

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Civil Division)

Claim No. CV 0410/2007

BETWEEN:

ANDREA WARNER

CLAIMANT

AND

NATIONAL CONSERVATION COMMISSION

DEFENDANT

Before the Honourable Justice Cecil N. McCarthy, Judge of the High Court

**Dates of Hearing: 2019 November 5 and 15;
December 17**

Date of Decision: 2020 August 26

**Mrs. Kristin C. A. Turton and Mr. Devon A. A. Jones Attorneys-at-Law for
the Claimant**

**Mr. Larry C. Smith, Q.C. and Mrs. Makala K. Brome (holding papers for
Mr. Junior O. Allsopp, Q.C.) Attorneys-at-Law for the Defendant**

DECISION

Introduction

- [1] The claimant, Andrea Warner (“Ms. Warner” or “the claimant”) seeks damages for personal injury and losses arising from an accident which occurred on 26 April 2004 at Folkestone Marine Park, St. James. Ms. Warner was an employee of the defendant at the time of the accident.
- [2] The claimant alleges that the accident resulted from the negligence of another employee of the defendant, Mr. Grantley Trotman (“Mr. Trotman”), who on the date of the accident negligently drove motor vehicle ML 448, a Suzuki Grand Vitara Jeep, over her foot.
- [3] The defendant contends that the said vehicle was not driven over the claimant’s foot. Alternatively, the defendant says that the accident was caused or contributed to by the claimant who failed to move out of the path of the said vehicle despite being repeatedly warned by Mr. Trotman that he was about to drive off from a stationary position.
- [4] When this matter came before me on 15th August 2019 for the hearing of an application for interim payments it became apparent that the issue of liability was still disputed.

- [5] With the concurrence of the parties I ordered that there be a trial on the issue of liability only.
- [6] That trial was conducted on 5 November 2019, 15 November 2019, and 17 December 2019.

The Pleadings

- [7] Prior to considering the evidence at trial, it is helpful to look at the pleadings.
- [8] By writ of summons filed May 9, 2007 the claimant claims damages for personal injury loss and damage resulting from an accident at Folkestone Marine Park, St. James. On that day the claimant alleges that the defendant's servant so negligently drove motor vehicle ML 448 that it ran over the claimant's foot, causing her substantial damage and loss.
- [9] On 30 April 2007, the defendant filed a defence which consisted of bare denials.
- [10] By Notice of Application filed November 9, 2010, the claimant applied to the Court to have the defence struck out on the ground that it consisted of bare denials of essential facts without disclosing any reason for or any support of such denials.

[11] The matter came before Master Keith Roberts on January 14, 2011 and he ordered the defendant to file a defence in accordance with the Civil Procedure Rules.

[12] A new defence (“the amended defence”) was filed by the defendant on January 28, 2011.

[13] Among other things, in the amended defence the defendant responded to paragraph 3 of the claimant’s statement of claim in which the claimant’s allegation of negligence is pleaded. That paragraph along with the particulars of negligence immediately following, read:

“3. *In the course of the Plaintiff’s duty at Folkstone Marine Park on the 26th day of April, 2004 a mobile patrol jeep, registration number ML 448 belonging to the Defendant was negligently driven by one of its servants or agents over the claimant’s foot.*”

“4. *PARTICULARS OF NEGLIGENCE*

(1) knowing that the Plaintiff was or might have been standing near to or leaning against the relevant vehicle;

- (2) *knowing that the Plaintiff was or might have been standing near to or leaning against the relevant vehicle, the Defendant or its servant or agent failed to ensure that the Plaintiff was not in any danger before driving off;*
- (3) *failing to give the Plaintiff any or any adequate warning that she might be in a position of danger before driving off;*
- (4) *failing to take such care as was reasonable in all of the circumstances to see that the Plaintiff did not suffer injury from his driving off.”*

[14] In response to the above allegation, the defendant at paragraph 2 of the amended defence pleaded, and I quote:

“2. *Save and except that the Defendant admits that on the 26th day of April 2004 a mobile patrol jeep registration number ML-448 belonging to the Defendant was driven by one of the Defendant’s servants or agents at Folkstone Marine Park in the course of his duty, the Defendant denies paragraph 3 of the Statement of Claim and states that on the day in question, the driver of the Defendant’s said motor vehicle repeatedly*

gave warning to the Claimant of his intention to move the vehicle forward, and that she should move. After giving adequate notice, he proceeded to move the said motor vehicle forward in his belief that it was safe to do so.”

[15] Paragraphs 3 and 4 of the amended defence are also instructive. They read:

“3. The Defendant denies that it is liable for the alleged or any negligence as claimed in paragraph 4 of the Statement of Claim whether by itself, its servants or agents.

4. Further or alternatively, such injuries, loss and damage as the Claimant may prove were wholly caused, or in the alternative contributed to by her own negligence.”

[16] The particulars of negligence which the defendant attribute to Ms. Warner are stated as follows:

“(a) Recklessly or carelessly standing too near to or leaning against motor vehicle registration ML-448 knowing that the driver was going to drive off;

(b) Failing to heed the warning of the driver of motor vehicle registration number ML-448 that he was driving off;

- (c) *Failing to take such care as was reasonable in all of the circumstances to see that she did not suffer injury from the Defendant driving off;*
- (d) *Failing to take any or any adequate precautions for her own safety.”*

[17] The issues for the Court are:

1. Did Mr. Trotman drive motor vehicle ML 488 over the right foot of Ms. Warner causing her damage and loss?
2. Was Mr. Trotman as driver of ML 448 negligent?
3. Did the Claimant cause or contribute to the accident and if so, by what proportion should the claimant’s loss be reduced to reflect her contributory negligence.

[18] I have heard evidence from the claimant and two witnesses for the defendant, who were both passengers in ML 448 at the time of the accident. It is common ground between the parties, acknowledged both in the pleadings and in the evidence before the court, that Mr. Trotman was the servant/agent of the defendant acting within the course of his duty.

The Claimant's Evidence

[19] Ms. Warner gave a witness statement on 23 March 2012 in which she set out the details relating to the accident and annexed the medical evidence in support of her allegation that she sustained injury to her right foot. That statement was admitted into evidence.

[20] That statement reads at paragraphs 10 to 14:

“10. On the 26th day of April 2004 just before 1:30 p.m. I was on duty as a Ranger/Warden at Folkestone Marine Park. I was standing to the right side of the building which housed the office of head lifeguard, Mr Bascombe, and the Ranger Room. I was speaking to a Supervisor, Mr Alfred Burnett, who was seated in the left rear passenger seat of a mobile patrol jeep ML 448. The jeep was parked parallel to the right side of the building and was facing the exit.

11. When we began the conversation Mr. Burnett was the only person seated in the vehicle. I was standing directly next to the back left passenger door. Mr. Burnett gave me an envelope and I walked away. I turned around to ask him a question and saw Mr.

Grantley Trotman sit in the driver's seat and Ms. Marcia Storey sit in the front passenger seat. When I returned to the jeep Mr. Burnett then said "leh we move from hay" even though I was still speaking to him. Mr. Trotman immediately started the vehicle, said "excuse me Warner" and drove off.

12. *When Mr. Trotman drove off, the back rear left tyre drove over my right foot. I immediately screamed and shouted "You drive over my foot and aint stop!" The car never stopped. I turned to Mr. Astelle Lorde who was standing above me on the balcony of the building and said "You didn't just see them run over my foot and gone long?" He responded "I ain't interested in that. I looking for my umbrella which I lost yesterday." He then turned around and walked in the direction of the Ranger Room.*
13. *It was too painful for me to stand on my right foot so I hopped on my left foot to the souvenir shop. I was able to sit in the area where the tours are booked and remove my shoe. It was so painful and the situation was so unbelievable that I was crying as I explained to the clerk of the shop what happened. She allowed me to use the telephone. I managed to compose myself sufficiently*

to call the head office and report the accident to the Chief of Rangers and the Human Resource Manager. Then, at approximately 1:40 p.m., I called the Holetown Police Station and reported the matter to Police Constable 445 Rock.

14. *I waited in the souvenir shop until Police Constable 386 Edwards and Police Constable 1609 Rochester arrived at approximately 2:55 p.m. I told them what happened and showed them my foot, which was swollen by that time. I also showed them the shoe which I was wearing which still bore the marks from the wheel. They gave me a Police Medical Report Form to take to the doctor.”*

[21] Ms. Warner was subjected to extensive cross-examination by Mr. Larry Smith QC.

[22] Despite the intense cross examination, Ms. Warner was generally consistent in her evidence and gave credible testimony.

[23] In her oral evidence Ms. Warner said she was touching the vehicle. She denied that Mr. Trotman asked her to move. She, however, admitted that Mr. Trotman said to her: “*Excuse me Ms. Warner*” and she did not move.

She affirmed that she did not scream or shout as alleged in her witness statement.

[24] Ms. Warner had also given oral testimony that Mr. Alfred Burnett was the father of her child; that on the day of the accident she was speaking to Mr. Burnett in relation to the child; and that she was at the time angry with him.

[25] This aspect of the case was not explored significantly by counsel for the parties, but the evidence was clear that Ms. Warner and Mr. Burnett were having an animated discussion about the child.

[26] Having carefully observed Ms. Warner as she gave her evidence, I formed the view that she was an honest witness who was hurt by the whole episode but was still prepared to give an honest account of what transpired.

Evidence of Alfred Burnett For The Defendant

[27] Mr. Alfred Burnett gave a witness statement on 20 March 2012, which he testified was a true account of what transpired on the date of the accident.

[28] His account of the accident from his witness statement which was admitted into evidence, reads:

- “12. *When we were ready to leave Folkestone Park, Ranger Grantley Trotman said “Miss Warner I’m leaving move back”.*
13. *Ranger Warner said “you gine run over my foot?”*
14. *Mr. Trotman again said “move I am leaving”. After about 5 seconds he proceeded to move the vehicle in a forward motion.*
15. *Ranger Warner said “you see he ran over my foot.”*
16. *Ranger Trotman stopped the vehicle and had a conversation with Ranger/Warden Astelle Lorde (now deceased), and then Mr. Trotman drove off.*
17. *At no time did I see any kind of reaction or hear any sound of pain from Miss Warner which would indicate that the vehicle had gone over her foot or even touched her.”*

[29] In his oral testimony Mr. Burnett said that Mr. Trotman had warned Ms. Warner on two occasions that he was moving and that she should move back. He also testified that Mr. Trotman moved the vehicle five seconds after the second warning and that about 90 seconds to 2 minutes had elapsed from the time he started the vehicle until he drove off.

- [30] Mr. Burnett said that Mr. Trotman stopped the vehicle after Ms. Warner had said that he had run over her foot.
- [31] Mr. Burnett conceded after refreshing his memory from a statement made on the day after the accident that Mr. Trotman and Ms. Storey were in a conversation with Ranger Astelle Lorde. Prior to this Mr. Burnett had said that Mr. Trotman and Ms. Storey were not in a conversation with Lorde.
- [32] There were a number of long pauses in the testimony of Mr. Burnett. It was clear that he struggled to give a reliable account of what had transpired on the date of the accident.
- [33] Having given an account of the incident to the Chief of Rangers on the day after the accident, it would have assisted the court if that account was tendered as part of his evidence.
- [34] I did not regard the inconsistency in the evidence of Mr. Burnett as conclusive of the reliability of his testimony. After 16 years it would have been surprising if there were no inconsistencies, where as here, he was being asked to rely on his memory. However, having given a statement very soon after the incident it is more than likely that his witness statement would have been prepared from that statement; and since he was the one who was

nearest to the claimant on the day of the accident, his evidence is important evidence in the case.

Evidence of Marcia Storey For The Defendant

[35] Marcia Storey was the second and final witness giving evidence for the defendant. She also gave a witness statement which was admitted into evidence.

[36] Her statement was brief and outlined the events and timelines leading to the incident.

[37] Her account of the accident and the matters leading up to it were set out in paragraphs 6 – 17 of her witness statement.

[38] Those paragraphs read:

“6. *At 13:25 hrs we decided to leave Folkestone Park.*

7. *Rangers/Wardens Andrea Warner and Astelle Lorde who were assigned to Folkstone Park were standing on the left side of the said vehicle.*

8. *Ranger/Warden Grantley Trotman said to Ms. Warner, please move back I am moving.*

9. *Ms. Warner asked "You gine run over my foot?"*
10. *Ranger/Warden Trotman again said "Miss Warner the vehicle is moving please move back."*
11. *Miss Warner asked "You gine run over my foot."*
12. *Mr. Trotman proceeded to move the vehicle.*
13. *Ms. Warner said, "See you run over my foot."*
14. *Mr. Trotman stopped and had a conversation with Ranger/Warden Astelle Lorde (now deceased).*
15. *I, Marcia Storey know for sure that Miss Warner was not close enough to the vehicle to have been injured. She was not leaning on the vehicle, and she did not make any painful sounds after the alleged incident.*
16. *The vehicle left Folkestone at 13.27 hrs.*
17. *I later heard that Ranger/Warden Warner claimed that vehicle ML-488 had run over her foot."*

- [39] Ms. Storey testified that she was seated in the back seat of the mobile jeep ML 448. Both Ms. Warner and Mr. Burnett said that she was seated in the front passenger seat.
- [40] Ms. Storey, despite testifying that Mr. Trotman asked Ms. Warner to move back said in her witness statement that she was “*sure*” that Ms. Warner was not close enough to the vehicle to have been injured.
- [41] The evidence of Ms. Storey set out at paragraphs 8-15 of her witness statement and reproduced at paragraph 38 of this judgement only makes sense if Ms. Warner was standing close to the motor vehicle ML 448. It is therefore, clear that her evidence at paragraph 15 of the witness statement where she says that she knows for sure that Ms. Warner was not close enough to the vehicle to have been injured, cannot be relied upon.
- [42] I have concluded that Ms. Storey’s evidence is on the whole not only contradictory of and in itself, but it is also inconsistent with the two defences filed on behalf of the defendant in this matter.

The Claimant's Submissions

[43] Counsel for the claimant, Mrs. Kristin Turton made oral submissions to the court on 17th December 2019, having filed written submissions on December 16, 2019.

[44] Mrs. Turton saw the matters as one of credibility. She referred the Court, among other things, to **Armages Ltd v Mundogas S. A. (The Ocean Frost) [1985] 1 Lloyd's Rep. 1, at page 57** where Lord Goff said:

“.... when considering the credibility of witnesses, always test their veracity by reference to objective facts proved independently of their testimony, in particular by reference to documents in the case and also to pay particular regard to their motives and to overall probabilities.”

[45] Mrs. Turton pointed to the consistency of Ms. Warner's testimony, and the fact that her evidence remained consistent throughout her cross-examination.

[46] Mrs. Turton mentioned the medical report of Dr. Wharton, (which was annexed to the statement of claim and to Ms. Warner's witness statement). She mentioned that this report supported the testimony of Ms. Warner; and

emphasised that, though available for cross-examination, counsel for the defendant declined to cross-examine him.

[47] In respect of the defendant's case, Mrs. Turton submitted that Alfred Burnett was not a reliable witness. She alleged that he was generally evasive in his testimony. Mrs. Turton pointed to his reluctance to admit that Ranger Trotman and Storey had a conversation with Astelle Lorde while they were seated in the mobile Jeep ML 448 before moving off. This was inconsistent with what was told to the Chief of Rangers in a report given the day after the accident.

[48] Mrs. Turton also submitted that Ms. Marcia Storey was an unreliable witness. She argued that the warnings given to Ms. Warner to move are inconsistent with Ms. Storey's evidence that Ms. Warner was not close enough to the vehicle to be injured.

The Defendant's Submissions

[49] Counsel for the defendant, Mr. Larry Smith QC made oral submissions to the court on 17th December 2019. Written Submissions were also filed on 16th December 2019 on behalf of the defendant.

[50] Mr. Larry Smith QC argued that the claimant did not put material aspects of her case to the defendant's witnesses. In this regard he submitted that the evidence tendered by Ms. Storey that Mr. Trotman did not run over her foot was not controverted.

[51] At paragraph 11 of the defendant's written submissions, counsel for the defendant, Ms. Makala K. Broome itemized what the defendant considered to be essential matters that the Court should consider in determining liability. I set out extracts of those submissions particularized at 11a, b, c, d and g of her written submissions:

- “a. There is no contemporaneous or corroborative evidence supporting the claim that the Claimant's foot was run over by ML-448. Neither is there any independent “direct” evidence in the form of video, photographs or even voice recordings.*
- b. The Claimant has failed to put essential elements of her case to the Defendant's witnesses and based on the primary facts before the Court, the Court ought not draw an unfavourable inference against the Defendant.*

- c. *The evidence of Marcia Storey, a passenger in the motor vehicle, was that she did not hear any painful sounds made by the Claimant which one would expect if a vehicle ran over one's foot. The Claimant's evidence also does not suggest that she made any painful sounds after the vehicle allegedly drove over her foot.*
- d. *The Claimant's evidence was that she was standing next to the motor vehicle bearing registration number ML-448. There was no evidence that the Claimant was leaning over the motor vehicle, standing in a manner which placed her foot under the body of vehicle or that her feet were in line with the wheels of the motor vehicle. The mere standing next to the motor vehicle does not ipso facto mean that her feet were under the motor vehicle or so placed as to be injured when the vehicle moved off.*
- g. *Further, the fact that the Claimant suffered soft tissue damage "consistent with the mechanism of the accident" is simply not enough to link the Defendant to the present claim. Soft tissue damage is a common diagnosis that can occur to any number of reasons and cannot directly be linked specifically to the Claimant's injuries."*

[52] Counsel for the defendant also submitted that if the court found that the claimant's foot was run over by the motor vehicle ML 448, that it should also find that the claimant contributed to the accident. Mr. Larry Smith QC argued that the liability ought to be split 50-50.

[53] In respect of contributory negligence, counsel submitted that it was the claimant's failure to move when she was warned to move that was the cause of the accident.

[54] Counsel for the defendant cited a number of cases in support of their submissions on contributory negligence, including **Nance v British Columbia Electric Railway Company [1951] A.C 601**.

The Rule in Browne and Dunn

[55] Counsel for the defendant submitted that counsel for the claimant did not put material aspects of her case to the defendant's witnesses.

[56] Specifically, Mr. Larry Smith QC submitted that witness Storey's evidence that Ms. Warner was not close enough to the vehicle to have been injured, and that she did not make any painful sounds, was not put to the witness and remained uncontroverted.

[57] It has long been the practice of the courts that a witness should be cross-examined on a point if it was intended to ask the court, or other tribunal of fact, to disbelieve him.

[58] The following statement of principle is found at Halsbury's Laws of England, Fourth Edition, Volume 17 at paragraph 278:

“Where the court is to be asked to disbelieve a witness the witness should be cross-examined; and failure to cross-examine a witness on some material part of her evidence, or at all may be treated as an acceptance of the truth of that part or the whole of the evidence ...”

[59] In the cross-examination of Ms. Storey, counsel for the claimant did not direct any question specifically at the matters identified by counsel for the defendant and referred at paragraph 56, above.

[60] However, to the end of her cross-examination she did put to the witness that her account of the incident was a lie. To which the witness replied in the negative.

[61] The rule of cross-examination discussed herein is referred to as the rule in Browne and Dunn.

[62] I should point out that the rule in *Browne and Dunn* is not an inflexible one and there are circumstances in which it may not be followed.

[63] In the case at bar, one of the particulars of negligence attributed to the claimant is:

“Recklessly or carelessly standing too near to or leaning against motor vehicle registration number ML-448 knowing that the driver was going to drive off.”

[64] It is my considered view that it is not permissible for the defendant to argue at the same time, that the claimant was standing too close to the vehicle ML 448 and the diametrically opposite position that she was standing too far to be injured by the vehicle.

[65] It is for the above reasons that I contend that the claimant’s counsel was not bound by this rule in the special circumstances of the case.

[66] The court has also accepted the evidence of both the claimant and Mr. Burnett that Ms. Storey was sitting in the front seat of the vehicle.

[67] In my assessment of the evidence I consider Ms. Storey’s account to be so improbable that it is unsafe to rely on it.

Issues, Legal Principles And Analysis

ISSUE I

Did Mr. Trotman drive motor vehicle ML 448 over the right foot of the Claimant causing her damage and loss?

[68] This is a question of fact to be determined on the evidence.

[69] Ms. Warner said she began a conversation with Mr. Burnett who was the sole person in the vehicle at the time. Mr. Burnett gave her an envelope and she walked away and then turned around to ask him a question. She then saw Grantley Trotman and Marcia Storey sit respectively in the driver and passenger seat in the front of the jeep. Mr. Trotman started the vehicle and said “*Excuse me Warner*” and drove off and the rear left tyre drove over her right foot.

[70] Ms. Warner said that she immediately screamed and shouted, “*You drive over my foot and ain’t stop!*” Ms. Warner testified that the car never stopped.

[71] Ms. Warner deposed that at 1:40 pm she called the Hometown Police Station and reported the matter to the Police, who later arrived at the souvenir shop, from where she had placed the call. She said she was given a Police Medical Form which she took to the doctor.

- [72] The evidence of Ms. Storey and Mr. Burnett is that Ms. Warner was told twice by Mr. Trotman that he was leaving and to move back.
- [73] Mr. Burnett testified that after 5 seconds after the second warning Mr. Trotman moved the vehicle forward and Ranger Warner said, “*You see he ran over my foot.*”
- [74] According to Mr. Burnett, Mr. Trotman then stopped the vehicle and had a conversation with Ranger/Warden Astelle Lorde.
- [75] Having examined the evidence, it can be inferred that Mr. Trotman recognized that Ms. Warner was in the path of the motor vehicle and that is why he warned her that he was leaving.
- [76] Mr. Trotman’s warning to Ms. Warner to move, would only have been necessary if she was in danger of being struck by the motor vehicle.
- [77] But there are other facts that are noteworthy. Ms. Warner testified that about 10 minutes after the accident she made a complaint to the police at Holetown. She also saw a doctor later that day. Significantly, no evidence was given that Ms. Warner moved out of the path of the vehicle; nor was any evidence given that the driver of ML 448 made any checks to see where

Ms. Warner was, or made any attempt to steer the jeep away from Ms. Warner.

[78] It is my view that on a careful examination of the total evidence in the case, it is more probable than not, that the claimant's foot was run over by ML448. I therefore, hold that the motor vehicle ML 448 did run over the claimant's foot.

ISSUE 2

Was Mr. Trotman as driver of ML 448, negligent?

[79] The learned authors of **Clerk & Lindsell on Torts, 20th Edition** at **paragraph 8-04**, identify four requirements of the tort of negligence. They are:

“(1) the existence in law of a duty of care situation. i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable;

- (2) *breach of a duty of care by defendant. i.e. that failed to measure up to the standard set by law;*
- (3) *a causal connection between the defendant's careless conduct and the damage;*
- (4) *that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote."*

[80] Having decided that motor vehicle ML 448 was driven over the right foot of Ms. Warner, liability will turn on whether the driver, Mr. Trotman was negligent as defined above. First, was there "a duty of care situation"?

[81] The answer to this question is clearly yes. The mere fact that the driver felt it necessary to warn Ms. Warner on two occasions that he was moving, (if the defendant's witnesses are to be believed) or once (if Ms. Warner's evidence is to be preferred) before driving off, makes it clear that the driver would have had Ms. Warner in his contemplation as a person that was likely to be struck if he moved off with her in the position that she was when he started the vehicle. Where as here, it is evident that a pedestrian could be injured if there is a failure to exercise reasonable care it is very obvious that a duty of care exists.

[82] Did Mr. Trotman take enough care to ensure that it was safe to move off?

[83] The circumstances in which the accident occurred are not entirely unfamiliar though they would rarely give rise to an accident.

[84] When a driver sits down at the wheel of his motor vehicle, and he is aware that there is a pedestrian close to or leaning on the vehicle, a duty of care situation arises, and liability will attach to the driver if that pedestrian is injured as a result of his careless driving.

[85] Whether or not the driver has breached his duty of care depends on whether his actions fall short of the standard of a reasonable driver. The test is objective. What would a reasonable driver do in those circumstances?

[86] The accident occurred around 1:30 p.m. and even though the driver was driving a jeep it should have been possible to observe the pedestrian in the rear view mirror, though it is conceded that the feet of the pedestrian may not have been visible.

[87] It would seem also, that apart from a signal that he was moving, a reasonably prudent driver would have looked in the rear view mirror or looked back to ascertain where the claimant was standing before proceeding to move the vehicle.

[88] The evidence in the case is that after starting the engine it took about one minute and a half to two minutes for the driver to move the vehicle. The fact that the claimant was struck by the motor jeep was evidence that it was not safe to move off. There is, therefore, little doubt that the accident was caused primarily by the carelessness of Mr. Trotman in moving off without verifying that it was safe to do so.

[89] I have concluded that Mr. Trotman was negligent, and as an employee of the defendant acting within the course of employment, the defendant is vicariously liable for his negligence.

ISSUE 3

Did the claimant cause or contribute to the accident? If so, by what proportion should the claimant's damages be reduced to reflect her contributory negligence?

[90] I have already concluded that the defendant was principally responsible for the injury suffered by the claimant. Therefore, the question that must be answered is whether the claimant contributed by her conduct to the injury she sustained. *“In order to establish the defence of contributory negligence, the defendant must prove (i) that the plaintiff failed to take reasonable care for himself “or, in other words such care as a reasonable man would take for his own safety, and (ii) that his failure to take care was a contributory*

cause of the accident. Per du Parc LJ in Lewis v Denye LJ [1939] 1 ALL ER 310, 316-317.

[91] Section 3 of the Contributory Negligence Act, Chapter 195 makes provision for the apportionment of liability with respect to contributory negligence.

That section states:

“... where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the persons suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.”

[92] In **Nance v British Columbia Electric Railway Company Ltd. [1951] A.C. 601 (Nance)** and **Davies v Sawn Motor Co. (Swansea) Ltd. [1949] 2 K. B. 29, (Davies)** there was significant discussion concerning the requirement of contributory negligence.

[93] In **Nance** Viscount Simond in delivering judgment of the Judicial Committee of Privy Council at [1951] A.C. 611, said:

*“When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove the satisfaction of the jury that the injured party did not in his own way interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff’s claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in *Davies v. Swan Motor Co. (Swansea) Ltd.*”*

[94] In **Davies** Lord Denning said at p. 291 2.K.B. 326:

“Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be

found by the court to be “just and equitable,” having regard to the claimant’s “share in the responsibility” for damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness. The fact of standing on steps of the dustcart is just as potent a factor in causing damage, whether the person standing there be a servant acting negligently in the course of his employment or a boy in play or a youth doing it for a lark: but the degree of blameworthiness may be very different.

Speaking generally, therefore, the questions in road accidents are simply these: What faults were there which caused the damage? What are the proportions in which the damages should be apportioned having regard to the respective responsibilities of those at fault?”

- [95] Using a similar approach in respect of this accident, I pose two questions. What faults were there that caused the damage? What are the proportions in which damages should be apportioned having regard to the respective responsibilities of those at fault?
- [96] In my view the injury to the claimant’s foot was primarily caused by the negligence of the driver of ML 448, Mr. Trotman.

- [97] Ms. Warner was standing to the left of the motor vehicle with her right foot in the path of its left wheel (that is the only logical inference based on the fact that the wheel of the jeep collided with her foot).
- [98] On her evidence she was aware that the driver had started the engine and said to her: “*Excuse me, Ms. Warner.*” Yet she did not move.
- [99] Mr. Burnett testified that she was warned twice that the driver was about to move.
- [100] Once the engine of the vehicle had been turned on, the position in which Ms. Warner was standing became dangerous, and a reasonable person in her position would have stepped back to avoid any chance of the jeep colliding with her. Clearly if Ms. Warner was not in the path of the vehicle she would not have been struck. In the circumstances, I have concluded that she has contributed to her injury.
- [101] On the other hand, Mr. Trotman was clearly not checking his surroundings sufficiently, as one would expect of a driver about to move a vehicle. One can only assume that he was not making proper use of his mirror or otherwise checking to see that it was safe for him to move the jeep. Having clearly recognized that there was a danger that Ms. Warner could be struck

by his motor vehicle he failed to exercise the reasonable care that was necessary to avoid injuring her.

DISPOSAL

[102] Having given very careful consideration to this matter, judgment is given for the claimant. I have also determined that it is just and equitable that the claimant should be held responsible for one-fifth of the damages.

Cecil N. McCarthy
Judge of the High Court