

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
A.D. 2022**

CLAIM NO. NEVHCV2020/0071

BETWEEN

WINSTON CROOKE

Claimant

And

CAMILLE KELLY

Defendant

Before: **His Lordship Justice Patrick Thompson Jr.**

Appearances: Mrs. Marlene Uter Bent and Mrs. Emily Prentice Blackett for the Claimant
Mr. Oral Martin and Ms. Anmarieta Staines for the Defendant

2022: October 18th 19th
2023: February, 3rd

JUDGMENT

Factual Background:

- 1. Thompson, JR J:** Everyone agrees that on the afternoon of June 5th, 2018 the Claimant, while riding his bicycle collided with the Defendant's vehicle in the vicinity of the Gingerland Cemetery.
- 2.** Mr. Crooke says that Ms. Kelly was the sole cause of the accident as she was looking into the cemetery instead of looking at the road and negligently came onto his side of the Island Main Road and created the ensuing collision between himself and her vehicle.
- 3.** Ms. Kelly says that Mr. Crooke was the author of his own misfortune. According to her, Mr. Crooke was crouched low over his bicycle, speeding and unable to properly maneuver his bicycle when he collided into her stationary vehicle.
- 4.** This Court has carefully considered the evidence of both the Claimant and Defendant and the witnesses called on this issue and makes the following findings.

Speed

5. Firstly, there is no dispute that the Claimant was an experienced and accomplished cyclist. This Court accepts the Claimant's evidence that on the day of the collision he was conducting a training exercise with several other cyclists and that it was their first round the island training exercise. The Claimant testified that as this was a training and not a racing exercise they were not traveling at or above the speed limit. This Court had no difficulty accepting this evidence.
6. The Claimant's evidence as to the nature of their riding that day was supported by the evidence of his witnesses, Jamor Merchant and Omar Hendrickson. Both Merchant and Hendrickson confirmed that they were on a training ride and were not going fast. Their evidence of their speed is supported by the fact that they were both able to stop and maneuver their bicycles in order to avoid colliding with the Claimant or the Defendant's vehicle.
7. The Defendant's case that the Claimant and his fellow cyclists were speeding is implausible. Crucially, the Defendant called no witnesses of fact, aside from her own evidence. It is accepted that the Defendant is not obliged to call other witnesses to rebut the Claimant's case and that her evidence, if believed could suffice to do so. All the same, this Court does not accept this aspect of the Defendant's case and finds that neither the Claimant nor his fellow cyclists were speeding. The fact that Mr. Merchant, who was following the Claimant, managed to hit the hearse but avoided any damage to himself or his bicycle only serves to confirm that none of the riders in that procession were speeding.
8. This Court's findings on this issue are buttressed by the evidence of both the Claimant and Omar Hendrickson that the topography of the Island Main Road meant that they were 'coasting' their bicycles as they had just descended the incline adjacent to Market Shop in Gingerland. In this Court's view, this evidence underscored the nature and type of cycling that was being undertaken by the Claimant and his fellow cyclists at the time of the collision. Simply put, this Court is satisfied that the Claimant was decelerating as he approached the corner by the Gingerland Cemetery and only about to begin to accelerate around that corner by the Gingerland Cemetery when he collided with the Defendant's vehicle.
9. Critically, neither side adduced any evidence of speed (except for bald assertions of speeding) or sought to do the mathematical calculations to persuade the Court that the Claimant's bicycle was traveling at a particular speed. It seems to this Court that it would have been a simple matter for the Defendant, since the Claimant's speed was critical to her case, to establish that an object such as the Claimant's bicycle would have covered the distance at the speed she alleged. The failure to so lend further supports to this Court's findings above.

Point of Impact

10. Everyone was agreed that a visit to the scene of the collision (*locus in quo*) would have been useful to the Court. It is for this reason, the Court decamped to Gingerland area and took the evidence of both sides as to their respective points of impact.

11. The Defendant's evidence as to the point of impact was further away from the corner than the Claimant's evidence as to the location of the point of impact. The Defendant tendered in evidence and relied on contemporaneous photographs of the aftermath of the collision on June 5th, 2018.
12. Those photos show the position of the Defendant's vehicle and the hearse and the presence of other vehicles on the Island Main Road in the vicinity of the Gingerland Cemetery. Everyone agrees that to the right of the Defendant's vehicle was a small set of stairs leading to what appeared to be a telecommunications antenna. Everyone is agreed that the Claimant was placed either on the stairs or in the close proximity to the stairs while they waited for the ambulance.
13. The photographs when considered in conjunction with the evidence of the parties at the locus confirm that the point of impact was closer to the corner after Market Shop and not as far away from the corner as the Defendant had indicated although not precisely where the Claimant had pointed out.
14. Crucially, the photographs also show the presence of both the hearse and other vehicles on the same road which confirms the Claimant's case that the Defendant was attempting to overtake these vehicles at the time of the collision. There was no evidence from the Defendant that she tooted her vehicle horn to indicate that she was now on the Claimant's side of the road.
15. There is no dispute that the Claimant was on his side of the road. He was entitled to be there. In the same vein, the Defendant had no right to be on the Claimant's side of the road. Once she realized that she was on the 'wrong' side of the road, it was incumbent on her to loudly toot her horn thus indicating to oncoming traffic that she was not on her side of the road. She was not on her side of the road because the hearse and other vehicles were occupying the other lane. It was thus incumbent on her to loudly and clearly signal her presence to all oncoming traffic since everyone accepts that the corner at Market Shop was a 'blind corner'.
16. In simple terms, the Defendant could not have known whether a bicycle, car, truck or elephant would be coming around the corner while she was on the wrong side. Her failure to signal her presence and take all such precautions to ensure that she could safely maneuver around the hearse and other vehicles meant that she failed to exercise the requisite standard of care.
17. The Claimant's evidence that the Defendant was looking into the cemetery instead of looking at the road is accepted. In this Court's view, this evidence, clearly explains the collision. Had the Defendant been looking at the road she ought to have seen the Claimant's bicycle and taken evasive measures. Whether those measures would have avoided the collision is beside the point, but the photographs clearly show the Defendant's vehicle parallel to the hearse which suggests that the Defendant's vehicle had just completed its overtaking maneuver when the collision occurred.
18. The Defendant's evidence that she simply stopped in the middle of the road is implausible. Assuming that the Defendant is speaking the truth, the reasonably prudent driver would pull to one side or the other thus creating more space for the Claimant to pass. The Defendant's decision to remain in the middle only compounded the dangerous situation that the Defendant had created by coming on to the wrong side of the road and failing to signal her presence there. This Court is satisfied on a balance of probabilities that the Defendant was looking into the cemetery and not focused on the road when she came on to the Claimant's side of the road. Her inattention meant that she failed to signal her

presence to oncoming traffic and her alleged decision to remain in the middle of the road only served to make matters worse.

19. The Defendant's insistence at trial that while she passed the line of vehicles on her side, she was not overtaking them only serves to underscore her economical approach to the truth. Simply put, Ms. Kelly's account of the accident is implausible. Her evidence that the Claimant's bicycle was swerving in both directions was patently false. This Court accepts the Claimant's evidence that his bicycle is a racing bicycle with extremely thin tires. Logic, common sense and the laws of physics all dictate that if the Claimant were swerving in the way testified to by the Defendant, the bicycle would have toppled over before the collision.
20. This Court has little difficulty in finding that the Claimant has proved its case in negligence against the Defendant and so finds that the Defendant is liable to pay damages to the Claimant.

General Damages

21. The Claimant seeks general damages for his pain and suffering and loss of amenities arising from this accident. The Claimant sustained the following injuries:
- (i) Lacerations to his right eye, right side of his nose and his right upper lip
 - (ii) Extensive abrasions to his nose and chin with abrasions to his right knee and little finger
 - (iii) Dense muscle spasm with extreme tightness in his scapula
 - (iv) Decreased range of motion in his cervical spine
 - (v) Limited forward flexion and hypertonic¹ multifidius, rhomboids, upper trapezius and pectoralis muscles
22. Everyone accepts that the Claimant's injuries are soft tissue injuries. The Claimant was treated by Dr. Rawlins and also by a Dr. Fellows and a Dr. Herrera. The latter two are not medical doctors but hold doctoral degrees in their respective fields of chiropractic and physical therapy. The Claimant was also treated by a Ms. Tina Hull who provided massage services in 2019.
23. In Dr. Herrera's view, the Claimant had sustained serious injuries that were likely to impact him for the rest of his life. In his view, the Claimant had sustained soft tissue musculature injuries which caused him to experience swelling, decreased range of motion, strength, flexibility and function in the affected areas.
24. The pain caused the Claimant significant disruption in his sleep and even with a continuing course of treatment in June 2018, November 2018, April 2019 and November 2019 the Claimant had in his view sustained traumatic and long-lasting injuries which left him with permanent disability in the cervical area and left shoulder.
25. Dr. Herrera, while indicating familiarity with the term could not indicate by percentage the extent of any permanent partial disability that the Claimant had sustained. He could not indicate a scale for

¹ Hypertonic means tension or inflamed and in this context suggests that the Claimant had tension in his upper back, chest and shoulder muscles.

the Claimant's disability but confirmed that the disability was serious and would continue to impact the Claimant for the rest of his life.

26. The Claimant also gave evidence of the impact of the accident on his pain and suffering and loss of amenities. The Claimant testified that while he has now resumed his business of conducting cycling tours of Nevis, he still has some difficulty turning his head and neck when conducting said tours. The Claimant also testified that for a considerable period of time after the accident he struggled to sleep as a result of the pain from the accident.
27. Insofar as his loss of amenities are concerned, the Claimant gave evidence of his busy and active life as a coach, manager, captain and trainer in the sport of cycling and triathlon both in St Christopher and Nevis and internationally. The Claimant indicated that while he could still attend global events as an official, he could no longer participate in the training of the Federation's Olympic athletes as he used to. The Claimant also indicated that he could no longer compete with or coach his athletes in the way that he used to before the accident. In his view, the accident robbed him of his competitive edge and robbed him of the significant enjoyment he had previously derived from the sport of cycling and triathlon.
28. The Claimant relied on the following authorities in support of his argument that the sum of EC\$140,000.00 was appropriate for the Claimant's pain and suffering and loss of amenities:
 - (i) Annesley Roban v Delex Horne et al
 - (ii) Randy James v Leroy Lewis & ors
 - (iii) Anita Tobitt v Grand Royal Antiquan Beach Resort Ltd
 - (iv) Andrella Wickham & ors v Deshawn Gordon
 - (v) Oscar Frederick v LIAT
 - (vi) Miriam Myers v Dickenson Bay Hotel Management Ltd dba Sandals Antigua
 - (vii) Cedric Dawson v Cyrus Claxton
 - (viii) Anselma Mederick v Sylvester James & Anor
29. Counsel for the Defendant contended in their submissions that the Claimant sustained no fractures and underwent no surgical procedures. In their view, the Claimant's injuries were not severe and sought to distinguish the authorities relied upon by the Claimant.
30. Counsel for the Defendant further contended that the Claimant's loss of amenities were not as significant as he alleged since he was able to cycle significant distances in August/September 2018 and competed in a sprint triathlon in February 2020.

Court's Findings on Pain and Suffering and Loss of Amenities

31. This Court had little difficulty in accepting the Claimant's evidence on his loss of amenities. The Claimant's evidence was clear and cogent on how his ability to enjoy his twin passions of cycling and triathlon were affected by the accident. The suggestion that he was aged 65 and thus limited in his ability to enjoy these activities was roundly rejected by the Claimant who pointed out that he had hoped to compete until age 85.

32. The Claimant made it clear that he was struggling to come to grips with the fact that he could no longer compete or participate at the level that he did before the accident. The evidence indicated that the Claimant could and did continue to compete. The issue is the diminution in performance and enjoyment that the Claimant attributes to the accident. There was no real challenge to the Claimant's evidence in this regard. The suggestion that he continued to compete and/or officiate ignores his evidence that while he did compete his performances declined. He could no longer coach or keep up with his athletes as he did before the accident. He had lost his competitive edge as a result of the accident which amounts to a significant loss of amenity and enjoyment for the Claimant.
33. There is considerable force in the Defendant's argument that the Claimant's injuries though serious were not as grave as those outlined in the cases prayed for by his lawyers. The Claimant's injuries were not comparable with the injuries sustained by the claimants in the cases cited above.
34. The Defendants cited the case of Celia Hatchett v First Caribbean International Bank in support of their position that the sum of EC\$20,000.00 be awarded to the Claimant for his pain and suffering. In their view, the US\$20,000.00 award in the Celia Hatchett case was easily transposed to EC\$20,000.00 on a dollar for dollar basis. However, it is important to note that in that case, Ms. Hatchett had sustained a non-displaced fracture of her C3 vertebra, while in the current factual matrix Mr. Crooke sustained no fractures.
35. Nevertheless, it is this Court's view that the Celia Hatchett injuries bear the nearest similarity to the Claimant's injuries in this matter. There is a clear distinction between soft tissue and non-soft tissue injuries with the former being deemed more serious when there is significant and lasting permanent partial disability. It is clear that Mr. Crooke sustained a significant soft tissue injury but in the absence of any clear permanent partial disability assessment it is difficult for this Court to find that the Claimant's injuries approach the levels of the cases cited by his lawyers.
36. The sums awarded in the Celia Hatchett matter ought to be uplifted to take into account inflation since 2007 (the date of the Hatchett judgment) and also the difference in purchasing power² between EC\$20,000.00 and USD\$20,000.00. In this court's view, the sum of EC\$35,000.00 is a fair sum for the Claimant's pain and suffering in this matter.
37. The Claimant's loss of amenities are significant. It is difficult to assess in financial terms the loss of one's competitive edge. It is accepted that the aging process would have caused some diminution in Mr. Crooke's performance but the accident accelerated what Father Time would have done incrementally. The sum of EC\$30,000.00 for the Claimant's loss of amenities is eminently reasonable in the circumstances.

Loss of Earnings

² See per Olivetti J at paragraph 31 of her judgment in Lester Anderson v Penngor Ltd that "In my judgment we cannot simply convert EC \$ to US\$ without more as one has to have regard to the prevailing social and economic situation in the countries which are being sought to be treated as comparable. In my judgment such an award would be palpably unfair and without reason."

38. The Claimant claimed the sum of EC\$130,537.44 or US\$50,000.00 for his loss of earnings for the period between June 2018 and the end of December 2019. The Claimant's evidence on this issue was as follows.
39. Firstly, he indicated that he was in the business of offering guided bike and kayak tours and other services. These services were offered to hotels such as the world famous Four Seasons Hotel on Nevis and individual visitors to the Federation. The Claimant would lead the tour and depending on the number of persons on the tour he would hire an assistant.
40. In the high season he would earn US\$10,000.00 per month and he estimated that he lost the sum of US\$15,000.00 for the period of June to December 2018 and then the sum of US\$35,000.00 for the year 2019. He accepted that his business continued to operate while he was recuperating from his injuries but indicated that he had to hire a substitute or assistant and that he lost the opportunity to do work that his assistants could not do for his clients.
41. In support of his oral evidence the Claimant tendered in evidence a bundle of documents at TAB 12 of the trial bundle. TAB 12 was comprised of emails evidencing payment to the Claimant and invoices from the Claimant to his clients for tours conducted in 2017, 2018 and 2019. The Claimant accepted that he did not tender any bank account information indicating the monies deposited to his account and relied on his oral evidence supported by the documents at TAB 12 in support of his claim for loss of earnings.
42. The Defendant submitted that the Claimant's loss of earnings, amounted to EC\$5,000.00, if at all. This was a remarkable submission particularly since this Court had in the course of hearing the closing arguments drawn to the Defendant's lawyers the decision of the Court of Appeal in the case of Alvin Hodge et al v Michael Hasted. The Court of Appeal decision in that matter confirmed that a trial judge had a broad discretion to award damages for loss of earnings and that the paucity of the evidence as to loss of earnings did not disentitle a claimant to damages for loss of earnings.
43. In Alvin Hodge v Michael Hasted the Court of Appeal confirmed the learned trial judge's decision to award damages for loss of earnings in circumstances where Mr. Hasted had only adduced 6 documents (receipts and contracts) evidencing his earnings over a 3-year period. In this Court's view, it is not the number of documents adduced in support of the claim but the inferences that can be drawn from them in conjunction with the oral evidence. Simply put the absence of substantial documents such as bank or accounting statements is not fatal to a claim for loss of earnings.
44. The Claimant's evidence clearly demonstrated that his business had clients who supplied him with regular and well-paying work. For example the Claimant earned the sum of US\$2,200.00 for a bike and kayak tour from one client between the 23rd -26th December 2018. Another tour from the same client on the 28th to 31st December 2018 earned the Claimant US\$2,190.00. It is worth repeating that this is only from one client. One family group booked a kayak and snorkeling tour with the Claimant for December 26th, 2018 to January 3rd, 2019 in the sum of EC\$5,896.00 or US\$2,193.28.
45. This Court has little difficulty in finding that the Claimant's business earned the sums claimed for and this Court suspects that the Claimant's assessment is a frank and honest assessment of his earnings as opposed to the inflated assessments that are often arrayed before judges.

46. The Defendant's argument that the Claimant's business continued to operate and was able to engage in bike tours by August 2018 ignores the Claimant's evidence that while he could ride he could not do so in the way that he used to before. Simply being able to ride and riding again does not mean that you are able to conduct your business in the same way that you did before. This Court accepts the Claimant's evidence that he was not able to do so.
47. The fact that the Claimant continued to seek and receive physical therapy from Dr. Fellows, Dr. Herrera and Ms. Hull throughout 2019 clearly confirms that his injuries were hampering his ability to ride in the way that he used to before the accident. This evidence when allied to the evidence above clearly confirms that the Claimant sustained the loss of earnings argued for and this Court consequently awards the Claimant the sum of EC\$130,537.44 or US\$50,000.00.
48. No express claim was made for the costs of future medical care. It appears that the Claimant has reached the limits of his physical recovery and will have to live with his reduced physical capacity for the rest of his natural life. There is no evidence, medical or otherwise that some future medical procedure is likely to result in an improvement in the Claimant's condition and as such this court makes no award for the costs of any future medical care.

Special Damages

49. The Claimant has specifically pleaded the following items of special damages:

Nature of Expense	Amount of Expense (EC\$)
Hospital Bill	\$195.00
Bill from Dr. Cardell Rawlins	\$1,300.00
Airplane Fare to Miami	\$3,145.93
Hotel Accommodation	\$1,908.49
Medical Bill at Jaguar Therapeutics	\$11,103.00
Medical Bill at Eden Life	\$6,235.00
Tina Hull's Massage Clinic	\$1,385.62
MRI Scan	\$940.87
Bike Repairs	\$2,392.28
Glasses replacement	\$1,580.00
Garmin Sports Watch	\$940.00
Total	\$31,126.19

50. The Defendant takes issue with the airplane fare to Miami, hotel accommodation and medical bill at Jaguar Therapeutics and says that the Claimant could have received treatment in St Christopher and Nevis. The Defendant contends that the Claimant's bill at Eden Life should be discounted to take into account that Eden Life was treating the Claimant before the accident for a pre-existing knee condition. The Defendant also contends that the MRI Scan was unnecessary and should also be discounted.
51. The MRI Scan can be easily dealt with. The only way to determine whether the Claimant had sustained an injury to his cervical and lumbar discs is by an MRI Scan. Clearly, a scan was warranted

as a diagnostic measure. The fact that further MRI's were not carried out is to the Defendant's benefit since there was a clear need for additional MRI's to assess and determine the scope of the Claimant's injuries. The Defendant ought to have asked that the Claimant be examined by a medical doctor who would have undertaken an MRI to assess the nature, scope and severity of his injuries. This Court is left with the Claimant's unchallenged medical and other evidence which the Defendant has not rebutted. Therefore, there can be no rational basis for discounting the cost of the MRI Scan.

52. The Defendant's argument for discounting the Eden Life bill does not require extensive treatment. The authority of *Owens v Liverpool Corp* confirms that a Defendant takes his victim as he finds him and is liable for all the damages that he suffers, even if he has a pre-existing condition that increased the level of damage suffered.³ In that case it was stated by MacKinnon LJ that "it is no answer to a claim for a fractured skull that its owner had an unusually fragile one."
53. In other words, the Defendant as a tortfeasor cannot rightly argue that the injuries she has caused turned out to be more serious than she had expected due to a pre-existing condition of the Claimant. The accident caused by the Defendant is likely to have worsened any pre-existing condition of the Claimant and as a result, she must be liable. In any event there was no cross examination directed at separating out the treatment for the accident from the treatment for the knee injuries. There is no evidence that the Claimant sought payment for bills for treatment before the accident and thus no basis for discounting Eden Life's bills.
54. Finally, the Defendant argued that the Claimant unreasonably incurred the expense of seeking treatment at Jaguar Medical in Florida and contended that she should not have to bear this expense. The Claimant's evidence on this issue was clear. Jaguar Medical had first treated him in May 2018 for a 'niggle' to his left knee. He was impressed with their service in May 2018 and had scheduled a return visit for June 2018. The accident occurred on June 5th, 2018 and since he had already planned to visit Jaguar before the accident he sought treatment from them as a result of the accident. As a part of his follow up treatments with Jaguar he purchased a further ticket to Miami, and it is that ticket and the resulting hotel accommodation that he seeks compensation for.
55. As a matter of law, the Claimant must act reasonably and in line with his duty to mitigate his losses.⁴ This includes taking reasonable steps to reduce the amount of loss incurred.
56. The Claimant's case is clear. In his view, Jaguar Medical provided care that was not accessible in the Federation of St Christopher and Nevis. According to him, he was well placed to know whether that sort of treatment was available in the Federation in view of his years of experience in cycling and triathlon. The onus was therefore on the Defendant to demonstrate that care, comparable to that offered by Jaguar Medical was available to the Claimant if they were to make good on their submissions. As a first step, the Defendant ought to have called or sought witness statements from the Federation's medical comparators. The cost of securing their evidence is unlikely to have been more than ¼ of the total Jaguar Medical bill and would have been more in line with the cost of Dr. Rawlins' report in this matter.

³ [1939] 1 KB 394

⁴ *Selvanayagam v The University of the West Indies* TT 1976 HC 60

57. Secondly, in the absence of the foregoing medical evidence the Defendant could have contacted the Federation's medical comparators and given in evidence their services and fees and compared these against those supplied by Jaguar Medical in support of their argument. The Defendant did not do this and opted for a strategy of simply asserting that there were physical therapists in the Federation who could have seen and treated the Claimant. Simply put, the presence of other physical therapists in the Federation was not the issue. The issue was whether it was reasonable for the Claimant to seek medical attention outside of the Federation.
58. It is clear that the Claimant's decision to seek medical care outside of the Federation was eminently reasonable. There is no evidence from the Defendant to rebut this finding and as such the Claimant's claim for special damages in the sum of EC\$31,126.19 succeeds.

Handicap on the Labour Market/Loss of Earning Capacity

59. The Claimant also seeks damages for loss of earning capacity, and for any handicap on the labour market he has suffered as a result of his injuries, also referred to as the *Smith v Manchester* award⁵.
60. The late Lord Scarman stated in *Smith* that "Loss of future earnings or future earning capacity is usually compounded of two elements. The first is when a victim of an accident finds that he or she can, as a result of the accident, no longer earn his or her pre-accident rate of earnings. In such a case there is an existing reduction in earning capacity which can be calculated as an annual sum...The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are the chances of obtaining comparable employment in the open labour market?"
61. All the same, a Court should be careful to avoid duplication. In *Ronan v Sainsbury's Supermarkets Limited* [2006] EWCA Civ 1074, Hughes LJ set out the difference between a *Blamire* award (loss of earnings) and a *Smith v Manchester* award as follows:
62. "A *Blamire* award and a *Smith v Manchester* award may be combined but they are quite distinct. The former is appropriate where the evidence shows that there is a continuing loss of earnings, but there are too many uncertainties to adopt the conventional multiplier and multiplicand approach to its quantification. The latter is nothing to do with continuing loss. It is an award for a contingent future loss, in the event of the claimant losing his current job, where, as a result of the accident, he would then be at a handicap in the labour market at which he would not have been but for the accident."
63. The Claimant has not given details of the nature of any handicap on the labour market or loss of earning capacity that he has sustained as a result of the accident. The Claimant's evidence is that he resumed riding recreationally several months after the accident and resumed conducting tours and his business from 2020 onwards.
64. In order to successfully claim damages for any loss of earning capacity the Claimant would have to demonstrate a clear diminution in his earnings arising from the accident. For this purpose, some evidence of his pre and post-accident earnings was imperative so that a Court could juxtapose both sums and fairly assess whether there was any diminution and whether to award any sums for any

⁵ [1974] EWCA Civ 6

proven diminution. In the absence of that evidence of his post-accident earnings, the Claimant's claim for damages for his handicap on the labour market and loss of earning capacity must fail.

Contributory Negligence

65. The Defendant contended in the alternative that the Claimant contributed to the cause of the accident by failing to ride with all due caution and that any award of damages should be reduced on that basis.
66. The Defendant did not indicate the percentage of contributory negligence that ought to be attributed to the Claimant and casually asserted that he was at fault for his injuries to some indeterminate extent. The Court of Appeal in the case of Melvina Frett-Henry v Tortola Concrete Ltd and Clayton Smithen⁶ was of the view that a person is guilty of contributory negligence where that person fails to take reasonable care of themselves in circumstances where the person ought reasonably to have foreseen that if they did not act as a reasonably prudent person they might be hurt. They must therefore take into account the possibility of others being careless.
67. The facts of the Melvina Frett-Henry matter are instructive and are summarized at paragraph 53-54 of the Court of Appeal's judgment in that matter. Essentially, Mr. Smithen, drove his large and loaded concrete truck in the middle of a road that could not safely be used by Mrs. Frett-Henry's approaching car. Mrs. Frett-Henry was driving downhill on a wet road at an unsafe speed which did not allow her to stop safely after first seeing the truck 45 feet away in the middle of the road and obstructing her path.
68. In those circumstances, the Court of Appeal set aside the trial judge's 25% allocation of liability to Mr. Smithen and 75% to Mrs. Frett-Henry and substituted an apportionment of 70% to Mr. Smithen and 30% to Mrs. Frett-Henry.
69. Applying those principles to the instant case, the onus was on the Defendant to demonstrate that the Claimant failed to take reasonable care of himself. There was no evidence that the Claimant was speeding or that his riding was unsafe in the particular conditions. This Court reminds itself of its earlier finding that the topography meant that the Claimant would have decelerated/coasted down the hill and had only just started accelerating in order to navigate the corner after Market Shop when the collision occurred. The road conditions were dry and there is no evidence that the Claimant gave any signal of his approaching the corner after Market Shop.
70. Was it reasonably foreseeable to the Claimant that an approaching vehicle would be on the Claimant's side of the road? If so, the Claimant's failure to indicate his presence (whether by bicycle bell or horn) would have meant that he failed to guard for the possibility of others being careless. There was no evidence of the distance between the corner after Market Shop and the parties' respective points of impact and what speed the Claimant's bicycle would have been traveling at in order to cover that distance.
71. In this Court's view, the onus lay on the Defendant to make good the point that the Claimant failed to take sufficient care for himself. Once the Defendant accepted that the accident occurred on the 'wrong side' of the road it was open to her to show how the Claimant contributed to the accident. The

⁶ HCVAP 2008/024

fact that the Claimant was unable to stop and thus avoid the collision does not mean that the Claimant was travelling at an unsafe speed or at a speed that meant he was not mindful of the carelessness of others.

72. The Claimant's evidence was that he pressed his brakes and realized that he would not have been able to come to a stop and thus sought to avoid a head on collision. His fellow riders who were behind him came to a stop and this is easily explained by the fact that he was at the front of the bicycle procession. It is significant that the rider immediately after the Claimant collided with the hearse but was able to stop while the third rider came to a complete stop without impacting any cyclist or vehicle. If as the Defendant contends, they were all traveling at high speed, multiple collisions between cyclists and other vehicles was inevitable.
73. The locus visit puts matters squarely into focus. The point of impact was not so far away from the Market Shop corner to allow this Court to find that the Claimant had sufficient time and space to be able to stop his bicycle before the collision with the Defendant's vehicle. Math and physics⁷ would have supplied the answer. In the absence of that answer this Court is unable to find on a balance of probabilities that the Claimant was contributorily negligent.

Costs

74. The Claimant is entitled to judgment in the following sums plus prescribed costs and post not pre-judgment interest at the statutory rate.

Damages for Pain and Suffering	-	EC\$35,000.00
Damages for Loss of Amenities	-	EC\$30,000.00
Damages for Loss of Earnings	-	EC\$130,537.44
Special Damages	-	<u>EC\$31,126.19</u>
Total	-	<u>EC\$226,663.63</u>

75. As a postscript, this Court is mindful of its stated promise to deliver the judgment in this matter before the end of 2022 and must apologize for its failure to meet that promise.

Patrick Thompson Jr
Resident High Court Judge

BY THE COURT

REGISTRAR

⁷ The Defendant sought to rely on Google maps imagery in support of their position. Google Maps though remarkably accurate is dependent on satellite imagery that is no substitute for simply traveling to the scene and accurately measuring and recording the respective distances. It was open to the Defendant to have done so at any time up to trial or even at the locus visit particularly since the police accident report that was tendered in evidence did not refer to points of impact or to the distance from the corner at Market Shop.

