to use the car whenever she pleased went a long way to destroy any presumption of agency on her part." Lord Donovan went on to state that since the driver in *Rambarran* had a general permission to use the car, it was impossible to assert, merely because the appellant owned the car, that the driver was not using it for his own purposes.

[87] As is evident at paragraph [82] above, The Court of Appeal regarded that proposition to be part of the basis of the Board's decision in *Rambarran*. In that case, the Board also rejected the notion that to rebut the *prima facie* evidence of agency, an owner has to lead evidence as to the purpose of the journey since such knowledge would be peculiarly within his or his family's bosom. Describing the argument as misconceived, it stated at *page 216*:

The appellant it is true, could not, except at his peril, leave the court without any other knowledge than that the car belonged to him. But he could repel any inference, based on this fact, that the driver was his servant or agent in either of two ways. One, by giving or calling evidence as to Leslie's object in making the

journey in question, and establishing that it served no purpose of the appellant. Two, by simply asserting that the car was not being driven for any purpose of the appellant, and proving that assertion by means of such supporting evidence as was available to him. If this supporting evidence was sufficiently cogent and credible to be accepted, it is not to be overthrown simply because the appellant chose this way of defeating the respondent's case instead of the other. Once he had thus proved that Leslie was not driving as his servant or agent, then the actual purpose of Leslie on that day was irrelevant.

[88] From my survey of the cases, I understand the law to be that: (1) proof of ownership is *prima facie* evidence that a vehicle was driven by the owner or the owner's servant or agent; (2) where it is known that the vehicle was not being driven by the owner, the *prima facie* presumption is that the driver was the owner's servant or agent; (3) that inference arises whether or not the driver has been identified; (4) this presumption which arises from the fact of ownership may be displaced by other evidence in the case; (5) the defendant may seek to rebut the inference by adducing evidence of the driver's purpose, or asserting with such supporting evidence as is available to him, that the vehicle was not being driven for his purpose; I do not take the statement to that effect in *Rambarran* to be a legislative proscription or to be exhaustive of the possibilities; (6) evidence that the driver had the owner's general permission to drive his car, without more, makes it impossible to assert that the driver was not using the vehicle for his or her own purposes; (7) ultimately,

it is for the claimant to prove the relationship alleged and for the Court to determine whether it existed after considering all the evidence.

[89] I have already found that the offending motorcar was owned but not driven by the defendant. Based on the fact of ownership, there is a *prima facie* case that it was driven by her servant or agent. To determine whether that inference has been rebutted by the other evidence adduced by the defendant, I must come back to what she said relating to the use of her vehicle.

[90] Under cross-examination by Mr. Denny, the defendant stated that she was the sole owner of X-1473 and that she had control over who drove it. She could not recall whether anyone else had driven the vehicle on the date of the accident but she acknowledged the possibility that her son or her husband could have driven it. I understood her evidence to be that those persons had her general permission to drive the car. She stated:

I do not recall if at December 17 2002 anyone else was driving motor vehicle X-1473. It is possible that my son or my husband could have driven my vehicle but I don't recall. They would require my express permission to drive my vehicle. For them to use the vehicle, they would probably have said something to me but not necessarily have to get my permission. To use the vehicle, they would not require my consent. They had my permission to use the vehicle.

[91] The defendant again attributed her inability to be more helpful in respect of the use of the vehicle on the date of the accident to the fact that over a year had elapsed before she was contacted. In response to Mr. Denny, she stated:

It is my previous evidence that my husband or son would likely have driven my vehicle on the day in question. Because I have no recollection of the accident in 2002, I was constantly questioning myself and everybody around me to shed some light but I have no recollection. I was completely shocked when I received the letter. It was a situation where I could not remember nothing. ... I was shocked. That would have led to me questioning and looking at the possibility of somebody else – somebody else driving the vehicle. I asked them because of the possibility that they could have been driving at the date of the accident. ... At December 17 2002, it is possible that persons other than myself were driving my vehicle. It is possible. I am not sure if these persons were driving with my consent- 2002 - If I was asked the question one month or weeks after, I probably would be able to get some idea of the reason myself or somebody would be using my car at that time in that area.

[92] I have carefully considered the manner and context in which the defendant alluded to the possibility of herself being the driver of the vehicle in that passage. In my judgement, it does not override the clear evidence given by her previously that she had no recollection of being in the area and had not caused the accident. I maintain the finding to that effect.

[93] I accept the defendant's evidence that her husband and her son had a general permission to drive her car. I so find. There are, therefore, three possibilities in respect of who drove her car at the time of the accident. It may have been driven by her son, her husband, or a third person to whom it was entrusted by her son or husband. There is nothing to suggest that the vehicle might have been stolen. It is clear though that if it was being driven by a person other than

the defendant's son or husband, he or she would not have been driving with her permission, or as her agent.

[94] Furthermore, given the general permission granted to her husband and son, it is impossible to assert, merely from the defendant's ownership of the car, that if either of them was driving it at the material time, he was not doing so for his own purposes as he was entitled to do.

[95] Thus, on the totality of the evidence, I am not satisfied that the claimant has discharged the burden of proving that the car was being driven at the material time by the defendant, or her servant or agent.

DISPOSAL

[96] Accordingly, the claim is dismissed. I will hear the parties in respect of costs.



OLSON DEC. ALLEYNE
JUDGE OF THE HIGH COURT

