



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 58

BETWEEN:

STEPHANIE ANN SOULE

Plaintiff

- and -

**(1) REUBEN WALDRON
(2) CASSANDRA TAYLOR
(3) DONALD TAYLOR**

Defendants

JUDGMENT

*Trial on Road Traffic Accident, Personal Injury, Liability,
Negligence, Contributory Negligence, Agony of the Moment*

Date of Hearing: 8, 30 March 2022

Date of Judgment: 30 June 2022

**Appearances: Sam Stevens, Carey Olsen Bermuda Limited, for Plaintiff
Bruce Swan, B. Swan Associates, for Defendant**

JUDGMENT of Mussenden J

Introduction

1. The Plaintiff (“**Mrs. Soule**”) is a USA national from Grand Junction, Colorado who was on vacation in Bermuda with several family members on 22 March 2018. She was operating her rented Red TGB Hook scooter (the “**Scooter**”) when she was involved in a collision with a Honda Fit private motor car registration number 42083 (the “**Car**”) driven by the First Defendant (“**Mr. Waldron**”) at the junction of 2 Middle Road and George’s Bay Road, Southampton (the “**Scene**”).
2. The Second and Third Defendants are the owners of the D&C Grill West restaurant (the “**Restaurant**”) located at the Scene. Their business van (the “**Van**”) was parked in front of the Restaurant, presenting an obstacle to access and line of sight for road users at the Scene. The matter with the Second and Third Defendants has been resolved without trial and they were not participants in the trial. There is an area at the Scene, adjacent to the west side of the Restaurant which has been referred to as “George’s Bay Road”, the “side-street” and the “car park”. For convenience, I will hereinafter refer to it as the “**Side-Street**” and where the Side-Street intersects with Middle Road I will hereinafter refer to it as the “**Intersection**”.

Background and Pleadings

The Claim

3. The Statement of Claim (the “**SOC**”) set out that on 22 March 2018 at approximately 1:30pm Mrs. Soule was riding her Scooter in the westbound lane on Middle Road when Mr. Waldron driving the Car exited the Side-Street into the westbound lane of Middle Road causing Mrs. Soule to collide with the Car (the “**Collision**”). As a result of the Collision, Mrs. Soule was conveyed to King Edward VII Memorial Hospital and later was transported by air ambulance to St. Mary’s Hospital in Colorado, USA.

4. The SOC sets out that the Plaintiff suffered personal injury, loss and damage. It set out the particulars of the Mr. Waldron's negligence as follows:
 - a. Failing to keep any or any proper lookout.
 - b. Failing to look ahead and to see Mrs. Soule or to heed her presence or approach upon Middle Road.
 - c. Failing to give precedence to Mrs. Soule.
 - d. Driving across Mrs. Soule's path when it was unsafe and dangerous to do so, by reason of Mrs. Soule's presence and approach on Middle Road.
 - e. Failing to wait until Mrs. Soule had passed him in safety before attempting to turn right.
 - f. Failing to stop, to slow down, to swerve or otherwise to steer or control his vehicle as to avoid the Collision.
 - g. Failed to heed section 17 of the Road Traffic Act 1947 (the "**1947 Act**").
 - h. Further, or in the alternative, failed to adhere to the Traffic Code at Schedule 1 of the 1947 Act (the "**Traffic Code**") by:
 - i. Failing to give way to traffic on a major road when entering from a minor road or from a private drive, entry or alleyway; and/or
 - ii. After stopping in compliance with his obligation to do so, failing to give way to traffic on the road he was about to enter; and/or
 - iii. Failed to proceed very slowly and with special care when coming from a minor road into a major road; and/or
 - iv. When moving on after halting at a stop sign or after halting when entering a main road from a private road, drive, or alleyway, failed to give way to traffic on the major road; and/or
 - v. When moving on after halting, and whilst not having a clear view of the major road in both directions, failing to stop again just before entering the carriageway of the major road.
 - vi. Otherwise failed to act in accordance with the requisite standard of care owed to other road users when entering a major road from a minor road and negligently drove the Car out of George's Bay Road and into Middle Road into oncoming traffic.

5. The SOC set out the Particulars of Injury which included injuries to her nose, ribs, knees, femur, nerves and tibia plateau. She also suffered from post-traumatic stress syndrome and anxiety and emotional distress. She was immobilized for 12 months and required weekly rehabilitation, physical therapy and medication for pain. She was unable to continue her work in the equine industry and continues to suffer from a loss of income as well as pain and suffering and loss of amenity.
6. The SOC set out that Mrs. Soule has suffered loss as follows:
 - a. Loss of Salary -\$156,000 at date of Statement of Claim and continuing;
 - b. Future loss of earnings and benefits; and
 - c. Medical costs in the amount of \$52,890 and continuing.
7. The SOC set out that Mrs. Soule claimed:
 - a. General damages;
 - b. Special damages in the amount of \$208,890 and continuing; and
 - c. Costs and interest.

The Defence and Counterclaim and Defence to the Counterclaim

8. Mr. Waldron filed a Defence and Counterclaim dated 27 March 2019 (prior to the date of the SOC) and filed another more detailed Defence and Counterclaim dated 15 May 2019 in response to the SOC.
9. The Defendant accepted that he was the driver of the Car at the time of the Collision. However, he denied that he entered the westbound lane of Middle Road although he accepted the bumper part of the car was past the visible line of the sidewalk (the “**Sidewalk Line**”) which he stated was not negligence on his part. He denied that his conduct caused the Collision questioning whether Mrs. Soule’s ability to handle the Scooter and her actions as not being what a reasonable rider would do. In general, he denied the Particulars of Negligence.

10. Mr. Waldron set out in the Counterclaim that Mrs. Soule was solely responsible for the damages caused to the Car and claimed damages. Mrs. Soule denied the claims in the Counterclaim.

The Trial

11. The trial took place on 8 and 30 March with evidence given by witnesses for the Plaintiff and Defendant. The Plaintiff provided an Expert Report (with diagrams and location pictures) of Mr. Dustin Archibald of Onsite Engineering Services Ltd. and intended to produce him for cross-examination, however, the Defence opted not to challenge the Expert Report or cross-examine the Expert witness.

12. Counsel for the parties made opening remarks, referred to a diagram of the Scene and took the Court in detail through a series of still photographs which were in evidence (“**HB67**” – “**HB75**”, “**HB127**” – “**HB136**” and “**HB172**” to “**HB176**”).

The Evidence – The Plaintiff’s Case

13. In the following sections, I set out some of the most relevant parts of the evidence. The Plaintiff called four witnesses – Stephanie Soule, Brian Soule, Lorraine Voiles and Richard Voiles.

Plaintiff’s Case – Stephanie Soule

14. In essence Mrs. Soule’s evidence was that she had lived in Bermuda from 1971 – 1974, was comfortable riding scooters as a result of riding scooters on vacation and from riding more powerful motorcycles in the US. On the day of the accident she and her family were heading west to their apartment in Sandys parish. She knew the Scene area well having travelled it regularly. It was a clear day with minimal clouds. She was riding in the

¹ The “HB” number is the Hearing Bundle page number of the pictures

westbound lane with her son as her pillion passenger. Her husband Brian Soule was riding ahead of her by about 30 feet with Mrs. Soule's mother as his pillion passenger. She was diligently following guidelines of riding the quarter lane and maintaining a safe distance from the scooter in front of her. Therefore, she was travelling just to the left of the center of her lane at about 20kph.

15. As she approached the Intersection she saw her husband pass the Van which was parked to the left side of the street. She was riding about three to five seconds behind him. As she approached where the Van was, the Car unexpectedly pulled out from the Side-Street into her path, leaving her no time to take any evasive manoeuvre. She stated that she had no obstruction to her view of the road. She had seen the Car in a stationary position waiting by the Intersection of the Side-Street and Middle Road and saw her husband's scooter pass it. She was thrown forward and struck her head on the front right side, landing fully on the road on her right side. She remained still and took inventory of her body, realizing that she had suffered injury. She described those injuries and how they had affected her life.

Cross-examination

16. Mrs. Soule was cross-examined by Mr. Swan. She maintained that she was in the quarter lane which she described as being equidistant between the shoulder of the lane and the center line. She was unable to comment on the car being moved after the accident as she was unaware that it had been moved. She maintained that she never spoke to Mr. Waldron. She explained that she was a novice scooter rider in Bermuda as it was her first time riding a scooter in Bermuda. She explained that she struck the Car at the right front bumper but more to the tyre area than the front of the Car. She denied that she re-adjusted her path of riding after passing the Van.

Plaintiff's Case – Brian Soule

17. Mr. Soule stated that on the day of the accident he was travelling west on Middle Road with his family riding on three scooters in a row. He was riding on the first scooter with

his mother-in-law Mrs. Voiles as his pillion passenger, his wife Mrs. Soule was riding the second scooter with her son as her pillion passenger and his father-in-law Richard Voiles was riding the third scooter alone.

18. As he approached the Restaurant, he noticed the parked Van and the stationary Car on the Side-Street. He passed the Car and approximately one or two seconds later he heard a screech or scream accompanied by a crashing sound. He looked into his rear-view mirror and saw the Car sitting across the westbound lane where he had just passed. He pulled into the bus stop area and then he returned to the Scene where he parked, noticing people had gathered. He went to his wife, who was laying in the middle of the westbound lane along with her Scooter. He checked on his son who was uninjured. He stated that the Car moved back from where it was further out in the westbound lane so that its bumper was just over the Sidewalk Line.

Cross-examination

19. Mr. Soule was cross-examined by Mr. Swan. He disagreed that Mrs. Soule struck the Car at the Sidewalk Line. He maintained that the Car was further out in the westbound lane than when he passed it at the Sidewalk Line. He stated that they normally travel three to five seconds between them but at the point of the Van, his wife was about two to four seconds behind him. He clarified that he did not see the impact or when the Car moved back. He disagreed that in HB69 his wife was on the ground in front of the Car due to the perspective of the Car, his wife and the grid cover in the picture. He denied that his wife was talking to Mr. Waldron as she was concerned with their son.
20. Mr. Soule stated that the tyres of the Van were about two to three feet out into Middle Road. He was travelling to the right of the center of the lane. He stated that once the Collision had occurred his wife was on the ground on the left side of the Car, not on the right side of the Car. He denied that the people who were around tending to his wife and son were blocking the Car from being moved back out of the westbound lane to the Sidewalk Line. He maintained that when he looked back he saw the Car out in the

westbound lane but when he went back to the Intersection the Car had been moved back into the Side-Street. He denied that a lady seen at the back of the Car in HB135 was there when he rode past clarifying that he saw no-one there.

Plaintiff's Case – Lorraine Voiles

21. Lorraine Voiles stated that on the day of the Collision, she was the pillion passenger on Mr. Soule's scooter. She recalled passing the Van and the stationary Car after which she heard the sounds of the Collision. Once Mr. Soule had stopped their scooter, she ran back to the Intersection where she saw the Car sitting in the Intersection, blocking half of the road. She saw her daughter Mrs. Soule laying in the road, on the right side of the left lane of Middle Road in front of the Car. She noticed various injuries to her daughter. She tended to her grandson. The ambulance quickly arrived and she then took several pictures with her digital camera which she exhibited. She then noticed that the Car had moved back into the Side-Street and the driver Mr. Waldron was standing there talking to a lady.

Cross-examination

22. Mrs. Voiles was cross-examined by Mr. Swan. She stated that Mrs. Soule was lying on the right side of the westbound lane with the Scooter near her. She stated that Mrs. Soule did not move when she was on the ground. She maintained that the Car had moved back into the Side-Street.

Plaintiff's Case – Richard Voiles

23. Richard Voiles stated that on the day of the accident he was on his scooter and was a few seconds behind Mrs. Soule who was travelling at about 20kph in the center of the of the left lane, just off the center line. He noticed the parked Van and as he approached the Intersection he noticed the Car waiting to join Middle Road. He saw the Car suddenly pull out into Middle Road directly crossing into Mrs. Soule's lane. He stated she had no possibility of avoiding the Car. He saw Mrs. Soule and her son rise up out of their scooter

seat at the moment they struck the Car. He immediately braked, realized he could not stop his scooter and then laid it down on its side to avoid striking anyone else. Having fallen, he got up uninjured and tended to Mrs. Soule and her son.

Cross-examination

24. Mr. Voiles was cross-examined by Mr. Swan. He maintained that he saw the Car pull out and the resulting impact with the Scooter. Referencing HB72, he stated that the Scooter had hit the Car to the left of the front wheel, near the rearview mirror, denying that it hit the Car to the front of the tyre. He stated that Mrs. Soule landed on the right side of the Car where she remained on the ground until the EMT tended to her. He denied that the car never moved, explaining that the Car moved into the westbound lane and then after the Collision it moved back into the Side-Street to the Sidewalk Line. He did not know who moved the Car back into the Side-Street. He agreed that in his statement he never put that the Car was moved back but he recalls that it was so moved.

25. Mr. Voiles agreed that the front bumper of the Car appeared dislodged but he was unable to say if the Scooter struck the bumper noting it could have been dislodged before the Collision. He stated that he could not see any tyre damage. He disagreed that the Collision occurred where the Car was at the Sidewalk Line. He could not confirm where the Scooter landed explaining that where the plastic parts landed did not assist him as they could fly around. When it was put to him that in order for the Car to move back, it would have to roll over Mrs. Soule, he stated that he saw the impact, saw Mrs. Soule and her son rise up out of the seat, but he did not know if she went over the bonnet of the Car.

26. On re-examination, Mr. Voiles stated that the nose of the Car was in the westbound lane about where Mrs. Soule's foot was positioned in HB69. I note that her foot is closer to the center line than her head which is nearer to the Sidewalk Line and Car.

The Defence Case

27. The Defence called one witness – Reuben Waldron.

Defendant's Case – Reuben Waldron

28. Mr. Waldron stated that on the day of the Collision he had gone to the Restaurant to get lunch when he parked his Car on the Side-Street (he referred to it as the “parking lot”). Later he collected his lunch from the Restaurant and returned to his Car to head back to work. He stated that he started to approach the Intersection and came to a full stop to await a clear path to travel east on Middle Road. He recalled that when he stopped, his Car was not in the westbound lane. He noticed that after the Collision his bumper was ever so slightly past the Sidewalk Line but not in such a way to affect the traffic flow westerly on Middle Road. I will add here that HB72 shows the Car in a position on the Side-Street facing into Middle Road. The front wheels have stopped immediately before the Sidewalk Line. In my view, the bumper is more than slightly past the Sidewalk Line and the front of the car including part of the headlights and the front part of the bonnet are also over the Sidewalk Line. Mr. Waldron stated that on coming to a stop, he saw Mrs. Soule travelling westward on Middle Road, he did not move nor did he do any act to move toward or onto the westbound lane.

29. Mr. Waldron stated that he saw the three scooters approaching before they had passed the Van. He saw Mrs. Soule pass the Van and continue towards him when he heard her say “*Oh no he is going to pull out and hit me.*” However, he did not move nor pull out in front of her. Then he saw her make a left turn and ride right into his front right bumper which shocked him as Middle Road is wide enough for Mrs. Soule to ride past him without a collision. He also noticed that the eastbound lane was clear of traffic meaning that both lanes were available to Mrs. Soule. He stated that Mrs. Soule was on the ground because of the Collision and he went to her. She was shouting at him and said words to the effect that he had hit her on purpose but he did not respond. While they waited for the ambulance Mrs. Soule continued to shout at him.

30. Mr. Waldron stated that he was never charged with any offences relating to the Collision and he had his car repaired for \$2,000.

Cross-examination

31. Mr. Waldron was cross-examined by Mr. Stevens. He stated that BF&M Insurance Company was his insurer on the date of the accident but had since voided his insurance and returned his premium as he had forgotten to declare his previous traffic offences from about four years before. He maintained that he did not move the Car once he saw the scooters passing him. He stated that he had seen the Plaintiff's Expert Report but had not read it. He agreed that his view was obstructed by the Van as set out in the Expert Report diagrams and by the example car as set out in the Expert Report pictures although he maintained that the line of sight for the westbound vehicles would not be obstructed and would be clear.
32. Mr. Waldron maintained that he observed Mrs. Soule riding for 10 seconds before the Collision. He denied that he described her riding at an aggressive speed but accepted that his counsel's letter dated 4 January 2019 described her as riding at an aggressive speed. He clarified that speeding meant anything over 20kph and he accepted that he told his counsel that Mrs. Soule was speeding in a reckless manner.
33. Mr. Stevens put some calculations to him as follows:
- a. Based on the Expert Report, the scooter travelling 35ft in one second would travel 350ft in ten seconds. Mr. Waldron agreed.
 - b. If the Scooter was travelling faster as Mr. Waldron says it was, then it would have been further away when he first observed it. Mr. Waldron agreed.
 - c. The distance of 120ft eastwards would place Mrs. Soule near the pedestrian crossing further back than the Restaurant. If she was travelling faster than 35kph then she would be even further back. Mr. Waldron agreed.
34. Mr. Waldron conceded that he had not seen Mrs. Soule for 10 seconds before the Collision. Also, he conceded that he could not see Mrs. Soule for that long as the Van obstructed his line of sight eastwards. Mr. Waldron agreed that in his counsel's letter dated 4 January 2019 Mrs. Soule's riding was described as being in a zigzag manner but that he had not

described it as such in his witness statement. He denied that he had fabricated the zigzag manner of riding but conceded that he was angry and frazzled when the letter was prepared and when he made his witness statement, noting that tourists always zigzag. He eventually conceded that Mrs. Soule was not riding in a zigzag manner, he was still angry but he did not have trouble telling the truth when angry and he may have embellished his version. He denied that the truth was that Mrs. Soule was driving carefully when he pulled out into Middle Road.

35. Mr. Waldron stated that the position where he stopped at the Intersection before the Collision was about 20 feet from the back of the Van. He maintained that in the duration of less than two seconds from when he would have first seen Mrs. Soule and the Collision, the following events happened: Mrs. Soule was speeding, he heard her shout “*Oh no, he will hit me*”, she turned and rode towards his stationary car and then collided with the Car. He denied that this version of events was a fabrication. Finally, he denied that he pulled out without looking to see if the roadway was clear.

The Law

36. Claims arising from road traffic accidents are tortious in nature and are almost exclusively based on the tort of negligence. In *Butterworth’s Road Traffic Service* at [3.3 - 3.4] it states: “*There is a recognized duty of care owed by drivers to other road users. The duty owed by the driver of a vehicle is breached if their driving falls below the recognised ‘standard of care’. The standard of care expected of road users is to exercise such care and skill as it is reasonable to expect of a competent and experienced driver. The same standard applies to all drivers, even learner drivers. Whether or not a driver has fallen below this standard in a particular case must be determined in light of all the circumstances.*”

37. Schedule 1 of the 1947 Act contains the Traffic Code which applies to all road users including drivers, motorcyclists and auxiliary cyclists. The legal effect of the Traffic Code is at section 48(2) of the Act which provides that:

“A failure on the part of any person to observe any provision of the Traffic Code shall not of itself render that person liable to criminal proceedings of any kind (unless such failure is specifically constituted an offence by any provision of this Act) but any failure to observe the provisions of the Traffic Code may in any proceedings, whether civil or criminal and including proceedings for an offence under this Act, be relied on by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings.”

38. Section 17(1) of the 1947 Act concerns traffic entering a highway from a private road:

“17(1) Every person driving a vehicle on a private road, estate road or alleyway, on coming to an intersection with a highway or with a naval or military road—

(a) shall, where there is no sidewalk, stop the vehicle immediately before entering the carriageway of the highway; or

(b) shall, where there is a sidewalk, stop the vehicle immediately before crossing the sidewalk,

whether or not there is a traffic sign (not being a traffic signal at the intersection indicating that vehicles must stop).”

39. Relevant rules of the Traffic Code applicable in this case are as follows:

Rule 8 (Rule of the Road) – “The rule of the road in Bermuda is to the left. Keep as near to the left as practicable, unless about to overtake or turn to the right.”

Rule 13 (Right of Way) – “Always give way to traffic on a major road when entering from a minor road or from a private drive, entry or alleyway.”

Rule 20 (Control of Vehicle) – “Never attempt to drive a vehicle from such a position, or allow anyone to sit beside you in such a manner, that you have not full control and an unobstructed view of the road and of other traffic.”

Rule 28 (Duties Towards Other Road Users) – “Take special care when passing a stationary vehicle or any other form of obstruction which prevents a clear view of pedestrians or oncoming traffic.”

Rule 34 (Cross Road, Corners and Bends) – “Go slow, take special care at cross roads, corners and bends.”

Rule 36 (Cross Roads, Corners and Bends) – “Proceed very slowly and with special care when coming from a minor road into a major road, or when moving on after halting at a stop sign or after halting when entering a main road from a private road, drive or alleyway, and give way to traffic on the major road and if there is a sidewalk, to pedestrians on the sidewalk.

When moving on after halting at a stop sign or short of a sidewalk, then unless you have a clear view of the major road in both directions stop again just before entering the carriageway of the major road.”

Analysis

40. In my view, Mr. Waldron was negligent in that he was responsible for the Collision for a number of reasons. First, in my view, the Plaintiff was driving in a manner that was consistent with the care and skill as is reasonable to expect of a competent and experienced driver and in compliance with Rule 8 of the Traffic Code, namely to keep as near to the left as practicable. I accept the evidence of both Mrs. Soule and Mr. Voile who was riding behind her that Mrs. Soule was riding in the quarter lane of the westbound lane as she approached the Intersection and started to ride through it.
41. Second, I am satisfied on the balance of probabilities that Mr. Waldron attempted to enter Middle Road from the Side-Street and I find as such. I had the opportunity to hear the evidence of Mrs. Soule and Mr. Voile that Mr. Waldron pulled out of the Side-Street into Middle Road. Also, I accept the evidence of Mr. Soule who said when he looked back, he saw the Car sitting across the westbound lane. I found them to be credible witnesses and their evidence to be clear, consistent and reliable.
42. On the contrary, I do not accept Mr. Waldron’s version of events that his Car had remained stationary on the Side-Street once he got to the Sidewalk Line of the Intersection, that he did not pull out, that he did not move his car back after the Collision and that Mrs. Soule drove into his Car at the Sidewalk Line. In respect of the Car being moved back, I accept on the evidence of Mrs. Soule and Mr. Voile that that action took place immediately or

shortly after the Collision. I reject Mr. Swan's arguments that in respect of HB74 a lady was behind the Car thus Mr. Waldron could not move the car back. That same lady is in HB72 at the side of the Car thus her positioning does not assist.

43. Further, I do not find Mr. Waldron to be a credible witness on the basis that from the start of the proceedings he had instructed his counsel about the nature of Mrs. Soule's riding that he later conceded was not correct, for example she was not zigzagging. Also, I take into account that Mr. Waldron stated that he was frazzled and angry about the Collision. In my view, this has clouded his version of events such that his instructions to his counsel as contained in his counsel's letter, his witness statements and his evidence are not consistent about the riding manner of Mrs. Soule. He also described Mrs. Soule's riding as aggressive and reckless when there is no other evidence to support that contention, when she had her young son as a pillion passenger and she was riding with various family members as the second of three scooters.
44. Third, it is clear and obvious that the major road is Middle Road and the minor road is the Side-Street. In my view, Mr. Waldron breached Rule 13 in that he did not give way to the traffic on Middle Road when he entered it from the Side-Street. In *Hollis and Coller* [1993] BM 1985 CA 23 the Court of Appeal addressed the duty imposed on a driver when entering a major road from a minor road stating "*Approaching a major road, as he undoubtedly was, his duty was to ascertain what traffic there was on that road in order to decide when it was safe to cross.*" In *Callabras v Marsh* [1988] Bda LR 21 Sir Blair-Kerr approved the dicta of the lower Court with regards to the decision facing a defendant emerging from a minor road stating "*It can, in my judgment, never be right for a motorist to decide to emerge from a minor onto a major road if to do so would be to take a risk knowing that the risk could cause harm to others. To create a hazard; to put a person at risk of injury; when injury results, is in my judgment, "prima facie" an act of negligence. I put the matter in that way deliberately for that is how I approach the issue of liability in this action.*" Sir Blair-Kerr also stated that "*If there is a danger of two vehicles being on a collision course, the driver of the vehicle entering the major road must drive in such a way that the driver of the vehicle on the major road may proceed on his way without altering speed or*

direction.” In my view, Mr. Waldron failed in his duty to ascertain what traffic was on Middle Road once he approached and/or crossed the Sidewalk Line and once he entered the westbound lane of Middle Road.

45. Fourth, I accept the evidence contained in the Expert Report that the location of the Van presented an obstacle to the sight line of Mr. Waldron. I note that the Expert did qualify his findings that he did not have the precise location and dimensions of the Van. The Defence did not produce an Expert Report and they also chose not to challenge the Expert Report or cross-examine the Expert. The Expert had reviewed the accident reports and photographs and had visited the Scene. He had also engaged registered surveyors to prepare a survey of the area which allowed him to secure accurate dimensions of the Intersection, unobstructed sight lines from the Side-Street onto Middle Road and the reduction in sight line due to the presence of the Van. He then prepared schematic drawings showing various scenarios of the Scooter and the Car. In essence the Expert concluded that the Van obstructed a significant cone of vision for Mr. Waldron such that he would not have been able to see the Scooter until it was within 32 feet of the Intersection, thus presenting a dangerous scenario for him. The Expert opined that in order to gain a clearer view of the westbound lane of Middle Road, Mr. Waldron would need to begin to enter Middle Road to be able to see around the Van.

46. Based on this unchallenged Expert evidence, in my view once Mr. Waldron had arrived at the Intersection, he did not have the benefit of an unobstructed view looking eastwards due to the presence of the Van. It follows that once he pulled out of the Intersection passing the Sidewalk Line and/or into the westbound lane of Middle Road, Mrs. Soule was already past the point where she could bring her Scooter to a stop and thus avoid a Collision. In *Herbert v Holder* [2001] Bda LR 22 the Plaintiff was riding her motorcycle on a major road and the Defendant was in his vehicle on a minor road waiting for the traffic to ease in order to enter the major road. Meerabux J held that “*The physical facts of this case raise strong prima facie evidence that the First Defendant was at fault and that this fault was the cause of the accident. Unless he had a satisfactory answer sufficient to displace the inference he has to be held liable*”. In my view, Mr. Waldron has to be held liable as he

breached the standard of care of a competent and experienced driver when he failed to give way to Mrs. Soule and failed to exercise special care pursuant to Rules 20, 28, 34 and 36 of the Traffic Code, thereby causing the accident. I agree with Mr. Stevens that I can be satisfied, and I am, that the facts of this case raise strong prima facie evidence that Mr. Waldron was at fault and that this fault was the cause of the accident.

47. Fifth, Mr. Waldron's evidence was that he stopped at the Sidewalk Line although the bumper was slightly over it. I have already stated above that in my view the bumper was more than slightly over the Sidewalk Line as were other front parts of the Car. Mr. Waldron's evidence was that he had brought the Car to a complete stop and then never moved it before or after the Collision. Mr. Waldron has not mounted a defence that he was inching the Car out into Middle Road. As I have already found, Mr. Waldron drove his Car out into the westbound lane of Middle Road where the Collision took place and then he moved the Car back to the position in HB72 atop the Sidewalk Line. If I was wrong on that point, then on Mr. Waldron's own case, that is stopping at the Sidewalk Line with part of his car over the Sidewalk Line, I would still find him liable for the Collision because (a) the Car is protruding into the westbound lane of Middle Road (b) the front of the Car only got over the Sidewalk Line by Mr. Waldron driving it over the line; and (c) Mrs. Soule always had the right of way in that lane pursuant to Rule 8 of the Traffic Code no matter how far or little the Car was in the westbound lane.

48. Sixth, Mr. Swan urged me to consider that based on the debris from the Collision being in the westbound lane and Mrs. Soule landing and remaining in the westbound lane, then the Car had to have been at the Sidewalk Line at the point of impact. His point was that if the Collision had been out in the westbound lane of Middle Road then Mrs. Soule and the debris would have landed in the eastbound lane. He also argued that an examination of the Car shows damage to the front right corner thus the Collision happened when the Car was at the Sidewalk Line. To this point, I have reviewed the still photographs and several photographs² show that on the front right corner of the bumper just below the right headlight, there is red paint, the colour of the Scooter. I am satisfied that I can infer that

² HB69/HB129, HB136, HB161/HB172, HB162/HB173, HB164/HB175, HB165/HB176 (“/” indicates duplicates)

the Scooter collided with the Car at that point, that is the right front bumper. This is consistent with the evidence of Mrs. Soule who stated that she collided at the front right bumper although she says that it was more to the tyre area than the front. This finding is not consistent with Mr. Voiles who is clearly mistaken that the point of collision was to the rear of the front wheel near the rearview mirror.

49. Mr. Swan also argued that the Car could not have been out in the westbound lane of Middle Road and then backed up as it would have had to roll over the debris and Mrs. Soule. I am not satisfied that I should accept these arguments of positioning as it seems possible that a person and the debris could land in various places based on all the circumstances including sequence of events, speed and exact movements of the Scooter, Car and Mrs. Soule. There was no CCTV footage or an expert Traffic Collision Investigator report in evidence on which the Court could be satisfied of these points.

50. Seventh, Mr. Waldron denies all liability for the Collision and pleads that the Collision was caused entirely by Mrs. Soule's negligence. He did not plead contributory negligence in the alternative. However, in his evidence he does imply it by stating that Mrs. Soule had the whole road to move around him and avoid the Collision. Mr. Swan argued that Mrs. Soule did not address the counterclaim for damages based on her liability and that the Court should dismiss Mrs. Soule's claim and then find her liable for the Collision with contributory negligence by Mr. Waldron to the extent of 20%. He did not explain how he came to that percentage figure.

51. I reject Mr. Swan's submissions entirely for the following reasons. I have already found that Mr. Waldron was liable for the Collision and that Mrs. Soule was not responsible for causing the Collision. On that basis, I do not need to address contributory negligence on the part of Mr. Waldron.

52. In respect of Mr. Waldron being found liable for the Collision and any contributory negligence on the part of Mrs. Soule, I rely on Clough JA in *DeFrias v Rooney* [2002] Bda LR 21 where he stated "37....*Contributory negligence required the foresee-ability of harm*

to oneself. A person is guilty of contributory negligence if she ought reasonably to have foreseen that if she did not act as a reasonable prudent person she might be hurt and in reckoning must take into account the possibility of others being careless. All that is required here is that the Plaintiff should have failed to take reasonable care for her own safety. I do not find that the Plaintiffs conduct was in any way contributory negligent. In the agony of the moment she made an unsuccessful attempt to avoid the collision.” Further, in *Callabras v Marsh*, DaCosta JA considered some actions on the part of a Plaintiff that would contribute to his failure to avoid being injured, quoting an excerpt from Professor Fleming on the *Law on Torts* stating “*For example, by riding a moped without a crash helmet, a car without fastening the seat belt, or with a driver known to be incompetent or intoxicated.*”.

53. In *Callabras v Marsh*, a finding of contributory negligence was deemed appropriate as the plaintiff was driving with his head down, in significant rainfall on a wet surface and at speed which was considered dangerous in the circumstances. On the basis that the onus is on Mr. Waldron to establish contributory negligence as he has asserted it, he must establish that Mrs. Soule failed to take reasonable care for her own safety, that there was a reasonably foreseeable risk of harm and that this failure to take care contributed to the injury. In my view, Mr. Waldron has not provided any such evidence and I agree with Mr. Stevens that there are no facts which support a finding of contributory negligence on the part of Mrs. Soule. She was abiding by the rule of the road in keeping as near to the left as practicable. As Kawaley CJ stated in *Brown v Levon and Grant* [2015] Bda LR 25 at para 28 “*A mere “hunch” that the Plaintiff’s own carelessness may have contributed to the accident is not a sufficient foundation for a finding of negligence of any kind in the absence of a legal presumption that a particular act constitutes prima facie proof of negligence.*”

54. Eighth, I reject Mr. Waldron’s contention that as Mrs. Soule had sufficient room to avoid the collision she should be held liable in some way. In *DeFrias v Rooney*, the Court of Appeal confirmed the “*agony of the moment*” principle in circumstances where the Plaintiff being placed in a predicament by the negligence of the Defendant, is not negligent if they do not take the evasive action the Defendant asserts they should have taken, stating:

- a. At paragraph 47 “... the Respondent [Plaintiff] was put in a predicament in circumstances where there was no evasive action she could reasonably be expected to take”;
- b. At paragraph 58 “The time for her to make her decision must have been minimal. In any event she had no choice. There was no alternative....”;
- c. At paragraph 59 “In our judgment the judge was right to conclude that the appellant had no right to complain if in the agony of the moment the respondent baulked at attempting to ride through the gap between his car and the wall on the western edge of the road because that was not a step which a reasonably careful man would fairly be expected to take.”

55. In my view, the Van provided an obstruction in the sight lines. On Mrs. Soule’s case Mr. Waldron suddenly pulled out in front of Mrs. Soule whilst on Mr. Waldron’s case he remained stopped at the Sidewalk Line. In any event, I do not accept that Mrs. Soule should be faulted in any way because she chose in the agony of the moment not to steer from the quarter lane further to the center of the lane and certainly she cannot be faulted for refusing on an urgent or any basis to ride into the eastbound lane at the risk of colliding with any oncoming traffic.

Conclusion

56. In summary I have made the following findings:

- a. Mrs. Soule’s case is proved as Mr. Waldron is liable for the cause of the Collision as pleaded for the reasons as set out above;
- b. Mrs. Soule was not contributorily negligent;
- c. Mr. Waldron’s counterclaim is dismissed.

57. I shall hear the parties on quantum of damages at a date to be fixed by the Registrar.

58. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the

Plaintiff against the Defendant on a standard basis, to be taxed by the Registrar if not agreed.

Dated 30 June 2022

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**