

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

COURT OFFICE, SAN FERNANDO

Claim No. CV2016-00533

BETWEEN

CYNTHIA PERSAD

CLAIMANT

And

JOHN BITTAN

FIRST DEFENDANT

THE PRESIDENTIAL INSURANCE COMPANY LIMITED

SECOND DEFENDANT

TRINWELD CONTRACTING SERVICES LIMITED

THIRD DEFENDANT

MARITIME GENERAL INSURANCE COMPANY LIMITED

FOURTH DEFENDANT

And Between

JOHN BITTAN

FIRST ANCILLARY CLAIMANT

THE PRESIDENTIAL INSURANCE COMPANY LIMITED

SECOND ANCILLARY CLAIMANT

And

TRINWELD CONTRACTING SERVICES LIMITED

FIRST ANCILLARY DEFENDANT

MARITIME GENERAL INSURANCE COMPANY LIMITED

SECOND ANCILLARY DEFENDANT

[by First Ancillary Claim dated and filed on 13th June, 2016

And Between

TRINWELD CONTRACTING SERVICES LIMITED

ANCILLARY CLAIMANT

And

JOHN BITTAN

FIRST ANCILLARY CLAIMANT

THE PRESIDENTIAL INSURANCE COMPANY LIMITED

SECOND ANCILLARY DEFENDANT

[by Second Ancillary Claim filed on 04th July, 2016]

Before the Honourable Madame Justice Margaret Y. Mohammed

Date of delivery: November 29, 2018

APPEARANCES:

Mr. Shawn Roopnarine instructed by Ms. Shanta Balgobin for the Claimant
Mr. Shaun Tikasingh for the First and Second Defendants and First and
Second Ancillary Defendants

Mr. Ronnie Persad and Mr. Renaldo Paul instructed by Ms. Shameli Parsad
for Third and Fourth Defendants and the Ancillary Claimant

JUDGMENT ON LIABILITY

1. The Claimant, Cynthia Persad (“Ms. Persad”) was injured whilst she was standing on the pavement at the corner of Eccles Road and Guayaguayare Road, Mayaro on the 3 July 2015. Motor vehicle TBT 9098 (“Mr. Bittan’s vehicle”) driven by the First Defendant, John Bittan (“Mr. Bittan”) and motor vehicle TCM 8267 (“Mr. Toussaint’s vehicle”) driven by the servant and or agent of the Third Defendant, Mr. Robert Toussaint (“Mr. Toussaint”) collided with each other which caused Ms. Persad’s personal injuries. She has brought this claim against Mr. Bittan, the Second Defendant (“Presidential”), the Third Defendant and

the Fourth Defendant (“Maritime”) to recover special and general damages. In her claim she has alleged that Mr. Bittan, Presidential, the servant and/or agent of the Third Defendant and Maritime are responsible for her injuries.

2. During the case management of the action, the first ancillary claim which was filed by Mr. Bittan and Presidential was withdrawn. The second ancillary claim (“the ancillary claim”) filed by the Third Defendant and Maritime continued. The parties agreed that the Court first determine the issue of liability.
3. In the ancillary claim against Mr. Bittan and Presidential, the Third Defendant and Maritime claim a declaration that they be indemnified and/or be entitled to a contribution from Mr. Bittan and Presidential against Ms. Persad’s claim and the costs of the action and/or contribution; costs in defending the claim, and costs of the ancillary claim. Mr. Bittan and Presidential filed an Ancillary Defence and Counterclaim (“the Ancillary Defence”) where Mr. Bittan sought special damages in the sum of \$41,927.00.

THE CLAIM

4. There were different versions of the collision. Ms. Persad’s version was on the 3 July, 2015 around 11:00am she was standing on the pavement at Eccles Junction, Guayaguayare Road, Mayaro, when both vehicles collided and as a result Mr. Bittan’s vehicle went off the road and violently collided with her causing severe personal injuries, damages and loss.
5. The particulars of negligence pleaded by Ms. Persad against Mr. Bittan and Presidential were:
 - (a) Driving too fast in the circumstances;
 - (b) Colliding with the Claimant who was on the pavement;

- (c) Failing to stop and/or slow down and/or manoeuvre his said motor vehicle so as to avoid the said collision with the other vehicle;
 - (d) Failing to keep any or any proper look out or to have any or any sufficient regard for the other motor vehicle on the said road and colliding with the said other motor vehicle;
 - (e) Driving without due care and attention.
 - (f) Overtaking and/or attempting to overtake when it was unsafe so to do.
6. Ms. Persad also pleaded particulars of negligence against the servant and/or agent of the Third Defendant as:
- (a) Driving too fast in the circumstances;
 - (b) Colliding with Mr. Bittan's vehicle and causing same to collide with Ms Persad who was standing on the pavement;
 - (c) Failing to stop and/or slow down and/or manoeuvre his said motor vehicle so as to avoid the said collision with the other vehicle;
 - (d) Failing to keep any or any proper look-out or to have any or any sufficient regard for the other motor vehicle on the said road and colliding with the said other motor vehicle;
 - (e) Driving without due care and attention;
 - (f) Reversing or attempting to reverse when it was unsafe to do so;
 - (g) Turning or attempting to turn when it was unsafe to do so.

MR. BITTAN'S DEFENCE AND ANCILLARY DEFENCE/COUNTERCLAIM

7. The version from Mr. Bittan in his Defence ("Mr. Bittan's Defence") to Ms. Persad's claim is that he was driving his vehicle along the Guayaguayare Main Road, Mayaro in the vicinity of Eccles Road in a southerly direction, when Mr. Toussaint's vehicle pulled out from a

parked position suddenly and without warning when it was dangerous and unsafe to do so while Mr. Bittan's vehicle was passing, and caused it to collide into the front right of Mr. Bittan's vehicle which in turn lost control and collided with a pedestrian (Ms. Persad) who was standing on the pavement on the western side.

8. Mr. Bittan pleaded particulars of negligence against the servant and/or agent of the Third Defendant as:

- (a) Driving too fast in the circumstances;
- (b) Driving without due care and attention;
- (c) Failing to keep any or any proper outlook or to have any or any proper regard for other vehicles proceeding along the roadway and in particular of the First Defendant's vehicle;
- (d) Driving too close to the First Defendant's vehicle;
- (e) Colliding with the right front of the First Defendant's vehicle
- (f) Failing to see the First Defendant's vehicle in sufficient time so as to avoid the said collision or at all;
- (g) Failing to have or to exercise or to maintain any or any adequate control of the Third Defendant's vehicle; and
- (h) Failing to stop, to slow down, to swerve or in any other way as to manage or control the Third Defendant's vehicle so as to avoid the said collision;
- (i) Pulling out from a parked position in a manner that was unsafe to do and/or in an unlawful manner.

8. In the Ancillary Defence Mr. Bittan pleaded particulars of negligence against the Third Defendant as:

- (a) Driving too fast in the circumstances;
- (b) Driving without due care and attention;
- (c) Turning or attempting to turn right when it was dangerous and unsafe to do so;

- (d) Failing to keep any or any proper look out or to have any proper regard for other vehicles proceeding along the roadway and in particular the First Defendant's / Ancillary Defendant's vehicle;
- (e) Failing to wait along the Guayaguayare Road for the Ancillary Defendant's vehicle to pass before turning right;
- (f) Failing to accord precedence to the First Defendant/Ancillary Defendant's vehicle before turning right into Eccles Rad;
- (g) Colliding with the left front of the First Defendant/Ancillary Defendant's vehicle;
- (h) Failing to see the First Defendant/First Ancillary Defendant's vehicle in sufficient time so as to avoid the said collision or at all;
- (i) Failing to have or exercise or to maintain any or adequate control of the Third Defendant's vehicle; and
- (j) Failing to stop, to slow down, to swerve or in any other way so to manage or control the Third Defendant's/Ancillary Claimant's vehicle so as to avoid the said collision;
- (k) Pulling out from a parked position in a manner that was unsafe so to do and/or in an unlawful manner.

9. In the Ancillary Defence, Mr. Bittan's position was different in a few material aspects to Mr. Bittan's Defence to Ms. Persad's claim. First, in Mr. Bittan's Defence he pleaded that Mr. Toussaint pulled out from a parked position without warning. However, in the Ancillary Defence, he first specifically denied that Mr. Toussaint's vehicle came to a complete standstill at any time but later he pleaded that he was unable to admit or deny if Mr. Toussaint's vehicle came to a complete standstill since he did not know if the contention was true and he put Mr. Toussaint to strict proof.

10. Secondly, in Mr. Bittan's Defence he did not assert that Mr. Toussaint was turning or attempting to turn right or across his path. However, in the Ancillary Defence he pleaded that Mr. Toussaint turned across his path and later he pleaded that Mr. Toussaint's negligence or breach of statutory duty was due to him turning or attempting to turn right.
11. Thirdly, in Mr. Bittan's Defence he pleaded that he was passing Mr. Toussaint's vehicle when the accident happened. In the Ancillary Defence he pleaded that he was overtaking Mr. Toussaint.
12. Fourthly, in Mr. Bittan's Defence he stated that Mr. Toussaint's vehicle collided with the front right of Mr. Bittan's vehicle. However, in the Ancillary Defence he introduced new facts surrounding the collision stating that Mr. Toussaint collided with the left front side, left side headlight, left side wing, left side panel bonnet, left side front door and left side door post of Mr. Bittan's vehicle. This was termed the first collision. He then stated that as a result of the first collision Mr. Bittan lost control of his vehicle, ran off the road and collided with Ms. Persad who was standing at the south-western corner at the intersection between Guayaguayare Road and Eccles Road and it also collided with a lamp post causing further damage to the right side wing mirror, front bumper, right indicator, right side panel bonnet and right side front door. This he termed the second collision.
13. Fifthly, in paragraph 3 of Mr. Bittan's Defence he stated that Mr. Toussaint was wholly to blame for the accident. However, in the Ancillary Defence he denied that he was the sole cause for the accident and he asserted that Mr. Toussaint contributed to the accident as opposed to being wholly responsible for it.

14. The sixth limb of inconsistency was in Mr. Bittan's Defence he did not assert that there was a breach of statutory duty by Mr. Toussaint but in the Ancillary Defence he asserted that there was breach of statutory duty on the part of Mr. Toussaint.

MR. TOUSSAINT'S DEFENCE AND ANCILLARY CLAIM

15. The last version is from Mr. Toussaint, the driver of the Third Defendant's vehicle. He asserted that he was proceeding in a southerly direction along the Guayaguayare Road, Grand Lagoon, Mayaro and as he approached the intersection, he engaged his indicator to turn right (west) onto Eccles Road. He reduced his speed coming to a complete standstill on the eastern lane of the Guayaguayare Road. Mr. Toussaint awaited the passage of two vehicles from Eccles Road at the intersection onto the Guayaguayare Road as well as a pedestrian crossing the Guayaguayare Road from west to east. On attempting to turn west onto Eccles Road at the intersection, Mr. Bittan suddenly and/or without prior warning, drove, managed and/or controlled his vehicle in a southerly direction to the rear of Mr. Toussaint's vehicle in overtaking or attempting to overtake it, causing Mr. Bittan's vehicle to collide with the right, front of Mr. Toussaint's vehicle on the Guayaguayare Road. After the collision or due to the force of the collision, Mr. Bittan's vehicle drove in a south-westerly direction, mounted the sidewalk and collided with the Claimant, Ms. Persad.
16. The Third Defendant pleaded particulars of negligence against Mr. Bittan as:
 - i. Driving too fast in the circumstances, especially in approaching or driving through an intersection of roads such as the intersection;
 - ii. Failing to keep any or any proper look out or to have any or any sufficient regard for the vehicular traffic along the

Guayaguayare Road and/or at the intersection, in particular Mr. Toussaint's vehicle;

- iii. Failing to have any or any proper or sufficient regard for the fact that vehicles stop or are at a standstill or stationary position at intersections of roads, such as the intersection, to allow other vehicles to enter the same, and/or traverse the roads which constitute the same, in safety;
- iv. Failing to see or observe or heed in sufficient time or at all that Mr. Toussaint's vehicle was or had been at a standstill or stationary position on the Guayaguayare Road at the intersection;
- v. Failing to see or observe or heed in sufficient time or at all the indicator/signal that Mr. Toussaint's vehicle intended to turn west at the intersection onto Eccles Road; or, was turning or attempting to turn west at the intersection onto Eccles Road;
- vi. Failing to reduce his speed in approaching the intersection and/or in fact, accelerating;
- vii. Failing to reduce his speed in approaching the intersection and/or in fact, accelerating;
- viii. Failing to give way or accord precedence to Mr. Toussaint's vehicle – which had been at the intersection first – and/or to allow the same to turn west at the intersection onto Eccles Road in safety;
- ix. Failing to alert the driver of Mr. Toussaint's vehicle of his approach;
- x. Failing to give any signal or indication or warning that he was overtaking or attempting to overtake Mr. Toussaint's vehicle;
- xi. Overtaking or attempting to overtake Mr. Toussaint's vehicle in spite of the indicator/signal emanating therefrom that the driver thereof intended to turn west at the

- intersection onto Eccles Road; or, was turning or attempting to turn west at the intersection onto Eccles Road;
- xii. Overtaking or attempting to overtake Mr. Toussaint's vehicle when it was unsafe or dangerous to do so;
 - xiii. Overtaking or attempting to overtake Mr. Toussaint's vehicle when the roadway ahead was not clear of traffic which was or may be turning or attempting to turn west at the intersection onto Eccles Road;
 - xiv. Overtaking or attempting to overtake at an intersection of roads;
 - xv. Colliding with the right, front of Mr. Toussaint's vehicle;
 - xvi. Approaching and colliding with Mr. Toussaint's vehicle from its rear;
 - xvii. Driving at such a speed that Mr. Bittan's vehicle could not have been immediately stopped or otherwise controlled or managed upon impact; and/or,
 - xviii. Failing to stop, slow down, to swerve or in any other way so to drive, manage or control Mr. Bittan's vehicle as to avoid or prevent the subject collision and/or colliding with the Claimant.

17. The Third Defendant also pleaded particulars of breach of statutory duty of Mr. Bittan as:

“Failing to comply with **Rule 38(5)(6)** of the **Motor Vehicles and Road Traffic Regulations** made under the **Motor Vehicles and Road Traffic Act, Chapter 48:50 Rev. Laws, 2004 [TT]**, which provides that “ every driver of a motor vehicle shall not overtake other traffic.... When roads intersect...”

18. In Reply, the Third Defendant and Maritime contended that Mr. Bittan and Presidential's counterclaim claim should be struck out pursuant to Parts 25.1 and 26.2 Civil Proceedings Rules 1998 ("CPR").

WHO IS LIABLE FOR THE ACCIDENT?

20. A finding of negligence requires proof of: (1) a duty of care to the Claimant; (2) breach of that duty and (3) damage to the Claimant attributable to the breach of the duty by the defendant: **Charlesworth & Percy on Negligence**¹. There must be a causal connection between the Defendant's conduct and the damage. Further, the kind of damage suffered by the Claimant must not be so unforeseeable as to be too remote: **Clerk & Lindsell on Torts**².
21. The burden of proof of proving damages in negligence lies with Ms. Persad with respect to her claim and with Mr. Bittan with respect to the Ancillary Defence/Counterclaim.

DISPUTES OF FACT

22. There were several disputes of fact which arose to be determined by the Court namely:
- (a) Whether Mr. Toussaint's vehicle was parked/standstill or moving at the intersection of Guayaguayare Road and Eccles Road;
 - (b) Whether Mr. Toussaint's vehicle right indicator was illuminated signalling his intention to turn right into Eccles Road;
 - (c) Whether Mr. Toussaint could have seen Mr. Bittan's vehicle approaching;

¹ 13th Edition, Chap 1 para 1-19

² 19th Edition, Chap 8 para 8-04

- (d) Whether the speed of Mr. Bittan's vehicle caused or contributed to the accident;
- (e) Whether Mr. Bittan could have done anything to avoid the accident such as sound his horn to signal that he was overtaking;
- (f) Whether Mr. Bittan and Mr. Toussaint did what was reasonable in the circumstances.

23. According to the learning in **Horace Reid v Dowling Charles and Percival Bain**³ cited by Rajnauth-Lee J (as she then was) in **Winston McLaren v Daniel Dickey and Ors.**⁴ in determining the version of the events more likely in light of the evidence, the Court is obliged to check the impression of the evidence of the witnesses on it against the: (1) contemporaneous documents; (2) the pleaded case; and (3) the inherent probability or improbability of the rival contentions. The Court of Appeal in **The Attorney General of Trinidad and Tobago v Anino Garcia**⁵, took the position that in determining the credibility of the evidence of a witness any deviation by a party from his pleaded case immediately calls his credibility into question.

THE EVIDENCE

Ms. Persad

24. According to Ms. Persad's witness statement at the time of the accident she was standing on the pavement at Eccles junction, Guayaguayare Road, Mayaro awaiting a taxi when she heard a loud bang like a motor vehicular accident and as she turned her head, she saw a motor vehicle coming towards her. She did not remember anything after that, but she later learnt that Mr. Bittan's vehicle and Mr. Toussaint's vehicle collided with each other and that Mr. Bittan's vehicle struck her.

³ Privy Council Appeal No. 36 of 1987

⁴ CV 2006-01661

⁵ Civ. App. No. 86 of 2011 at paragraph 31

25. In cross-examination the Claimant stated that she was awaiting a taxi at the intersection when she heard a bang, and called out to Marlon Winston who had gone to the other side of the road but he came back across to her side of the road when she called out to him and at that time she told him something had hit her, after which time she could not recall anything.
26. She stated that she did not notice any vehicles driving through the intersection at that time but that she noticed vehicles driving from Mayaro to Guayaguayare and that she did not see any vehicle stop along that intersection for Marlon to cross the road.
27. Ms. Persad was shown a photograph of the area where the accident occurred and she asked to point where she was standing at the time she was struck. She indicated that she was standing next to the phone booth in the photograph. She indicated that the road on her left was Eccles Road and the road she was facing was Guayaguayare Road. She stated that opposite where she was standing and the direction she was facing, where Eccles Road continued, the road slopes downwards. She agreed that at time of the accident there was a continuous white line in the middle of the Guayaguayare Road.
28. She stated in cross-examination that she did not see any truck stop at the intersection, she did not see any vehicle overtake another vehicle and she did not see any vehicle reversing on the Guayaguayare Road.

Mr. Bittan

29. Mr. Bittan stated in his witness statement that on the date of the accident around 11:30am, he was driving in a southerly direction along the Guayaguayare Road, Mayaro at approximately 40km per hour and he noticed a 3 ton truck which turned out to be Mr. Toussaint's vehicle about 400 feet ahead, was at a standstill/ parked on the left lane facing

south. Mr. Toussaint's vehicle was directly and obliquely opposite Eccles Road. Mr. Bittan's also stated that Mr. Toussaint suddenly and without warning pulled out from the parked position.

30. In cross-examination Mr. Bittan drew a distinction between "passing" and "overtaking" a vehicle. He stated that in his opinion "overtaking is only when the vehicle (which is being passed) is moving and that passing was when the vehicle is stationary". However, Mr. Bittan accepted that he made a wrong assumption that Mr. Toussaint's vehicle was parked.
33. It was not part of Mr. Bittan and Presidential's Defence that Mr. Bittan gave any warning as he approached the intersection. Mr. Bittan's witness statement was silent on this issue. However in cross-examination Mr. Bittan accepted that he ought to have sounded the horn when as he approached the intersection.
31. I now turn to speed. Mr. Bittan's evidence in chief was that he was driving at approximately 40 km per hour. He did not state that he reduced his speed as he approached the intersection. However, in cross-examination Mr. Bittan changed his evidence. He indicated that he reduced his speed from 40 km per hour to 35 km per hour as he approached the intersection when he saw the first vehicle coming out of Eccles Road. He said that he again slowed down when he noticed a second vehicle coming out of Eccles Road but that the second vehicle stopped for him to pass and this was when he said he accelerated into the intersection. Mr. Bittan admitted in cross-examination that he was speeding when Mr. Toussaint's vehicle collided with his vehicle which caused his vehicle to eventually go across the road. He also admitted that if he was driving slowly he would not have lost control of his vehicle and that there was no element of speed by Mr. Toussaint which caused the accident.

32. In his witness statement, Mr. Bittan stated that he saw one vehicle exit out of Eccles Road and then another vehicle at the rear of that vehicle attempted to turn right onto Guayaguayare Road out of Eccles Road but it stopped at the intersection to allow him to pass.
33. In cross-examination Mr. Bittan agreed that if the second vehicle that came out of Eccles Road came out of the intersection and stopped on the Guayaguayare Road in front of Mr. Toussaint's vehicle so that he, Mr. Bittan could pass there was nowhere for Mr. Toussaint's vehicle to go.
34. Mr. Bittan was asked when the collision occurred whether the second vehicle which had stopped on the intersection in front of Mr. Toussaint's vehicle was still there to which he responded "... if the car was still there the truck couldn't go nowhere."
35. In his witness statement Mr. Bittan stated that the right side of the front fender and door mirror of Mr. Toussaint's vehicle collided with the left front of his vehicle above the headlight and the impact pushed his vehicle to the western side of the road onto the pavement and struck a short metal post and a pedestrian who was standing nearby. His vehicle came to a stop and the pedestrian ended up under his vehicle.
36. However, in cross-examination Mr. Bittan stated that his vehicle did not mount the pavement but rather it was the front of the vehicle that went onto the pavement and not the vehicle itself.
37. Mr. Bittan did not state in his witness statement whether there was a white line in the middle of Guayaguayare Road and if so whether it was continuous or broken. However, in cross-examination he accepted that there was a continuous white line in the middle of the Guayaguayare

Road and that where Mr. Toussaint's vehicle and his vehicle made contact it was just over the white line on the right lane.

38. Mr. Bittan's evidence was that he did not see if Mr. Toussaint's vehicle had engaged the indicator signalling his intention to turn right.

Rick Edmund

39. Mr. Edmund was a witness on behalf of Mr. Bittan and Presidential. He was driving a vehicle which was on Eccles Road at the time of the accident. He stated in his witness statement that on the date of the accident he was proceeding in a westerly direction along Eccles Road East about to turn right onto Guayaguayare Road when he saw a truck, Mr. Toussaint's vehicle travelling in a southerly direction along Guayaguayare Road. He said that Mr. Toussaint's vehicle stopped in front of his vehicle and blocked the entrance into Eccles Road East. The Mr. Toussaint's vehicle started to reverse, cleared the path for his vehicle and parked on the left lane of the Guayaguayare Road facing south.
40. In cross-examination, Mr. Edmund stated that he was the first car on the intersection after the car in front of him came out and headed south. When the car ahead of him approached the intersection, Mr. Toussaint's vehicle was already blocking that car, so Mr Toussaint's vehicle reversed for said car to pass and he drove off. Mr. Edmund admitted that he did not mention a first or other car ahead of him in his witness statement and when questioned as to why he did not include the first car in his witness statement, he stated that he did not think it was important.
41. Mr. Edmund also testified in cross-examination that Mr. Toussaint's vehicle was not parked. When asked to clarify what he meant that Mr. Toussaint's vehicle was not parked, he said that Mr. Toussaint reversed

his vehicle to allow the vehicle in front of Mr. Edmund to exit Eccles Road and then Mr. Toussaint's vehicle came to a standstill.

42. Mr. Edmund stated in his witness statement that when Mr. Toussaint stopped, he slowly started making his way out of Eccles Road onto Guayaguayare Road but while looking right to see if his path was clear he saw Mr. Bittan's vehicle travelling in a southerly direction about to overtake Mr. Toussaint's vehicle. He stopped to allow Mr. Bittan's vehicle to overtake Mr. Toussaint vehicle when he saw Mr. Toussaint's vehicle suddenly pull out from the parked position to turn right and collided with Mr. Bittan's vehicle. He then saw Mr. Bittan's vehicle run off the road and collided with Ms. Persad who was standing on the corner of Eccles Road West and Guayaguayare Road.
43. In cross-examination Mr. Edmund was asked why he did not continue to come out of Eccles Road. He enthusiastically agreed with Counsel that instead of continuing to come out he stopped at the intersection because the speed Mr. Bittan was overtaking he thought an accident would have occurred if he came out of Eccles Road.

Robert Toussaint

44. Mr. Toussaint stated in his witness statement that before the accident he was driving southwards along the Guayaguayare Road and he intended to turn right into Eccles Road. He was driving about 40-50km per hour and when he was about 100 feet before the intersection, he began to slow down at which point he put on his right indicator. He stated that from the time he was slowing down and approaching the intersection, up to when the accident happened his indicator was on.
45. In cross-examination Mr. Toussaint stated that he began to slow down about 100 feet from the intersection and it was from the same distance that he put on the right indicator in the vehicle he was driving. When

questioned as to how long he had his indicator on prior to the accident, he responded 15 to 20 seconds. He stated that from his point of view any vehicle at the back of his vehicle would have seen his indicator.

46. Mr. Toussaint was shown a photograph and asked whether it depicted the scene of the accident on the day. He stated that it depicted the scene but that the white line in the middle of the Guayaguayare Road was faded.
47. In his witness statement Mr. Toussaint stated that Mr. Bittan did not sound his horn or do anything to make known he was overtaking. He maintained this response in cross-examination and stated that had he seen Mr. Bittan's vehicle or heard a horn or heard an engine he would not have turned right.
48. In his witness statement, Mr. Toussaint stated that as his vehicle started to angle right to go into Eccles Road, he felt and heard an impact on the front right side of his vehicle and that the impact was on the intersection itself. He also stated that Mr. Bittan's vehicle came up from the back of his vehicle on the right side, on the lane for northbound traffic and that Mr. Bittan was overtaking him when the accident happened.
49. In cross-examination Mr. Toussaint stated that as soon as he attempted to turn right into Eccles Road, with only the front of his vehicle making it onto the northbound lane, he came into contact with a vehicle on the right side of his vehicle which he perceived to come from the rear. The first time he saw this vehicle was the point of impact since before he attempted to turn right, he looked at his rear view mirror and saw no vehicles behind him.

50. In his witness statement Mr. Toussaint stated that he saw Mr. Bittan's vehicle speed after it hit his truck and that he was driving fast. In cross-examination when asked how he gauged that Mr. Bittan's car was going very fast, he stated that the accident happened very suddenly and quick.

Ashwanie Bhola

51. Mr. Bhola was Mr. Toussaint's witness. He was in Mr. Toussaint's vehicle was driving at the time of the collision. In his witness statement he stated that when Mr. Toussaint's vehicle was about 100 feet before the intersection, he felt Mr. Toussaint's vehicle slowing down and Mr. Toussaint put on the right side indicator. He stated that he knew from the time Mr. Toussaint's vehicle was slowing down as he was coming to the intersection up to when the accident happened, the right indicator of the truck was on.
52. In cross-examination Mr. Bhola admitted that he did not see any flashing lights or hear the sound of the indicator. He admitted he was not sure if Mr. Toussaint had put on the indicator.
53. In his witness statement Mr. Bhola stated that while Mr. Toussaint was at a stop just before the intersection, other vehicles were driving north along Guayaguayare Road through the intersection. When the intersection was clear, there were two vehicles on his left on Eccles Road which drove off and turned north onto Guayaguayare Road.
54. In cross-examination Mr. Bhola recalled the collision occurred at Eccles junction and he was sitting in Mr Toussaint's vehicle but he was not paying attention to the road traffic and assumed there were vehicles travelling north.

55. In his witness statement Mr. Bhole stated that he did not hear any horn or sound before the accident. In cross-examination he repeated this position.

Janice George

56. Janice George was a witness for the Third Defendant and Maritime. Her witness statement was tendered into evidence with the consent of all the parties and she was not cross-examined. The importance of Ms. George's evidence was that she exhibited the police report dated the 27 July 2015 ("the police report") which was a contemporaneous document of the accident.
57. The contents of the police report stated that Mr. Toussaint had put on the indicator on his vehicle signalling his intention to turn right into Eccles Road. The police report made a final classification that Mr. Bittan was overtaking improperly.

ANALYSIS AND FINDINGS

58. It was submitted on behalf of Counsel for Ms. Persad that both Mr. Bittan and Mr. Toussaint played a role in how the accident occurred and the issue for the Court to determine is the degree of contribution by each person. Counsel suggested that in light of the numerous inconsistencies in Mr. Bittan's evidence he should bear the greater contribution.
59. It was submitted on behalf of Mr. Bittan and Presidential that Mr. Persad's evidence in cross-examination demonstrated that she did not see Mr. Bittan's vehicle collide with him and as such she has failed to prove her claim that her injuries was caused by Mr. Bittan's vehicle.

60. It was also submitted on behalf of Counsel for Mr. Bittan and Presidential that if the Court finds that Mr. Bittan and Presidential are liable for the accident, the contribution should be small since Mr. Bittan acted reasonably in the circumstances; there was no conflict between Mr. Bittan's pleaded case and his evidence and that of his witness, Mr. Edmund and that Mr. Bittan's Defence that the damage to his vehicle was on the right side was an error and the Court should not attach weight to this error. Counsel also argued that Mr. Toussaint was a self-serving witness and that this should taint his testimony and that Mr. Bholá's evidence did not assist Mr. Toussaint's version of the accident.
61. Counsel for the Mr. Bittan and Presidential also argued that they were limited in probing the witnesses in cross-examination since an objection was permitted to their Amended Defence which later turned out to be incorrect. Counsel submitted that the Court should take this into account in assessing the evidence of the witnesses for the Third Defendant and Maritime.
62. Counsel for the Third Defendant and Maritime submitted that Mr. Bittan and Presidential did not make a no case submission against Ms. Persad and as such the Court can make a finding on liability based on the totality of the evidence. In any event Ms. Persad had pleaded at paragraph 13 of her Statement of Case *res ipsa loquitur* and as such in the facts of this case Ms. Persad was without fault.
63. It was also submitted on behalf of the Third Defendant and Maritime that based on the several material inconsistencies between Mr. Bittan's Defence, the Ancillary Defence, Mr. Bittan's evidence in chief and his cross-examination, the Court ought to find Mr. Bittan and Presidential 100% liable for the accident and that if the Court is of the view that

there was a contribution by Mr. Toussaint, that such contribution should be no more than 10%.

64. Based on the evidence, the exigencies of the facts of this case were: the Guayaguayare Road was the major Road; it was a straight road; it intersected with Eccles Road which was the minor road; Mr. Toussaint vehicle was on the left lane of the major road; the accident took place at the intersection of Guayaguayare Road; and the accident took place around midday and it was sunny.
65. In my opinion, Ms. Persad had no interest to serve with respect to who caused the accident since she was the innocent bystander who was injured as a result of the accident. I was satisfied that she had discharged the onus on proving that her injuries was as a result of accident which Mr. Bittan and Mr. Toussaint was involved in. It was not her duty to prove who was liable or the degree of contribution, that was the responsibility of Mr. Bittan and Mr. Toussaint.
66. Although Ms. Persad was in a wheelchair during the trial and she had limited movement on one side of her body, she was forthright in her responses in cross-examination and she gave her responses with conviction.
67. However I found that Ms. Persad's evidence with respect to which person was more liable was of limited assistance as to how the collision occurred since she did not see Mr. Toussaint's vehicle at the intersection; she did not see any vehicle attempt to overtake another vehicle; she did not see any vehicles exit from Eccles Road unto the Guayaguayare Road and she did not see any vehicle reversing or attempting to reverse on the Guayaguayare Road. As such her allegation in her pleading that Mr. Toussaint was reversing or

attempting to reverse when it was unsafe to do so was discredited by her evidence.

68. In my opinion, Ms. Persad's evidence was important in two material aspects. She was certain that Mr. Bittan's vehicle collided with her as a result of the accident and at the time of the accident there was a continuous white line in the middle of the Guayaguayare Road which was consistent with the evidence of all the other witnesses.
69. I have concluded that Mr. Bittan was not a witness of truth since there were several inconsistencies between his evidence in chief, his cross-examination and his pleaded case. In my opinion, these inconsistencies undermined the credibility of his version of how the accident occurred for the following reasons.
70. Firstly, Mr. Bittan's case and his evidence in chief that Mr. Toussaint's vehicle was parked and in a standstill position at the intersection was discredited since he admitted in cross-examination that this was based on an erroneous assumption. It was also inconsistent with the evidence from his witness Mr. Edmund who stated that Mr. Toussaint reversed his vehicle to allow the car in front of Mr. Edmund to exit from Eccles Road.
71. Secondly, it was not part of Mr. Bittan's case that Mr. Toussaint vehicle reversed at any time on the Guayaguayare Road. Mr. Bittan's evidence in cross-examination was that he did not see Mr. Toussaint reverse at any time on the Guayaguayare Road and there was no evidence in his witness statement that there were two vehicles coming out from Eccles Road unto Guayaguayare Road.

72. In my opinion, Mr. Edmund's evidence that Mr. Toussaint reversed his vehicle to allow the car in front of Mr. Edmund to exit Eccles Street did not support Mr. Bittan's case which was that Mr. Toussaint vehicle came to a complete standstill to allow two other vehicles to come out of Eccles Road. Further, if Mr. Toussaint had reversed his vehicle as stated by Mr. Edmund then having regard to the distance and it is more plausible that that Mr. Bittan would have seen Mr. Toussaint reverse his vehicle just before the accident but this was not Mr. Bittan's evidence.
73. In my opinion the inconsistencies between Mr. Bittan's evidence and Mr. Edmund's evidence undermined Mr. Bittan's case that Mr. Toussaint's vehicle was parked or at a standstill. Based on these inconsistencies it is more plausible that Mr. Toussaint's vehicle was not at a standstill which was consistent with the Third Defendant and Maritime's case.
74. Thirdly, another inconsistency which undermined the credibility of Mr. Bittan's version of the accident concerned the vehicles which were coming out from Eccles Road. In Mr. Bittan's pleadings and witness statement, he said that the second car stopped at the intersection for him to pass but in cross-examination he stated that the second car which was existing out of the intersection onto the Guayaguayare Road, stopped in front Mr. Toussaint's vehicle, thereby not allowing Mr. Toussaint to move from his parked position. In my opinion if Mr. Bittan was overtaking Mr. Toussaint and the second vehicle had stopped in front of Mr. Toussaint, then it was plausible that Mr. Bittan would have collided with the second vehicle. It is also plausible that Mr. Toussaint's vehicle would not have been able to move if the second vehicle had stopped in front of it.

75. Even Mr. Bittan's witness Mr. Edmund on this issue did little to support Mr. Bittan's case. Indeed Mr. Edmund's evidence further undermined it making Mr. Bittan's version of the accident implausible.
76. If as Mr. Edmund stated when the second car came out of Eccles Road it stopped in front of Mr. Toussaint's vehicle on the left lane of Guayaguayare Road to allow him to overtake on the right lane then it would have been blocking Mr. Toussaint's vehicle and as such Mr. Toussaint's vehicle could not have been able to enter the intersection or it would have collided with the second car.
77. Further, Mr. Edmund admitted that he did not continue to come out of Eccles Road because the speed Mr. Bittan was overtaking he thought an accident would have occurred. Mr. Edmund's evidence supported the Third Defendant and Maritime's case that Mr. Bittan was speeding and it corroborated Mr. Bittan's admission in cross-examination that he sped up upon reaching the intersection. Mr. Edmund's evidence also supported the Third Defendant's case that he saw Mr. Bittan overtaking Mr. Toussaint.
78. Fourthly, Mr. Bittan's evidence on his speed at the time of the accident was also discredited in cross-examination since he admitted that after he slowed down he accelerated at the intersection. His witness Mr. Edmund also undermined Mr. Bittan's evidence on the issue of speed since he admitted that he did not continue to exit Eccles Road unto Guayaguayare Road because Mr. Bittan's vehicle was speeding while he was overtaking and if he had proceeded a collision would have occurred.
79. In my opinion, Mr. Bittan did not reduce his speed as he approached the intersection since he would have stated so in his witness statement. It is also more plausible that Mr. Bittan was speeding when Mr.

Toussaint's vehicle collided with his vehicle and the speed of his vehicle caused him to lose control of it and caused his vehicle to eventually go across the road and collide with Ms Persad on the pavement. It was not plausible that Mr. Toussaint's vehicle, with no element of speed could have pushed Mr. Bittan's vehicle across the intersection and onto the opposite pavement. It is more plausible that the speed from Mr. Bittan's vehicle caused it to be pushed across the intersection onto the opposite pavement and that the impact between Mr. Toussaint's vehicle and Mr. Bittan's vehicle caused Mr. Bittan to lose control of his vehicle and so collided with Ms Persad.

80. Fifthly, Mr. Bittan stated in cross-examination that his vehicle was not on the pavement where Ms. Persad was struck but only the front of his vehicle was on the pavement. This was inconsistent with his evidence in chief which is that his vehicle was on the pavement. This inconsistency undermined the credibility of his evidence that his vehicle was not on the pavement. In my opinion, it was more plausible that Mr. Bittan's vehicle went onto the pavement which was consistent with Ms. Persad's evidence that it was Mr. Bittan's vehicle that came into contact with her when she was standing on the pavement.
81. Sixthly, Mr. Bittan had two positions with respect to the point of impact and damage to his vehicle. First he stated that Mr. Toussaint's vehicle damaged the front right of his vehicle. This position is implausible since if Mr. Toussaint's vehicle was struck on the front right by Mr. Bittan's vehicle then the greater damage to Mr. Bittan's vehicle was the front left.
82. Mr. Bittan changed the version of the damage to his vehicle when he said in the Ancillary Defence the left front of his vehicle was damaged at the point of impact and then he lost control which caused his vehicle to collide with a lamp post which damaged the right side of his vehicle.

He repeated this position in his witness statement. In my opinion this changed position demonstrated that Mr. Bittan's was not being truthful with the Court with his first version. His changed position was self serving and not an error as submitted by his Counsel when Mr. Bittan pleaded in his Defence that the damage was to the right front of his vehicle.

83. In addition to the aforesaid material inconsistencies which was detrimental to Mr. Bittan's version of the accident, Mr. Edmund's witness statement no mention was made of any warnings given by Mr. Bittan as he overtook and proceeded into the intersection. In cross-examination Mr. Edmund stated that he did not hear any horn or sounds such as brakes which would have warned persons of Mr. Bittan's overtaking. Mr. Edmund's evidence was consistent with the Third Defendant's case that Mr. Bittan did not sound any warning and it also corroborated Mr. Bittan's admissions that he failed to give any warning that he was overtaking Mr. Toussaint's vehicle at the intersection.
84. Further, Mr. Bittan's evidence in cross-examination was that he did not see if the indicator on Mr. Toussaint's vehicle signalling that he was turning right was on. In my opinion, Mr. Bittan's failure to see it did not mean that it was not on.
85. Further, there was no evidence in Mr. Edmund's witness statement on whether the right indicator light on Mr. Toussaint's vehicle was on or off. This information was important since based on Mr. Edmund's evidence he would have been able to see if it was on or off since he said that Mr. Toussaint reversed his vehicle to clear the path for Mr. Edmund to move his vehicle forward. In my opinion, if Mr. Edmund had observed that the right indicator light on Mr. Toussaint's vehicle was not on he would have said so in his witness statement. It is

therefore more plausible that the right indicator light was on as stated by Mr. Toussaint. I have concluded that Mr. Bittan's and Mr. Edmund's evidence on the indicator light on Mr. Toussaint's vehicle not being on was not reliable.

86. Mr. Bittan's admission in cross-examination that he did not give any warning by sounding his horn, that he was overtaking at the intersection of Guayaguayare Road and Eccles Road supported the Third Defendant's case that Mr. Bittan failed to act reasonably by not giving any warning.
87. On the other hand, I found that Mr. Toussaint was in a large part a credible witness since his evidence in chief was mostly unshaken in cross-examination and the totality of his evidence was consistent with his case. I accept that Mr. Toussaint's witness Mr. Bhola was forthright with the Court. In being a witness of truth, his admission in cross-examination that he did not observe that Mr. Toussaint had put on the right indicator of his vehicle did not assist Mr. Toussaint's case. He also admitted that he was not paying attention to the road traffic and so he was not a reliable witness to give a proper recollection of how the accident may have occurred.
88. Despite Mr. Bhola's evidence, Mr. Toussaint's evidence on the right indicator was corroborated by the police report which was the sole contemporaneous document on liability.
89. However, there was one aspect of Mr. Toussaint's evidence which was not plausible to the Court. In cross-examination Mr. Toussaint stated that at the about 100 feet from the intersection he put on his indicator to signal that he was turning right into Eccles Road and that it was on for about 15 to 20 seconds. He said that before he attempted to turn right he looked in the rear view mirror and he did not see any vehicles

behind him. In my opinion, it was not plausible that Mr. Toussaint would not have seen any vehicles in the rear view mirror, even if Mr. Bittan was speeding. It was more plausible that Mr. Toussaint would have seen Mr. Bittan's vehicle at least in the distance since it was a sunny day and the Guayaguayare Road was a straight road. For this reason I am of the view that Mr. Toussaint did not keep a proper look out before he started to turn right.

90. In light of my assessment of the evidence I have concluded that:
- i. Mr. Toussaint's vehicle was not parked/ standstill on the left lane of the Guayaguayare Road but rather it was in the said lane at the intersection with Eccles Road waiting to turn right into Eccles Road;
 - ii. Mr. Toussaint vehicle's right indicator was illuminated which signalled to road users of his intention to turn right into Eccles Road;
 - iii. Mr. Toussaint did not keep a proper look out since he did not see Mr. Bittan's vehicle in the distance behind him as such he did not take all steps which were reasonable in the circumstances.
 - iv. Mr. Bittan was speeding when he overtook Mr. Toussaint's vehicle at the intersection and this contributed to the accident;
 - v. Mr. Bittan did not give any warning that he was overtaking Mr. Toussaint;
 - vi. Mr. Bittan could have reduced his speed and sounded the horn of his vehicle when he was overtaking at the intersection.
 - vii. Mr. Bittan did not act reasonably in the circumstances.

CONTRIBUTION

91. Both Mr. Bittan and Mr. Toussaint as users of the road owed a duty of care to proceed with caution. In the case of Mr. Toussaint he was at an intersection of a major road awaiting to turn right into a minor road and in the case of Mr. Bittan he was overtaking a vehicle which was in front of him in his lane and more importantly where the major road intersected with the minor road.
92. In my view, Mr. Bittan he had a greater duty of care since he was overtaking Mr. Toussaint's vehicle where Guayaguayare Road, the major road intersected with Eccles Road the minor road. He was better placed to see the vehicles in front of him which included Mr. Toussaint's vehicle and the vehicles which were coming out of Eccles Road. In my opinion, Mr. Bittan had a duty to warn Mr. Toussaint that he was going to overtake. He had failed to give adequate notice of his approach and that he was overtaking. Added to this Mr. Bittan did not proceed with caution as he approached the intersection but he sped up.
93. On the other hand, Mr. Toussaint's only fault was his failure to keep a proper look out.
94. For these reasons, I apportioned liability for the claim at 85% to Mr. Bittan and Presidential and 15 % to the Third Defendant and Maritime.

ANCILLARY DEFENCE AND COUNTERCLAIM

95. It was submitted on behalf of the Third Defendant and Maritime that Mr. Bittan and Presidential failed to establish any reasonable cause of action against the Third Defendant and Maritime. The basis of this submission was that in paragraph 8 of the Counterclaim, paragraphs 1 to 5 of the Ancillary Defence were expressly repeated and incorporated into the Counterclaim but that these paragraphs did not set out any negligence or breach of statutory duty by the Third Defendant. Instead

the averments which contained the assertion of negligence or breach of statutory duty were contained in paragraph 6 but that this paragraph was not specifically included or incorporated into the Counterclaim as such the Counterclaim as framed by Mr. Bittan did not call upon the Third Defendant to answer any particulars of negligence and breach of statutory duty.

96. Counsel for Mr. Bittan and Presidential did not address this submission in his response.
97. Having perused the Ancillary Defence and Counterclaim, Mr. Bittan and Presidential failed to include paragraph 6 of the Ancillary Defence which contained the particulars of breach of statutory duty and negligence on the part of the Third Defendant. As such I agree with Counsel for the Third Defendant's submission that the Mr. Bittan and Presidential did not rely on the averments in paragraph 6 which were the particulars of breach of statutory duty and negligence and this was not the case the Third Defendant and Maritime had to meet in the ancillary claim. For these reasons the counterclaim by Mr. Bittan must fail since it has failed to disclose any cause of action against the Third Defendant and Maritime and the said counterclaim is struck out.

ORDER

98. Judgment for the Claimant against the Defendants.
99. Liability is apportioned as follows:
 - (a) The First and Second Defendants are to pay 85% of the claim.
 - (b) The Third and Fourth Defendants are to pay 15% of the claim.

100. Damages to be assessed by a Master at a date, time and place to be fixed by the Court office.
101. The Defendants are to pay the Claimant's prescribed costs in accordance with the apportionment of liability. The said sum to be quantified by the Registrar in default of agreement
102. The counterclaim by the Ancillary Defendants, Mr. Bittan and Presidential is struck out since it has failed to disclose any cause of action against the Third Defendant and Maritime.
103. The Ancillary Defendants, Mr. Bittan and Presidential are to pay to the Ancillary Claimants/Third and Fourth Defendants prescribed costs of the counterclaim to be quantified by the Registrar in default of agreement.
104. The Ancillary Defendants, Mr. Bittan and Presidential are to pay to the Ancillary Claimants/Third and Fourth Defendants 85% of the prescribed costs of the ancillary claim to be quantified by the Registrar in default of agreement.

Margaret Y Mohammed
Judge