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**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**Cause No: G336/2006**

**BETWEEN:**

**THOMAS FARRELL**

**FIRST PLAINTIFF**

**CATHERINE FARRELL**

**SECOND PLAINTIFF**



**AND:**

**CHARLES BODDEN**

**DEFENDANT**

**Appearances:**

**Ms. Denise Owen and Mr. Kyle Broadhurst  
of Broadhurst LLC on behalf of the  
Plaintiffs**

**Sir Richard Cheltenham Q.C. instructed by  
Mr. Waide DaCosta on behalf of the  
Defendant**

**Before:**

**The Hon. Mr. Justice Charles Quin**

**Heard:**

**27<sup>th</sup> July to 3<sup>rd</sup> August 2012**

**Defendant's submissions:**

**19<sup>th</sup> November 2012**

**Plaintiffs' submissions:**

**17<sup>th</sup> January 2013**

**Counsel's agreed transcripts:**

**17<sup>th</sup> January 2013**

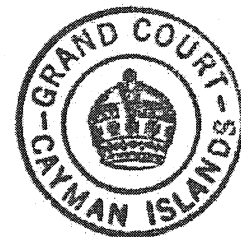
**JUDGMENT ON LIABILITY**

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*THE FACTS*

1. At about 11:45 p.m. on the evening of Tuesday the 30<sup>th</sup> December 2003, Charles Bodden, the Defendant, was driving from West Bay to George Town along the West Bay Road at the time when two visitors to the Cayman Islands, Thomas Farrell (“Mr. Farrell”) and Catherine Farrell (“Mrs. Farrell”), the First and Second Plaintiffs, were crossing the West Bay Road underneath the Hyatt overhead pedestrian bridge (the “Hyatt OPB”). The two Plaintiffs crossed the northbound portion of the road which runs from George Town to West Bay, and moved further across into the middle of the road, which is the lane for vehicles turning off the road, and, in moving from that point into the southbound portion of the road which runs from West Bay into George Town, they were struck by the Defendant’s vehicle – a red Honda Civic, registration 80 555. Both Plaintiffs were seriously injured and taken to George Town Hospital.

2. After the collision the Defendant drove his vehicle to the left side of the road and parked by Decker’s Restaurant/a nearby Restaurant.



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*PLAINTIFFS' PLEADINGS*

2       3.       On the 15<sup>th</sup> August 2006 the Plaintiffs filed a Writ of Summons and Statement of  
3       Claim against the Defendant, claiming that the accident on the 30<sup>th</sup> December 2003  
4       was caused by the Defendant's negligence and/or breach of statutory duty under  
5       s.59 and s.60 of the Traffic Law (2001 Revision). On the 26<sup>th</sup> July 2012 the  
6       Plaintiffs filed their Amended Statement of Claim.

7       4.       The Plaintiffs claim the following particulars of negligence and breaches of the said  
8       statutory duty:

9                   i.       Failing to exercise due care and attention when using the road and to  
10                  have due regard to the safety and comfort of other road users and the  
11                  preservation and protection of public and private property.

12                  ii.       Failing to drive in such a manner so as to have full control of the  
13                  vehicle at all times.

14                  iii.       Driving at a speed which was too fast in the circumstances.

15                  iv.       Failing to keep any or any proper, look out or to have any sufficient  
16                  regard for pedestrians.

17                  v.       Driving the vehicle so as collide with the first and second Plaintiffs.

18                  vi.       Failing to stop, to slow down, to swerve, or control the vehicle so as to  
19                  avoid the accident.

20                  vii.       Failing to give any adequate warning of his approach.



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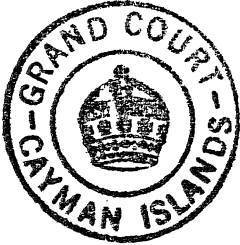
viii. Failing to see the First and Second Plaintiffs in sufficient time to avoid colliding with them or at all

ix. Failing to exercise reasonable skill and care to be expected of a reasonably skillful and careful driver in the circumstances.

5. The First Plaintiff was 49 years old and the Second Plaintiff was 46 years old when this accident occurred in 2003.

6. The Plaintiffs claim that by reason of the Defendant's negligence and or breach of duty, the Plaintiffs have suffered injury and loss and damage.

7. I will deal with the quantum claim for personal injury, loss and damage in a separate judgment.



1 *DEFENDANT'S RESPONSE*

2 8. On the 17<sup>th</sup> November 2006 the Defendant entered his Defence – denying the  
3 Plaintiffs' claim and claiming that the Plaintiffs caused the accident by reason of  
4 their negligence in recklessly and carelessly darting into the path of the Defendant's  
5 vehicle.

6 9. On the 7<sup>th</sup> May 2006 both parties signed a Consent Order for directions for the  
7 filing of witness statements and expert evidence.

8 10. On the 17<sup>th</sup> November 2006 the Defendant filed an Amended Defence, and on the  
9 13<sup>th</sup> July 2012 he filed a Re-Amended Defence, denying that he caused the accident  
10 by any negligence.

11 11. The Defendant pleaded that the area where the accident occurred is without  
12 streetlights and the lighting is consequently very poor. The Defendant also claims  
13 that the poor lighting was exacerbated by the dense, forest-like vegetation in the  
14 area on the left of the road for some 50 yards approaching from the north to the  
15 south.

16 12. In his Re-Amended Defence the Defendant claims that the Plaintiffs had not used  
17 the Hyatt OPB designed for the safe passage of pedestrians over the West Bay Road  
18 from the east to the west.

19 13. The Defendant denies that he drove negligently or at an excessive speed thereby  
20 causing the Plaintiffs injuries.



1           14.    The Defendant pleaded that the Plaintiffs' injuries resulted from negligence on the  
2                   part of the Plaintiffs as follows:

- 3                   a.    Failing to exercise due care and attention while on the road.
- 4                   b.    Failing to utilise the bridge to cross a busy thoroughfare;
- 5                   c.    Suddenly and without warning darting from their stationary position in the  
6                   centre turning lane of the road, and on into the path of the Defendant's vehicle.
- 7                   d.    Suddenly and without notice looking to the right and moving into the road in  
8                   front of the Defendant's vehicle when it was dangerous and unsafe so do, thus  
9                   causing a collision and their [the Plaintiffs'] personal injuries loss and damage.
- 10                  e.    The Plaintiffs were the authors of their own misfortune.

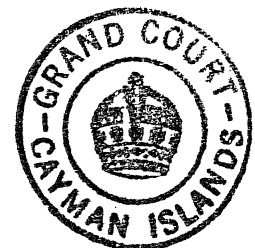
11           15.    The Defendant pleaded that he was lawfully driving at the material time within the  
12                   speed limit and with due care and attention and exercising proper skill.

13           16.    The Defendant points to the fact that between the 17<sup>th</sup> November 2006 and the 2<sup>nd</sup>  
14                   April 2012 there were no developments in these proceedings.

15           17.    On the 2<sup>nd</sup> April 2012 the trial date of the 16<sup>th</sup> April 2012 was vacated and a Case  
16                   Management Conference was set for the 19<sup>th</sup> April 2012 at which there were further  
17                   directions in relation to discovery and witness statements.

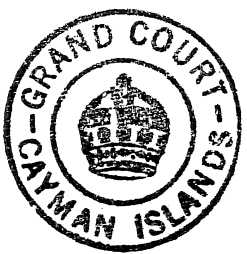
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1       18.     On the 19<sup>th</sup> April 2012 there was a further Order for directions in relation to the  
2             timetable for witness statements and a trial date was then set for the 30<sup>th</sup> July 2012.  
3             On the 19<sup>th</sup> April 2012 it was also ordered that the Witness Statements should be  
4             received by the Court in this format due to the passage of time since the statements  
5             had been taken.

6       19.     On the 26<sup>th</sup> July 2012 the Defendant filed a re-Amended Defence and, on the same  
7             date, the Court granted the Defendant leave to file late medical expert evidence and  
8             the Plaintiffs filed an Amended Writ and Statement of Claim.



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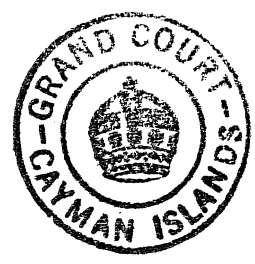
*EVIDENCE ON LIABILITY*

*FIRST PLAINTIFF – MR. FARRELL*

20. The First Plaintiff was in the Cayman Islands in December 2003 on vacation for his 10<sup>th</sup> consecutive family Christmas holiday. The First Plaintiff explained that the family always stayed at the Hyatt and the Britannia Villas. On the evening of the 30<sup>th</sup> December 2003 the family members divided into three separate groups and went to different restaurants. The First Plaintiff said all the family members met altogether again after dinner at the Bamboo Bar & Lounge (“Bamboo”) at around 10:30 p.m. The Plaintiff confirmed that he and his wife were staying at Britannia Villas and needed to cross the West Bay Road. He said there was one lane going north from George Town to West Bay. There was a middle lane for motorists wishing to turn left or right, and there was one lane going south from West Bay to George Town.

21. The First Plaintiff said that when they left Bamboo he saw his wife’s brother, Paul, “*leave just before us*” and that’s the last thing he can remember about that evening.

22. The First Plaintiff says he has no recollection of the accident or of crossing the road. He maintains that it is hard for him to understand how it happened, but he has since learned that he and his wife were hit by a car driven by the Defendant as they were crossing the third, southbound lane.



1       23.     In cross examination on the 30<sup>th</sup> July 2012 the First Plaintiff accepted that he had  
2             had some alcoholic drinks in the afternoon, but he had also had a nap before dinner.  
3             The First Plaintiff said he did not drink too much and he did not remember drinking  
4             very much on that evening. The First Plaintiff said he does not know whether he  
5             walked into the car.

6       24.     The First Plaintiff accepted that he knew there was an overhead pedestrian crossing  
7             when one comes out of Bamboo, which allows pedestrians to go from west to east.  
8             The First Plaintiff accepted that he had used the overhead pedestrian crossing  
9             before and that it was a prudent and safe way to cross the road.

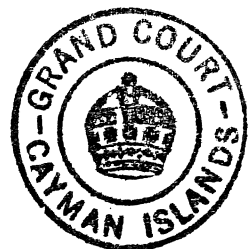
10      25.     When asked why he did not use the overhead pedestrian crossing the First Plaintiff  
11             said he cannot recall. He said he recalls going back to Bamboo and then maybe  
12             having one drink, but he and his wife left following Paul Horning.

13      26.     The First Plaintiff said he does not recall a quarrel but he does recall a discussion.

14      27.     In the court file was a record from the Burke Rehabilitation Centre (“BRC”) dated  
15             the 4<sup>th</sup> February 2004. This note records that the First Plaintiff attended a group  
16             health and behaviour session in which he discussed the accident and the injuries  
17             with Dr. Barry Jordan. The report records that the First Plaintiff said they (he and  
18             his wife) were vacationing in a country where driving is on the “*right-hand side*” of  
19             the road. He said that as they were crossing he saw the vehicle coming, pushed his  
20             wife out of the way and he was struck and thrown many feet.

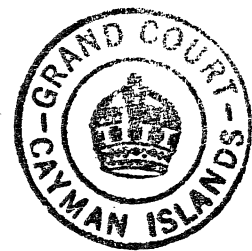
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1 This note was not referred to by counsel for the Plaintiffs or by leading counsel for  
2 the Defendant. Neither the counsel for the Plaintiffs nor leading counsel for the  
3 Defendant asked the First Plaintiff about the account that he reportedly gave at  
4 BRC some five weeks after the accident. Accordingly, the First Plaintiff was never  
5 given an opportunity to explain, in live evidence, this record made of the group  
6 discussion at BRC in which he reportedly discussed the accident and the injuries he  
7 sustained.

8 However, on the 8<sup>th</sup> August 2012 the Court drew the attention of both parties to this  
9 BRC record dated the 4<sup>th</sup> February 2004 and, sometime between the 8<sup>th</sup> August and  
10 the 10<sup>th</sup> August 2012, the First Plaintiff advised his counsel that he has no  
11 recollection of having attended the session at BRC on the 4<sup>th</sup> February 2004. The  
12 First Plaintiff states that he is not able to dispute his attendance, or the content of  
13 the record, and he will not attempt to do so. He maintains that he is simply unable  
14 to recall this particular group health and behaviour session.



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*SECOND PLAINTIFF – MRS. FARRELL*

2       28.     In her witness statement the Second Plaintiff records that the family had always  
3             stayed at the Hyatt in the Britannia Villas and 2003 was the family's 10<sup>th</sup> family  
4             holiday at the same place.

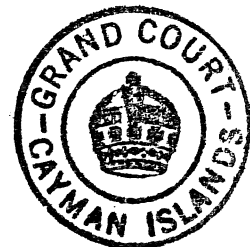
5       29.     Mrs. Farrell also records that the family split up into three groups and went to three  
6             different restaurants. They then met up at Bamboo on the beach side of the Hyatt –  
7             not far from where they were all staying. As the Bamboo got more crowded and  
8             louder, the Second Plaintiff and her husband, the First Plaintiff, decided to leave  
9             and return to their Villa, and she stated that in order to get back to their Villa they  
10            needed to cross the West Bay Road.

11      30.     The Second Plaintiff recalls seeing her brother, Paul Horning, a little ahead of them  
12             as they were heading out to go back to where they were staying.

13      31.     The Second Plaintiff states that she does not remember being hit by the car or the  
14             sequence of events immediately before the accident. The first thing the Second  
15             Plaintiff says she recalls is being up in the air and hearing a car engine whine and  
16             then hearing a scream. The Second Plaintiff recalls being flat on the pavement and  
17             other people being around. She recalls the ambulance arriving and two attendants  
18             placing her on a stretcher. She has no recollection of the drive to the hospital and  
19             the next thing she remembers is being in the hospital with her son and her brother.

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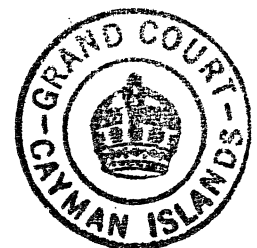
1       32.     The Second Plaintiff has no recollection of meeting the Defendant at George Town  
2             Hospital, or of having any conversation with him in which she purportedly told him  
3             that the accident was not his fault. The Second Plaintiff has no recollection of  
4             advising the Defendant that she and the First Plaintiff should have listened to their  
5             family members and used the Hyatt OPB.

6       33.     Under cross examination, the Second Plaintiff confirmed that she was familiar with  
7             the road and she knew it to be a busy highway. Also under cross examination the  
8             Second Plaintiff confirmed that she knew about the Hyatt OPB and had used it  
9             before.

10      34.     The Second Plaintiff said she knew that part of the danger was that there was traffic  
11             coming from both directions, but she did not have any idea why she did not use the  
12             overhead pedestrian crossing that evening. The Second Plaintiff acknowledged that  
13             there was a heavy duty to be more alert and careful in protecting herself. The  
14             Second Plaintiff said they had crossed that road for nine years. She said, "*We stayed*  
15             *at the Villas and we always crossed at that point.*"

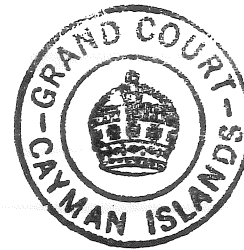
16      35.     It was put to the Second Plaintiff that she had been drinking and that her judgment  
17             was impaired. The Second Plaintiff said she did not think her judgment was  
18             impaired and that she does not get "*stumbling drunk.*"

19      36.     The Second Plaintiff said she did not recall a quarrel involving her brother on that  
20             night, but she did recall talking at Bamboo. The Second Plaintiff says that she does  
21             not recall standing on the road or crossing the road.



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*MR. CHARLES HORNING*

37. On the 30<sup>th</sup> December 2003 at about 11:45 p.m. Charles Horning left the Bamboo ahead of his sister, the Second Plaintiff, Mrs. Farrell, her husband, the First Plaintiff, Mr. Farrell, and his brother, Paul Horning.

38. Charles Horning recalls the Plaintiffs arguing with his brother Paul. Charles Horning says he's not sure what the argument was about – whether it was money or work. Charles Horning left the Bamboo and cross the road using the overhead pedestrian bridge. Charles Horning said he left the Plaintiffs and Paul Horning on the sidewalk outside Bamboo. He does not know why the Plaintiffs did not use the bridge.

39. Charles Horning said he had walked about 75 feet on the Hyatt OPB before the Plaintiffs began to cross the road. Charles Horning said he was about a quarter of the way across the Hyatt OPB when *"I looked and saw all three of them together."*

40. Charles Horning said that when he reached the elevator at the other end he heard a loud thud and he ran back along the bridge and saw both the Plaintiffs lying in the left lane. Charles Horning said he also saw the red Honda Civic Hatchback, facing south, pulled to the left side of the road in front of Decker's Restaurant.

41. Charles Horning did not hear any sound of any braking from the Honda Civic. He confirmed that the First Plaintiff was wearing khaki shorts and a royal blue polo shirt and the Second Plaintiff was wearing a black shirt and floral long pants.

42. Charles Horning said he estimates that it took him about 20 seconds to cross the West Bay Road using the Hyatt OPB.

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*MR. PAUL ANTHONY HORNING*

43. Paul Horning recalls that on the 30<sup>th</sup> December 2003 at about 11:45 p.m. he and his other family members left Bamboo. He said they had been drinking. He said while they were at the Bamboo there was a verbal argument over money. He said the Plaintiffs were arguing with Charles Horning and with him (Paul).

44. Paul Horning said they left Bamboo with the intention to go back to the Hyatt/Britannia Villas. He recalled Charles Horning using the Hyatt OPB to cross the road. Paul Horning said he, (Paul) did not use the Hyatt OPB and he crossed the West Bay Road ahead of the Plaintiffs. Paul Horning said he had completely crossed the road underneath the Hyatt OPB and the he was about to walk through the gates “*at the mini golf place*” when he stopped to wait for the Plaintiffs to cross the road. Paul Horning said he was then facing the Bamboo when he saw a red Honda Civic hit the Second Plaintiff on her left leg and pitch her in the air about 10 feet high across the road. She landed on her stomach and skidded. Paul Horning said he then saw the First Plaintiff about 30 to 40 feet beyond where Second Plaintiff was lying; they were both lying in the left/southbound lane of the West Bay Road.

45. Paul Horning recalls that seconds before the Second Plaintiff got hit he saw her looking the wrong way to her right. Paul Horning said he saw both Plaintiffs stop in the turning lane. He said he saw the Second Plaintiff stop in the turning lane and then step in front of the red Honda Civic. Paul Horning estimated the Honda Civic to be travelling at about 40 mph at the time of the accident.



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*MR. BILLY MICHAEL FARRELL*

46. Billy Farrell says he was at Decker's Bar on the opposite side of the West Bay Road from Bamboo. He said he saw a male and a female walking towards Decker's in the centre lane. He said he saw them walking and looking up at the Hyatt OPB at someone. Billy Farrell said he could hear someone talking back to them from the Hyatt OPB. Billy Farrell said he did not pay attention to or notice any vehicle that was approaching but he could see the two people on the road from the corner of this eye. Billy Farrell said he next heard a loud noise and saw the red Honda Civic as it hit one of the two people as he/she was crossing the West Bay Road, and then hitting the other person shortly afterwards.



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*MR. VINCENT WALTERS*

47. Mr. Walters explained to the Court that he was a traffic accident investigator. He had received Traffic Accident Reconstruction Training from Michigan State University, Emergency Response Driving Instructor Training at Staffordshire in England, and, Traffic Accident Reconstruction Training at North Florida University in Jacksonville, Florida.

48. He said on Wednesday the 30<sup>th</sup> December 2003 he visited the scene of the accident on West Bay Road in the vicinity of the Hyatt OPB. He was met by Royal Cayman Islands Police Service (RCIPS) Officer in charge of the investigation into the accident, Officer Brian Jameson (“Officer Jameson”) and he did a review of the scene of the accident and later he conducted a visibility test, with the assistance of RCIPS Officers Jameson and Taylor.

49. In relation to the scene he found there was no roadway evidence. There were no skid marks or yaw marks, which could be used for speed determination, and he did not find any scuff marks to indicate any sudden deviation of the vehicle involved. Mr. Walters said there was an area of darkness underneath the Hyatt OPB, within the proximity of the point of impact. He noted that there was a streetlight which was 178 feet south of the overpass along the West Bay Road, and another street lamp 186 feet and 6 inches north of the Hyatt OPB. Mr. Walters said that the point of impact was in close proximity to the Hyatt OPB.

50. He did a visibility test approximately 1 to 1 ½ hours later. He said he did not examine the headlights of the Honda.



1 51. Officer Taylor was dressed up in dark clothes and remained on the side of the road.  
2 At 1:15 a.m. Officer Taylor was asked to walk across the road at the accident scene.

3 52. Mr. Walters said that he and Officer Jameson drove to the Grand Pavilion Hotel and  
4 they measured and discovered that the distance from the Grand Pavilion Hotel to  
5 the scene of the accident was 458 feet. Mr. Walters said that he did not have any  
6 difficulty seeing Officer Taylor from the exit of the Grand Pavilion Hotel. Mr.  
7 Walters said that a vehicle travelling at 40 mph covering a distance of 58.64 every  
8 second, will take 7.8 seconds to cover the 458 feet of road. When they got to 458  
9 feet from the accident they could see Officer Taylor.

10 53. Under cross examination Mr. Walters said he did not agree with the term point-of-  
11 impact as shown on the police diagram as it should have been marked "area of  
12 impact". Mr. Walters confirmed that 458 feet was the distance they could see. Mr.  
13 Walters accepted that any driver travelling through that particular area where there  
14 are bars and restaurants and tourists is expected to look carefully.



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1 *MR. JEFFREY ARMSTRONG*

2 54. Mr. Armstrong is accepted as a forensic engineer with specific specialty in road  
3 traffic accidents. He prepared a report on the 13<sup>th</sup> March 2012 having reviewed the  
4 scene of the accident as instructed by the Plaintiffs' attorneys.

5 55. In cross examination Mr. Armstrong told the Court that he took the following steps:

6 i. Reviewed the police report and witness statements and familiarized  
7 himself with everything that was available;

8 ii. Visited the location of the accident: In the daytime he took  
9 measurements and this provided for the scale diagrams he put in his  
10 report.

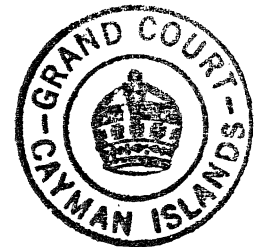
11 iii. Reviewed aerial photographs and took photos.

12 iv. Did a nighttime inspection

13 v. Visited the location between 9 p.m. and 10 p.m. when traffic was  
14 heavier and at 11 p.m. when traffic was light, going up and down West  
15 Bay Road. He noted that there are shadows on West Bay Road but  
16 there is still effective visibility.

17 vi. When it was safe to do so, he turned off his headlights in areas under  
18 streetlights and in shadows, and the visibility was not altered.

19 56. Mr. Armstrong said the testimony on speed was very consistent. He said he looked  
20 at the different versions of the accident and how much time would be involved for  
21 the accident to occur.



1 57. Mr. Armstrong said that the studies from the Society of Automotive Engineers  
2 showed similar damage to a windscreen from an impact at 35 to 40 mph and he  
3 compared that with the information from this accident. Mr. Armstrong said the  
4 result of that comparison gives credence to the reports and the consistent testimony  
5 of the witnesses about the speed of the vehicle, which was approximately 40 mph.

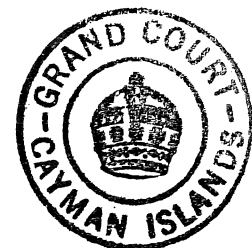
6 58. Mr. Armstrong said there were no skid marks to do a physical study.

7 59. Mr. Armstrong was of the opinion that the speed of the Defendant's Honda was  
8 between 35 to 45 mph. Like Mr. Walters, Mr. Armstrong found that the overhead  
9 streetlight was approximately 186 feet north of the pedestrian bridge, and the other  
10 streetlight was approximately 178 feet south of the pedestrian bridge.

11 60. Mr. Armstrong said there was additional ambient lighting in the area from the  
12 adjacent hotels, restaurants and condominiums. He said that, at the time of the  
13 accident the half moon was low in the sky but did not provide significant  
14 illumination to the accident's location.

15 61. Mr. Armstrong was of the view that typical low beam car headlamps would provide  
16 adequate illumination to allow drivers to recognise pedestrians in dark clothing  
17 from a distance of approximately 250 feet without any additional lighting sources.

18 62. Mr. Armstrong's view was that the West Bay Road curved slightly to the left for  
19 southbound vehicles approaching the pedestrian bridge. This curvature aims the  
20 headlights at the centre lane as vehicles negotiate the curve approaching the  
21 location of the accident.



1       63. Mr. Armstrong noted that the police traffic accident reports stated that there was  
2       major damage to the front windscreen, hood (bonnet) and bumper of the  
3       Defendant's Honda motorcar.

4       a. The First Plaintiff was wearing khaki shorts and a royal blue polo shirt, whilst  
5       the Second Plaintiff was wearing a black shirt and flowered long pants.

6       b. It was reported that the Plaintiffs were crossing the West Bay Road in a west to  
7       east direction from the Hyatt to Deckers. After they entered the southbound  
8       lane they were struck by the Honda.

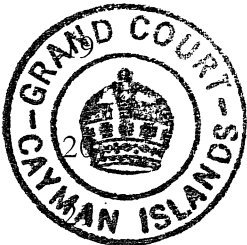
9       64. Mr. Armstrong confirmed that the road surface was good asphalt. There was no  
10       roadway evidence such as skid marks or yaw marks and there was an area of  
11       darkness, which was near to the point of impact, underneath the Hyatt OPB.

12       65. Mr. Armstrong confirmed that the visibility test conducted by the RCIPS Service  
13       Accident Reconstructionist, Mr. Walters, stated that pedestrians dressed similarly to  
14       the Plaintiffs would have been visible from approximately 458 feet.

15       66. Mr. Armstrong was of the view that the minimum visibility distance of pedestrians  
16       at this location was 250 feet. This was based on two factors.

17       The first is that the typical low beam headlamp would illuminate pedestrians  
18       adequately to be recognised by drivers from a distance of approximately 250 feet,  
independent of other light sources.

19       The second factor is that Mr. Tresidder, who was the front seat passenger in the  
20       vehicle behind the Defendant's vehicle, saw the Plaintiffs as the vehicle he was  
21       travelling in passed Palm Heights Road, which is approximately 250 feet north of  
22



1 where the accident occurred. Accordingly, Mr. Armstrong said he was comfortable  
2 in his opinion that the minimum visibility distance of the Plaintiffs was at least 250  
3 feet.

4 Mr. Armstrong took the statement from the Defendant that he first saw the  
5 Plaintiffs when he was “*by the manhole cover which is right before the bridge.*” Mr.  
6 Armstrong said that the distance from the manhole cover to the point of impact was  
7 approximately 80 feet, which is well below the distance from which an alert driver  
8 should have been able to see the pedestrians. Mr. Armstrong added that this is well  
9 below the 250 feet for which the headlamps of the vehicle would provide  
10 illumination – which is the same 250 feet from which the Plaintiffs were seen by  
11 Mr. Tresidder who was a passenger in the vehicle following the Defendant’s  
12 vehicle, and below the 458 feet observed by Mr. Walters.

13 67. Mr. Armstrong said that, as there were no skid marks or other evidence from the  
14 roadway from which to calculate the speed of the Defendant’s Honda at impact, he  
15 had to rely on the evidence of witnesses and the damage to the vehicle.

16 68. Mr. Armstrong pointed out the major damage to the windscreen, hood and bumper  
17 of the Honda. He said that studies published by the Society of Automotive  
18 Engineers state that such damage is consistent with an impact speed of 35 to 40  
19 mph, which was also consistent with the reports of various witnesses.

20 69. Mr. Armstrong said in a “worse-case scenario”, with the vehicle travelling at 40  
21 mph and a pedestrian recognition distance of 250 feet, a driver would be able to  
22 bring a vehicle to stop in 71 feet – allowing a driver perception and reaction time of  
23 3.05 seconds.



1       70.     Mr. Armstrong then moved towards a probable scenario analysis based on a 458-  
2             foot visibility distance, with the Honda travelling at 40 mph.

3       71.     Mr. Armstrong was of the view that a driver travelling at 40 mph would be able to  
4             stop his vehicle in approximately 70 feet, with full braking. This would leave 388  
5             feet for perception and reaction. At 59 feet per second it takes 6.6 seconds to travel  
6             388 feet – well above the typical perception and reaction time of 2 seconds for an  
7             alert driver. Mr. Armstrong was of the view that the Defendant had more than  
8             adequate time and distance to perceive, react and avoid the collision.

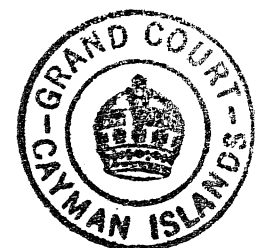
9       72.     In the accident scenario provided by the Defendant Mr. Armstrong said that the  
10            distance from the manhole cover to the point of impact is approximately 80 feet. At  
11            a speed of 59 feet per second it takes 1.4 seconds to travel 80 feet, and just 0.17 to  
12            0.26 seconds to travel 10 to 15 feet.

13       73.     During a 2-second perception and reaction time a vehicle would travel 118 feet. Mr.  
14            Armstrong was of the view that by not seeing the Plaintiffs until he was 80 feet or  
15            less from the impact point, the driver of the Honda did not have time to take any  
16            evasive action to avoid this collision.

17       74.     Even given some variation in Mr. Bodden’s estimate of when he first saw the  
18            pedestrians, Mr. Armstrong was of the view that in none of these estimates the  
19            Defendant demonstrated the characteristics of an alert driver who should have been  
20            able to see the pedestrians from a distance of 250 feet or more.

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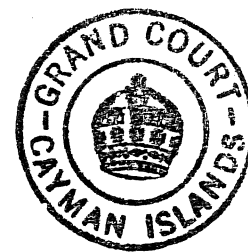
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1       75.     Accordingly, Mr. Armstrong's evidence is that by failing to maintain a level of  
2             attentiveness consistent with an alert driver, the Defendant also failed to provide  
3             himself with adequate time to perceive, react to, and avoid the collision with the  
4             Plaintiffs.

5       76.     In cross examination Mr. Armstrong said that in daytime, in good conditions, a  
6             driver would have a reaction time of 1.5 seconds, whereas at night a driver would  
7             have a reaction time of 2 seconds.

8       77.     Mr. Armstrong was asked: What if the pedestrians suddenly appeared before the  
9             driver. Mr. Armstrong replied that one must establish a baseline and Mr. Walters  
10            has established the effective perception and reaction time that is needed. Even if  
11            visibility were only 250 feet, one would still have 3.05 seconds perception and  
12            reaction time, whereas, if the driver only saw the pedestrians 80 feet away at 40  
13            mph, that would be too late to react. Mr. Armstrong concluded that the pertinent  
14            question is: Why did the Defendant not see them until they were 80 feet away, or  
15            about 1.3 seconds away?



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1 *RCIPS OFFICER BRIAN JAMESON*

2 78. Officer Jameson is the RCIPS officer in charge of the investigation of the motor  
3 vehicle accident that occurred on the 30<sup>th</sup> December 2003 at about 11:45 p.m.

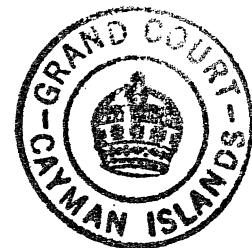
4 79. Officer Jameson said he attended the scene at 11:57 p.m. He noted that the  
5 Plaintiffs were lying in the left lane. He said measurements were taken at the scene  
6 and the Plaintiffs had come to rest about 31 feet apart. The First Plaintiff was 67  
7 feet and 9 inches from the point of impact and the Second Plaintiff was 36 feet 7  
8 inches from the point of impact.

9 80. Officer Jameson noted that there were no skid marks from the car driven by the  
10 Defendant.

11 81. Officer Jameson performed a roadside breath test at 12:02 a.m. on the Defendant  
12 and the result was negative.

13 82. In the early hours of the following day Officer Jameson attended the scene with  
14 accident reconstructionist, Mr. Walters, and Officer Taylor in order to accurately  
15 record the visibility in the area near the Hyatt overhead pedestrian crossing.

16 83. Officer Jameson said that they left Officer Taylor in the middle turning lane under  
17 the Hyatt OPB. They drove away from the area, in the direction of West Bay, in  
18 order to get accustomed to the lighting and the visibility. Officer Taylor said the  
19 area approaching the Hyatt OPB was not illuminated and he said it was very dark.  
20 He said it had dense, forest-like vegetation immediately before, and for about 50  
21 yards approaching the Hyatt OPB.



1 84. Officer Jameson said that upon reaching 450 feet away from the point of impact, he  
2 had to look quite intensely to notice Officer Taylor.

3 85. Officer Taylor said there was one light pole on the south side – 178 feet away from  
4 the Hyatt OPB – and another light pole on the north side – 186 ½ feet away.

5 86. Officer Jameson gave evidence that the speed limit where the accident occurred is  
6 40 mph. In that area there was no designated pedestrian crossing on the West Bay  
7 Road and neither were there stop signs. The area where the accident occurred was  
8 without streetlights. Officer Jameson said there the Hyatt OPB is designed for the  
9 safe passage of pedestrians over the West Bay Road between the east side and the  
10 west side of the road.

11 87. Officer Jameson said the damage to the car was to the right side of the front  
12 windscreen.

13 88. Officer Jameson agreed that the distance from the entrance to the Grand Pavilion to  
14 the scene of the accident was 450 feet. Officer Jameson said in his evidence to the  
15 Court that Officer Taylor became visible to Officer Jameson just past the Grand  
16 Pavilion entrance.

17 89. Officer Jameson said he did not take statements from the Plaintiffs because the First  
18 Plaintiff was unconscious and the Second Plaintiff was asleep.

19 90. In re-examination Officer Jameson suggested that the Plaintiffs should have used  
20 the Hyatt OPB, which was provided to cross the road and the Defendant drove  
21 without sufficient care and attention.

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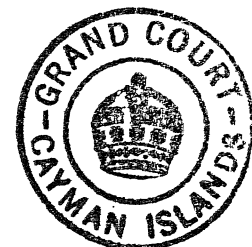
1 *MR. SAM ROBERT TRESIDDER*

2 91. Mr. Tresidder said that on the 30<sup>th</sup> December 2003 at about 11:30 p.m. he was the  
3 right front seat passenger in a red and white Subaru Motor vehicle with registration  
4 plates 46992, driven by his friend, Tom Watling. They were driving behind the red  
5 Honda hatchback, driven by the Defendant. Mr. Tresidder said the Honda was not  
6 swerving or anything it was driving under the speed limit. He recalls that the  
7 Subaru in which he was travelling was on cruise control at 35 mph at and  
8 maintained the same distance behind the Honda Civic whilst driving behind the  
9 Honda Civic down the West Bay Road.

10 92. Mr. Tresidder said that upon reaching Palm Heights, which is the road on the left-  
11 hand side before the Hyatt OPB, he saw two people in the road at the beginning of  
12 the middle lane crossing from the right side the left, that is, from Bamboo to  
13 Deckers. Mr. Tresidder said they both appeared to be drunk. He said that the female  
14 person stumbled, and, at one time, he saw her grab on to her male companion's  
15 shoulders and then let go. Mr. Tresidder said it appeared to him that the female  
16 stumbled and held on to his shoulder in order to prevent herself from falling.

17 93. Mr. Tresidder's evidence is that the centre of the road is a bit dark and one would  
18 have to "look hard" to see someone there. Mr. Tresidder said there were no vehicles  
19 coming from the opposite direction.

20 94. Mr. Tresidder's evidence is that the Plaintiffs continued walking, and walked right  
21 in front of the Honda Civic. Mr. Tresidder said the Honda Civic did not slow down  
22 until after the accident.



1 95. Mr. Tresidder said the two Plaintiffs were crossing the road side by side. He said  
2 the female got hit by the Honda Civic first and flipped backwards over the Honda  
3 and landed in the middle of the left lane. Mr. Tresidder's evidence is that the male  
4 got hit afterwards and smashed the front windshield – bouncing ahead of the Honda  
5 Civic and landing on his head on the road in the left lane.

6 96. Before the Court Mr. Tresidder said the Plaintiffs were not paying attention – they  
7 appeared to be laughing and joking. Mr. Tresidder said he assumed that they had  
8 had a few drinks, because they were coming from Bamboo.

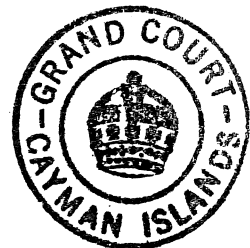
9 97. Mr. Tresidder said the Plaintiffs were holding onto each other. Mr. Tresidder said  
10 the Plaintiffs did not notice the car was coming and the car did not notice the  
11 Plaintiffs. The last second after the Plaintiffs got hit the driver of the Honda Civic  
12 stopped the car and parked over at Deckers. Mr. Tresidder said the driver of the car  
13 in which he (Mr. Tresidder) was travelling called the police.

14 98. Mr. Tresidder said the road was quite lit before the Hyatt OPB but not well lit under  
15 the Hyatt OPB and for about 10 feet in front of it.

16 99. In cross examination Mr. Tresidder said that the Defendant's vehicle was about  
17 three car lengths in front of the car in which he, Mr. Tresidder was in. It was Mr.  
18 Tresidder's opinion that the driver of the Honda would still have been able to see  
19 the people crossing the road.

20 100. Mr. Tresidder accepted that the road was normally busy and that drivers had to be  
21 incredibly careful.

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*THE DEFENDANT, CHARLES BODDEN*

101. Mr. Bodden was born on the 22<sup>nd</sup> June 1977 and at the time of the accident he had held a drivers' licence for six years.

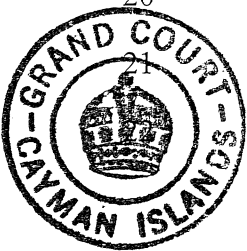
102. Prior to the accident the Defendant had been at a friend's house working on his brother's car. He recalled leaving the garage at about 11:30 p.m. and heading back to his house, which is on North Sound Road. The Defendant said he was in the southbound lane on West Bay Road, travelling at a speed of 60 km per hour. He said the traffic was fairly light and the paved road was dry.

103. In his witness statement the Defendant said the West Bay Road is a very busy main thoroughfare with a posted speed limit of 40 mph. He recalled driving there.

104. The Defendant said the area where the accident occurred is without streetlights. The lighting is poor and is exacerbated by the dense forest-like vegetation on the left side of the road.

105. The Defendant said that as he was coming towards the Hyatt OPB he noticed a male pedestrian and a second pedestrian behind or beside the male pedestrian. The Defendant said the Plaintiffs suddenly, without warning, darted from a stationary position in the centre turning lane into the path of his vehicle. The Defendant said that once he saw the Plaintiffs in his southbound lane he applied the brakes instantly.

106. In his evidence before the Court the Defendant said that the Plaintiffs were standing in the centre lane. He felt they were waiting from him to pass and then they would cross.



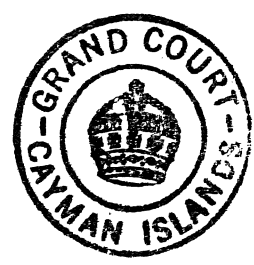
1 107. The Defendant said he was crossing the manhole cover, which is just before the  
2 Hyatt OPB when he first saw them. He said he could see them as they were in the  
3 headlights of an oncoming car, but as he drove towards the Hyatt OPB they stepped  
4 out in front of him and he saw them in his lane approximately a car length away or  
5 10 to 15 feet away.

6 108. The Defendant said the Plaintiffs were looking up and they were not paying  
7 attention. The Defendant said his reaction was to immediately step on the brakes  
8 and almost immediately he hit the gentleman who came up on the bonnet. The  
9 Defendant said he did not see or recall hitting the lady.

10 109. The Defendant said that after the accident had taken place he was concerned about  
11 the Plaintiffs although he felt the accident was not his fault. He said he wanted to  
12 make sure that they were okay and he got his parents to take him to the hospital to  
13 the A&E department.

14 110. The Defendant said he introduced himself to the female pedestrian who was in the  
15 A&E department. The Defendant said he had a short conversation with her. He said  
16 she tried to console him and she said he was not to worry, it was not his fault. The  
17 Defendant said the Second Plaintiff told him that they (the Plaintiffs) should have  
18 listened to the family members and taken the crossover bridge (the Hyatt OPB).  
19 The Defendant said the Second Plaintiff said that they had a few drinks and they  
20 should have listened to the family. The Defendant said the Second Plaintiff was  
21 then taken away for further treatment.

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*CROSS EXAMINATION OF THE DEFENDANT*

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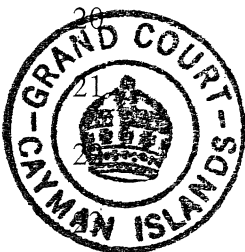
2       111. Under cross examination the Defendant said he was very familiar with the West  
3 Bay Road. He said he knew it had many restaurants, hotels, bars and was very  
4 popular. The Defendant said he was also aware that tourists would be crossing the  
5 road and drivers had to pay very careful attention. The Defendant said the area of  
6 the accident was a dark area and a prudent driver would have to drive at a safe  
7 speed in the all the circumstances.

8       112. The Defendant said he stayed within the speed limit and he felt that he was driving  
9 in a manner that would be safe for him and others.

10       113. The Defendant said he recalled the last street light was at Palm Heights and that  
11 there was no hard shoulder. He said he was driving and looking straight ahead. The  
12 Defendant said the road was well illuminated by his headlights.

13       114. The Defendant said that when he first saw the Plaintiffs they were in the middle  
14 lane and he was at the manhole cover. At that time, the Plaintiffs were just about 10  
15 to 15 feet away. The Defendant said he saw the Plaintiffs in front of him when he  
16 was coming towards the Hyatt OPB. The Defendant said that once he saw them in  
17 his lane he applied the brakes. He said they were approximately 10 to 15 feet away  
18 when he first saw them.

19       115. The Defendant said that he felt that as they were adults standing in the road they  
20 would wait for his car to pass and then they would cross the street. The Defendant  
21 accepted that one alternative would be to have slowed down to the Plaintiffs cross.  
22 The Defendant said that he felt that as the Plaintiffs were stationary they did not  
intend to cross the road.



1 116. The Defendant said when he first saw the Plaintiffs they were stationary in the  
2 middle lane. The Defendant said he progressed and then they moved and stepped in  
3 front of him.

4 117. The Defendant accepted that he only saw the Plaintiffs very quickly and then he hit  
5 the male Plaintiff. The Defendant said he saw them both but he only hit the male  
6 Plaintiff. The Defendant said he recalled that he was driving and the Plaintiffs  
7 stepped right out in front of him and they were not paying attention.

8 118. In his evidence to the Court the Defendant said that if the Plaintiffs had been  
9 moving he would have slowed down earlier, but because they had been stationary  
10 and then crossed in front of him he had no chance to avoid them.

11 119. The Defendant was asked why he never told the police that the Plaintiffs had darted  
12 out in front of him – to which the Defendant responded that he did not feel he was  
13 responsible for the accident.

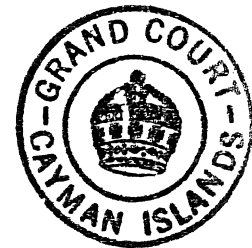
14 120. It was put to the Defendant by counsel for the Plaintiffs that he did not apply the  
15 brake before the impact and the Defendant said he applied the brake and then it all  
16 happened at the same time. The Defendant said he remembered seeing the two  
17 people but he only recalled hitting the male. The Defendant said that he did not hit  
18 the female.

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*ANALYSIS AND CONCLUSION*

*THE LIABILITY OF THE DEFENDANT*

121. The Plaintiffs' allegations are set out in their Amended Statement of Claim, with the primary allegation being that the Defendant failed to keep a proper lookout. The Plaintiffs assert that the Defendant failed to heed and react to their presence in the carriageway – despite there being ample time for him to do so. The Plaintiffs maintain that a prudent driver would have seen them in enough time to have avoided the collision. The Plaintiffs submit that the Defendant's failure to keep a proper lookout is consistent with the Defendant's failure to take any evasive action before the accident.

122. The Court must determine the issues of breach and causation and ask itself the following questions:

- a. Was the Defendant driving with the care and skill to be expected of a reasonably prudent driver, taking account of the circumstances surrounding the accident?
- b. If not, did the Defendant's acts and/or omissions cause the accident?

123. It is accepted by both sides that they were numerous establishments on both sides of the West Bay Road including restaurants, bars and hotels. The area is particularly popular with tourists and one would accept that pedestrians would cross the road at that juncture.

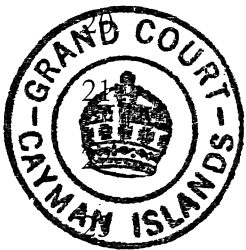


1       124.    The Defendant candidly accepted that he was familiar with the West Bay Road and  
2                    accepted that pedestrians do cross the road either way, which is, from West to East  
3                    and from East to West – thus raising the duty of care placed on drivers to be  
4                    cautious and alert about the possibility of pedestrians crossing the road, especially  
5                    at that juncture.

6       125.    The evidence from the RCIPS and the Expert, Mr. Walters, demonstrates that a  
7                    driver coming from West Bay towards George Town would be able to see  
8                    pedestrians from the point of the entrance to the Grand Pavilion – which was 458  
9                    feet from the scene of the accident. Both Officer Jameson [*sp*], the officer in charge  
10                  of the investigation, and Mr. Walters, the accident reconstructionist, said that,  
11                  during their test, they could see Officer Taylor, who was in the road under the Hyatt  
12                  OPB, from 458 feet away.

13       126.    Mr. Walters said that if a vehicle were travelling at 40 mph it would take 7.8  
14                  seconds to cover the 458 feet of distance between the first point of perception and  
15                  the point of impact. It was Mr. Walters' view that this "7.8 seconds" would provide  
16                  the Defendant or, indeed, any driver, with ample time to bring the car to a halt, and  
17                  thereby avoid any collision.

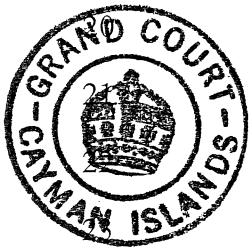
18       127.    The forensic engineer called on behalf of the Plaintiffs, Mr. Armstrong, agreed with  
19                  Mr. Walters and said that with a vehicle travelling at 40 mph it would cover the  
                    ground at 59 feet per second. Mr. Armstrong said that after deducting 70 feet  
                    required to stop the vehicle on full braking, 388 feet would remain, which would be  
                    covered in 6.6 seconds. Accordingly, Mr. Armstrong stated that the Defendant  
                    would have more than adequate time and distance to perceive, react and avoid the  
24                  collision.



1           128. Mr. Armstrong provided a second scenario, which he described as the “worst case  
2 scenario” as it assumed no ambient light whatsoever, and was based solely upon the  
3 illumination available from the vehicle’s headlights. On this basis, Mr. Armstrong  
4 said that the visibility distance would have been 250 feet. Again, assuming a  
5 vehicle travelling at 40 mph and therefore covering 59 feet per second, and  
6 deducting 70 feet to stop the vehicle on full braking, 180 feet would remain for  
7 perception and reaction. Mr. Armstrong said these 180 feet would have been  
8 covered in 3.1 seconds. Mr. Armstrong said that the typical perception and reaction  
9 time for an alert driver at night is 2 seconds and therefore, in his view, a reasonably  
10 prudent driver would have avoided the collision – based on the visibility distance of  
11 250 feet.

12           129. The Defence cited the distance used in a 1970 edition of *Wilkinson’s Road Traffic*  
13 *Offences* and takes issue with the 70-foot braking distance. The Defence submits  
14 that 80 feet should be allowed for braking. However, this amount would still leave  
15 the Defendant with more than two seconds for driver perception and reaction at  
16 night and sufficient time to avoid the accident – provided the driver saw the  
17 Plaintiffs in the roadway.

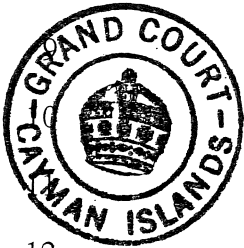
18           130. The evidence of Mr. Tresidder, who was the front seat passenger in a left-hand  
19 drive vehicle travelling behind the Defendant, said the Defendant was driving at  
approximately 35 to 40 mph. Mr. Tresidder stated he was able to see the Plaintiffs  
crossing the road from the point of Palm Heights Drive, which is recorded as being  
250 feet north of the accident. Mr. Tresidder said he clearly recalled the Plaintiffs  
walking at the time of the accident and he watched them continue to walk across the  
road until they were struck by the Defendant’s vehicle.



1           131.     The Defendant in his first statement to the police said he first saw the Plaintiffs by  
2                     the manhole cover, which is right before (that is, to the north of) the bridge. In  
3                     response to the police he said they Plaintiffs were about 10 to 15 feet away when he  
4                     first them – which he accepted was a very short distance.

5           132.     In a later statement some 8 years after the accident the Defendant said that, at the  
6                     point where the Hyatt OPB crossed the road he noticed

7                     “...a male pedestrian and a second pedestrian behind or beside the male  
8                     pedestrian. The Plaintiffs suddenly and without warning darted from a  
9                     stationary position in the centre turning lane of the road, into the path of the  
10                    vehicle I was driving. Once I saw the pedestrians in my southbound lane I  
11                    applied the brake instantly. I believe I saw the pedestrian when he was about  
12                    one car length ahead.”



13           133.     In his evidence before the Court the Defendant said that when he first the Plaintiffs  
14                     he was crossing the manhole cover which is before (to the north) of the Hyatt OPB.  
15                     The Court notes that the Defendant’s evidence varied, in that, he also said that he  
16                     saw the Plaintiffs in the middle lane for several seconds and was expecting them to  
17                     wait.

18           134.     There is no evidence of any brake marks or yaw marks, nor is there any evidence  
19                     from any witnesses, that the Defendant either applied his brakes or sounded his  
20                     horn, or took any other evasive action. In fact, the Defendant candidly accepted that  
21                     “braking and impact occurred almost simultaneously, with the brakes being applied  
22                     only slightly ahead of the impact.”

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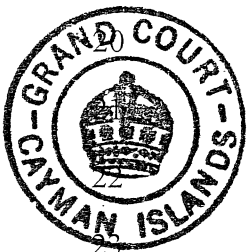
1       135. I fully accept that the Defendant was driving within the speed limit at a speed of  
2           between 35 and 40 mph. However, there is always a duty on all drivers to drive at  
3           such a speed and in such a manner as to be able to slow down, stop or swerve to  
4           avoid an accident in an emergency situation.

5       136. I accept the evidence from the experts that the earliest the Defendant could have  
6           seen the Plaintiffs was at 458 feet. I find that in all the circumstances of this case,  
7           Mr. Armstrong's visibility distance of 250 feet is fair and reasonable. I accept Mr.  
8           Armstrong's expert opinion that, in both his probable and worst-case scenarios, the  
9           Defendant had more than adequate time and distance to perceive the presence of the  
10          Plaintiffs and to take action to avoid colliding with them.

11       137. If the Defendant had been driving at a slower speed, and with proper attention to  
12          the road, he would have seen the Plaintiffs from when they were crossing the road  
13          over into the middle lane, and he would have been in a position to slow down or  
14          stop – thereby avoiding the collision.

15       138. On the balance of probabilities, I find that the Defendant failed to see the Plaintiffs  
16          in sufficient time to avoid colliding with them.

17       139. I find from all the evidence I have heard that the Defendant failed to exercise  
18          sufficient due care and attention and failed to drive in such a manner so as to have  
19          full control of the vehicle. Had he driven with care and skill of a reasonably prudent  
20          driver, he should have been in a position to stop or slow down and avoid the  
21          collision. Accordingly, I also find, on a balance of probabilities that the Defendant,  
22          though driving within the speed limit, was driving at a speed which was too fast in  
23          all the circumstances.



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In *John Lunt v. Bekhia Khelifa* [2002] EWCA Civ. 801, the English Court of Appeal held that:

*“A high burden has been consistently imposed on drivers of cars to reflect the fact that a car was a potentially dangerous weapon.”*

140. I find that, on the balance of probabilities, the Defendant failed to keep any proper lookout or regard for the Plaintiffs as they were crossing the road. Accordingly, and in all the circumstances, the Defendant failed to exercise reasonable skill and care, which is to be expected of a reasonably skillful and careful driver..



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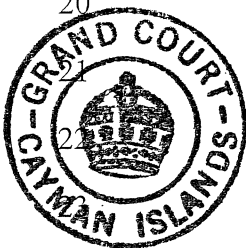
*CONTRIBUTORY NEGLIGENCE*

141. The Defendant has pleaded that the Plaintiffs were the authors of their own misfortune, and by their own negligence they caused the accident and thereby the personal injury loss and damage that they sustained.

142. Both parties have drawn the Court's attention to the case of *Karen Janet Eagle v. Garth Maynard Chambers* [2003] EWCA Civ 1107 where the English Court of Appeal held:

*"It was rare for a pedestrian to be found more responsible than a driver unless the pedestrian had suddenly moved into the path of an oncoming vehicle."*

143. The Plaintiffs had confirmed that they had come down from the United States to the Cayman Islands every year for the past 10 years and had stayed at the Hyatt Britannia Villas each time. In December 2003 they were again staying at the Hyatt Britannia Villas. The Plaintiffs had arranged to meet other family members at the Bamboo Bar, which is part of the Hyatt complex. As the First Plaintiff confirmed, when one comes out of the Bamboo bar, there is the Hyatt OPB on which guests and pedestrians can safely walk cross the West Bay Road. The Hyatt OPB removes guests and pedestrians from the risk of having to cross the road. In fact, the First Plaintiff candidly accepted that, using the Hyatt OPB would have been the prudent and safe way to cross the road. The Second Plaintiff said she did not know why they did not use the Hyatt OPB. In fact, the Second Plaintiff's brother, Charles Horning, had used the Hyatt OPB some seconds before the Plaintiffs began crossing the road.



1       144.    The burden of proof is upon the Defendant to prove that both the Plaintiffs were at  
2                fault, and that their fault was a cause or a contributory cause of the damage they  
3                sustained.

4       145.    The Plaintiffs' counsel rely upon the case of *White v. Chapman* Q.B.D 15<sup>th</sup> May  
5                2001 for the proposition that the allegation of failing to use the Hyatt OPB is  
6                insufficient on its own to justify a finding of contributory negligence. In *White v.*  
7                *Chapman* it was decided that a failure of a Plaintiff pedestrian to use a nearby  
8                pedestrian pelican crossing was not negligent in itself, but the Plaintiff pedestrian  
9                did, thereafter, take upon themselves a higher standard of care while crossing the  
10              road.

11      146.    The facts of this case are different from the facts in *White v. Chapman*. In *White v.*  
12              *Chapman* the pelican crossing was 35 yards away from where the pedestrian  
13              crossed the road. However, in this case, the Hyatt OPB is not a pelican crossing 35  
14              yards away. It is a footbridge located just outside the Bamboo bar. Furthermore, it  
15              is specifically for use by Hyatt Villa guests to cross the road safely and to avoid  
16              having to cross the vehicular thoroughfare and putting themselves at the mercy of  
17              oncoming traffic.

18      147.    I am sure that since the accident occurred the Plaintiffs have reminded themselves  
19              many times that if they had only used the Hyatt OPB as they had done on previous  
20              occasions, the accident on the West Bay Road on the 30<sup>th</sup> December 2003 would  
21              not have occurred and they would not have suffered any personal injury, loss or  
22              damage.



1 148. Andrew Hirschy who was travelling in the vehicle directly behind the Defendant  
2 stated in his statement dated the 4<sup>th</sup> January 2004, that he saw two people in the  
3 middle of the middle lane. He said,

4 *“I saw a woman walking in front of a man. The two people continued walking*  
5 *and walked in front of the Honda Civic.”*

6 149. Charles Horning, the Second Plaintiff’s brother, who used the Hyatt OPB to get  
7 across the road recalls that the Plaintiffs had been arguing with their family member  
8 Paul Horning, while crossing the road. Charles Horning stated that from the bridge  
9 he could see the two Plaintiffs and Paul Horning. Charles Horning said he saw that  
10 Paul Horning got across the road before the Plaintiffs and that Paul Horning, on  
11 reaching the other side of the road, stopped to wait for the Plaintiffs to cross the  
12 road. Paul Horning said he then saw the Defendant’s red Honda Civic hit the  
13 Second Plaintiff.

14 150. Paul Horning said that he saw the Plaintiffs stop in the turning lane. Paul Horning  
15 said that he saw the Second Plaintiff look right (and not left, as she should have  
16 done) and then step out in front of the red Honda Civic.

17 151. Mr. Tresidder who was the front seat passenger in the left-hand drive car following  
18 the Defendant’s car, saw the two Plaintiffs in the road in the middle lane. He recalls  
seeing the Second Plaintiff stumble and grab onto the First Plaintiff’s shoulders.  
Mr. Tresidder’s evidence is that the Plaintiffs continued walking and walked  
directly in front of the Honda Civic. Mr. Tresidder also said that the Honda Civic  
did not slow down until after the accident. Mr. Tresidder said that the Plaintiffs did  
not notice the car was coming and the car did not notice the Plaintiffs.

