[2024] **JMSC Civ 73**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO.SU2019CV00654

BETWEEN	**KIRK BROWN**	**CLAIMANT**
AND	**PHILLIP WILLIAMS**	**DEFENDANT**

Mr Richard Reitzin instructed by Reitzin & Hernandez for the claimant.

Mrs Michelle Shand - Forbes and Miss Monique Rowe for the defendant

Heard: July 6, 2023, and June 28, 2024

Damages - Motor vehicle accident - Entering a major road from a minor road - Whether the defendant liable in negligence for injuries suffered by the claimant - Muscle spasm, pains to neck and wrists - Assessment of damages - Whether award should be made for diminution of earning capacity - Whether claimant failed to mitigate his losses.

IN OPEN COURT

CORAM: JARRETT, J

Introduction

[1] The question in this case is whether Phillip Williams ("the defendant") is liable in negligence for personal injuries allegedly sustained by Kirk Brown ("the claimant"),

arising from a motor vehicle accident on Washington Boulevard on the night of August 9, 2016.

The pleadings

The claim

[2] In his claim filed on February 21, 2019, the claimant pleads that on August 9, 2016, at about 8'oclock at night he was riding his motorcycle in a westerly direction along the Washington Boulevard, heading towards Six Miles in the parish of Kingston. The defendant was driving a Toyota Stream motor car travelling on a road which intersects with Washington Boulevard and allows west bound traffic on Spanish Town Road to turn right and go onto Washington Boulevard in an easterly direction. Where it intersects with the Washington Boulevard, that road forms an obtuse angle. The claimant alleges that his lights were on, streets lights illuminated the area, the road was dry, and the weather was good. He also alleges that just as he reached the intersection, the defendant accelerated out from the road, entered the intersection and collided with him and with his motorcycle.

[3] It is alleged that the defendant was negligent in that he failed to exercise due care and attention, failed to wait until the intersection was clear before attempting to cross the westbound side of Washington Boulevard; failed to pay any attention to the traffic nearby including the claimant and was driving too fast to enable him to stop, slow down or steer to avoid the collision.

[4] As a result of the collision, the claimant claims to have suffered personal injuries, loss of earnings of $160,000.00 and loss of earning capacity. It is pleaded that at the time of the accident, the claimant was a post man employed to Jamaica Post and also had a contract with a company called DonCross Limited, delivering mail and utility bills for a monthly wage of $80,000.00. It is alleged that the claimant was unable to work for 8 weeks due to his personal injuries. With respect to loss of earning capacity, it is pleaded that the claimant continues to experience pain and disability to his right knee and wrists, and this has impeded his ability to work as a

postman and delivery man. It is also pleaded that the claimant's injuries have affected his ability to work on the Canadian Farm Work programme, and twice since the collision, he has been given light duties in Canada due to the pain in his right knee and wrists. He accordingly claims for diminution of his earning capacity.

[5] Special damages of $10,000.00 are claimed for travelling expenses and $15,000.00 for medical expenses.

The defence

[6] The defendant alleges in his defence filed on April 4, 2019, that he was travelling along the Spanish Town Road, and he stopped at the intersection with Washington Boulevard, waiting to go across to the eastbound side. After waiting for "a while", two vehicles travelling along the westbound lane of Washington Boulevard stopped side by side and allowed him to proceed. As he proceeded, the claimant rode his motorcycle between the two lines of traffic and "impacted" his vehicle. He denies being negligent and pleads that the accident was caused and/or materially contributed to by the claimant, in that, he failed to keep a proper or any look out; failed to heed the presence of the defendant; failed to observe that traffic had stopped to allow the defendant to proceed; rode between two lines of traffic and collided into the defendant; and failed to slow down or manoeuvre his motorcycle to prevent the collision. He makes no admission to the claim for damages and puts the claimant to strict proof of those losses.

The Evidence

The claimant

[7] The claimant's witness statement filed on July 30, 2021, stood as his evidence in chief. He says he resides in Greater Portmore and is a post man and delivery man and at the time of making the witness statement he was 46 years old having been born on August 25, 1974. In August 2016, he owned a KTM110cc motorcycle. On August 9, 2016, he was riding his motorcycle in a westerly direction along

Washington Boulevard. He was heading home in the direction of Six Miles and approaching the intersection with a road that allows traffic from the Spanish Town Road to cross the west bound traffic on Washington Boulevard and proceed to the east bound side. The streetlights were shining, the road was dry, the weather was clear, and visibility was good. He describes the road that intersects with Washington Boulevard as: “a kind of slip road” and that it intersects at an obtuse angle. As traffic traveling on the west bound side approached the intersection, Washington Boulevard narrows, traffic basically merged into a single lane and there were no white markings.

[8] According to the claimant he was riding on the right side of the roadway, his lights were shining, he was travelling at no more than 50km per hour, the traffic was moderate to heavy and there were some cars behind him and slightly to his left. As he was about to enter the intersection, he saw a vehicle travelling fast out of the slip road with a: “burst of speed”, and before he could react to what was happening, the front of the car smashed into his left leg throwing him off the motorcycle and onto the road surface. He remembers hitting the road surface with his hands and knees and finding himself on it. Two men came to help him up and onto the island separating the west bound traffic from the east bound traffic. He says that at first, he was lying down, but remembers that when he became more conscious of what was happening, he began to feel pain: “all over” and realised that he was bleeding from his left leg.

[9] The driver of the motor car, who he now knows as the defendant, was saying very little but was not denying that he was in the wrong. In fact, he heard him saying to bystanders that he did not see the claimant. Later, he asked the driver whether he could fix his motorcycle and take care of his medical bills, but the defendant responded that he had children going back to school, did not have any money as all his money went into getting the children ready for back to school. Two policemen came on the scene, they placed his motorcycle in the police van and

drove him to the Duhaney Park police station. At the police station he saw the defendant and made a written report of the accident. His wife came to the station,

and they went home together. When he got home, he was still in pain, particularly in his neck, right shoulder, writs and both knees. He also had a headache. The pain was more intense on the left side of his body. His wife helped him undress and she cleaned his wound. He had difficulty sleeping that night due to the pain. The day following the accident, he did not go to work at DonCross Limited as he was having a headache and was still in pain. Two days later he was still having a headache and continued to have pain in his right shoulder, neck, wrists and knees.

[10] On Thursday August 11, 2016, he visited Dr Nastasia Wade-Saddler ("Dr Saddler"). She gave him a prescription for pain medication and referred him to do X-rays of the neck, shoulder, wrists and knees. The medication helped to relieve the pain and he did X-rays at Apex in Portmore Pines. He made two further visits to Dr Saddler. The second visit was on August 15, 2016. He complained of stiffness in his neck, shoulder, wrists and knees. He had recently learned that his motorcycle was a "write off" and that a new one would cost over $100,000.00. He did not have that money and was extremely concerned. Dr Saddler referred him to physiotherapy and for counselling to cope with the stress. He was advised to continue to take the pain medication, was given a prescription for muscle relaxants and a sick leave certificate. He sought counselling from the elders at this church, but he could not afford the physiotherapy.

[11] His third visit to Dr Saddler was on September 12, 2016. He was feeling less stressed and having occasional pain in his left knee and stiffness in the back of his neck. He told her that the topical pain medication was not working as it used to. She examined him and advised him that he has spasm in the neck. She prescribed different pain medication and again recommended physiotherapy. Currently he has pain in his knees when he stoops or kneels, and this is especially in the right knee. He is unable to play football with his boys or run: "too hard", due to the pain in his knees. Due to pain in his wrists, he cannot lift heavy objects and for several months

after the accident he felt pain in the neck when bending down. For several months after the accident, he also felt pain and tenderness in the lower back whenever he drove for extended periods. He experienced pain and difficulty when delivering mail and bills on his motorcycle when he returned to work 6 to 8 weeks after the accident. There was also difficulty getting out of bed, bathing, dressing, cooking, washing, ironing and engaging in intimacy.

[12] In relation to his special damages, the claimant says that as a post man he is paid upkeep and mileage for his motorcycle and due to him being unable to work because of the accident he lost 8 weeks' worth of upkeep and mileage amounting to $35,000.00. He says he was not able to work for DonCross Limited where he delivers bills and is paid $80,000.00 per month. He claims to have lost earnings for 8 weeks totalling $160,000.00. He says he paid $15,000.00 for Dr Saddler's medical report, $5,000.00 for service fees and $5,000.00 for stamp duty for the claim form.

[13] The claimant also alleges that he has suffered diminution in his earning capacity due to his injuries. According to him he continues to experience pain and disability in his right knee and wrists, which impedes his ability to work as a delivery man since he uses his writs, hands and knees to operate a motorcycle. After riding for about an hour or two the pain in his wrists becomes worse, so much so that at times he has to stop working, shake out his hand, stretch his knee and rest for a while. He says that in April 2017 and in April 2018, he went on the Canadian Farm Work Programme but experienced pain in his right knee and wrists and was unable to continue working. He says he was given light duties and on the second programme he had to be seen by a doctor. In 2019 he applied again for the programme but was not called back. According to him:

> "While in Canada I was earning CA $14.00 per hour and worked, before I was injured some 60 hours per week. Each programme was for 8 months from April to December".

[14] On cross examination the claimant admitted that at the time of the accident there were two lanes of traffic on Washington Boulevard in the vicinity of the slip road. He said there were vehicles in front of him but could not recall whether vehicles

were behind him and to his left. He admitted that he did not reduce his speed on approaching the slip road but denied that both lines of traffic stopped to allow the defendant to proceed. When asked if he saw any vehicles in the slip road as he approached it, he said: “vaguely”; and when asked how far away he was from the slip road when he first saw the defendant, the claimant said he saw him just as he was entering the slip road. When asked if he had slowed down or sounded his horn when he saw the defendant, the claimant said he did not. He denied the defendant was at a stop when the collision occurred and denied that he was the one that collided into the defendant’s vehicle. He admitted that he did not seek further medical help from Dr Saddler after 2016 but said that he sought help from a doctor in Portmore whose name he cannot recall but he can “get the information”. He admitted that he returned to work at Jamaica Post in September 2016 and said that he received pay slips from that employment but none from DonCross Limited. He no longer works at Jamaica Post. He said the first time he went on the Canadian Farm Work Programme was in 2017.

[15] On re-examinations the claimant said there were no white line markings on the section of Washington Boulevard in the vicinity of the slip road. When asked about his answer on cross examination, where he said he could not recall whether vehicles were behind him and to his right, the claimant said his memory was better at the time he made his witness statement than it is now.

Medical evidence

[16] By an order of Master Henry-Anderson made on November 28, 2022, Dr Saddler was treated as an expert and the claimant was permitted to rely on her medical report. In a report dated September 19, 2016, she says that the claimant visited her on August 11, 2016, after he allegedly was involved in a motor bike accident

on the night of August 9, 2016. She says he reported that he was thrown off the bike and landed on his hands and knees after being hit to his left side by a motor car. There was no reported loss of consciousness, no bleedings from the ear, nose or throat or any abrasions. She reports, however, that the claimant complained of headache and pain to the wrists, right shoulder, neck and knees.

[17] According to Dr Saddler, on first presentation the claimant was in mild discomfort and his general examination was normal except for tenderness at the wrists, shoulders, posterior region of the neck and knees. She prescribed oral and topical analgesics, and he was advised to do x-rays for the cervical spine, shoulders, hands and knees. His second visit was on August 15, 2016. A review of his x-rays showed no acute bony injury to the cervical spine, shoulders, hands or knees. The significant findings were degenerative osteophytes at C4, C5 and C6 and a bony defect at the right radial styloid process suspicious for a chronic fracture. Dr Saddler said that the claimant reported that the analgesics were helping his pains, however, he still experienced stiffness in the affected areas. She said he complained of being stressed and overwhelmed due to work, personal issues and the accident.

[18] On the claimant's third and last visit on September 12, 2016, Dr Saddler reports that he stated that his stress level had improved, and he was sleeping at night. He admitted to "on and off pains" in his left knee and stiffness to his posterior neck. He admitted to not doing physiotherapy due to lack of funds and said he was not getting the same kind of relief from the analgesics as he once did. His general examination was normal save for spasm of his posterior neck muscles and tenderness of the left knee. There was no bony tenderness, swelling or bruising. He was prescribed different types of oral and topical analgesics; physiotherapy was again advised along with warm compress therapy to the areas in pain. She reports that there were no further follow up visits. Her assessment of the claimant was musculoskeletal pain to neck, shoulder, wrists and knees secondary to alleged

motor bike accident, and chronic fracture to right distal styloid. She concludes her report with the following statement:

> "At this time, there is no permanent deformity or disability secondary to the accident. Mr Brown's pain has improved with analgesics, and he continues to perform work related activities. He has been advised to continue analgesics for pain and may benefit from physiotherapy sessions to assist with pain relief."

The defendant

[19] The defendant's witness statement filed on July 29,2021, stood as his evidence in chief. He says he is a shipping consolidator employed to One Stop Custom Clearance Centre on Marcus Garvey Drive and he lives in Duhaney Park. In August 2016, he owned a 2002 Honda Stream motor car. On August 9, 2016, he left work at around 7pm and travelled along the Spanish Town Road. At about 7.30pm, he came to the end of the slip road that leads from Spanish Town Road onto Washington Boulevard and stopped with his right indicator on as he intended to make a right turn onto Washington Boulevard to go home.

[20] According to the defendant there was bumper to bumper traffic travelling westerly along Washington Boulevard and so he waited for about 5 minutes. A vehicle on the left lane stopped and he inched out in front of it waiting for someone in the other lane to also stop. A car in that lane stopped, and as he was moving off to pass this second vehicle, he saw a: "flash of movement" to his right and he immediately stopped. His motor car was now positioned at an angle to make the right turn. As he stopped, he felt an impact to his vehicle and saw that it was a motorbike that had collided into it, and he saw a man on the ground. When he came out of his vehicle, the rider was to the left of his vehicle and the motorbike was directly in front of his vehicle. He assisted the rider out of the road an onto the island in the middle of the road.

[21] The defendant says he did not see the motorbike when the first vehicle stopped to allow him to cross, and it was only when he was about to pass the second vehicle

that he saw a movement to his right and he stopped. He saw a police patrol car shortly after the collision and stopped it. The officer took their statements, and they were advised to go to the station to make a formal report. He said the officer called

for backup and he and the claimant put the motorcycle in the police jeep. He took the rider in his car to the Duhaney Park police station, but the traffic police was not there. He returned to the station the following morning and gave a formal statement. According to him, the left fog light of his front bumper was damaged due to the collision, the front of the motorbike was damaged, the fender over the wheel was twisted and the front wheel could not spin.

[22] On cross examination the defendant said he could have been waiting by the slip road to cross onto Washington Boulevard for up to 20 minutes but denies that he had become impatient. He admitted to being able to look to his right and see a considerable distance on Washington Boulevard, possibly as far as 30 car lengths away. When asked if he had repaired his left fog light or had asked the claimant to repair it, his answer was that he had not. He maintained that he took the claimant in his car to the police station and said there was no blood in his car as the claimant was not bleeding. He denied that the motorcycle was badly damaged.

Analysis and discussion

[23] This is a claim in negligence and therefore it is for the claimant is to prove that the defendant owed him a duty of care, that duty was breached, and as a consequence, he suffered loss. These are elementary but important principles that apply to the tort of negligence. Road users owe a reciprocal duty of care to each other. It is accepted that that duty is to drive with such reasonable care so as to avoid injury, loss and damage to another whom it is reasonably foreseeable would suffer loss and damage were the duty to be breached. (See for example **Bourhill v Young [1943] AC92**). It is not disputed that the defendant owed the claimant a duty of care on the night of August 9, 2016, to drive his motor vehicle in such a manner as to avoid causing any injury, loss and damage to the claimant.

Did the defendant breach the duty of care he owed to the claimant?

[24] Mrs Shand-Forbes, counsel for the defendant argued that the defendant took all reasonable care in the circumstances to avoid a collision as he stopped and waited

at the intersection before entering Washington Boulevard, and even when he got there, he proceeded with caution. She submitted further that it was the claimant who failed to keep a proper look out in that he failed to observe that vehicles had stopped to allow the defendant to pass them, and he did not have regard to the fact that he was approaching an intersection. She said that on the claimant's case, given the moderate to heavy traffic, if the defendant had exited the slip road with the amount of speed suggested by the claimant, other vehicles would have been involved in the collision. Learned counsel argued that the claimant having seen the defendant exit the slip road failed to take evasive action and admitted that he neither slowed down nor sounded his horn.

[25] I disagree with Mrs Shand-Forbes. The claimant's evidence on cross examination was that he vaguely saw someone in the slip road as he approached the intersection, and the first time he saw the defendant was just when he, the claimant was entering the slip road. Given that he was travelling west bound, and that the slip road intersected with Washington Boulevard, I understand him to mean by this evidence, that he first saw the defendant when he was entering the intersection. His earlier direct evidence was that it was when he was about to enter and pass the intersection that he saw a vehicle coming out of the slip road with a "burst of speed" and before he could react, the vehicle smashed into his left leg. It seems to me on his evidence, that there was no opportunity for the claimant to take any evasive action, as the defendant's vehicle collided into him as he entered and was passing through the intersection.

[26] The damage to the defendant's vehicle was to the left fog light on the front bumper, and his evidence is that the collision occurred as he was positioned to make the right turn onto the east bound side of Washington Boulevard. It initially struck me

as strange that the damage to the defendant's car was on the left side. The only probable explanation for this is that the defendant had indeed positioned himself to make the right turn where the slip road intersected with Washington Boulevard at an obtuse angle (or a merging angle of greater than 90 degrees), when the claimant was passing through the intersection, hence the impact to the claimant's left leg and to the defendant's left fog light.

[27] I make the observation that the defendant's direct evidence is that he waited for about 5 minutes at the slip road before he attempted to cross it, yet on cross examination he admitted that the wait could have been as long as 20 minutes. On the defendant's evidence, I find on a balance of probabilities, that having waited at the slip road for as long as approximately 20 minutes, he had become impatient, and consequently tried to cross Washington Boulevard when it was not safe to do so. I believe that it is more probable than not, that there came a point in time, when the defendant thought he could beat and manoeuvre through the oncoming moderate to heavy traffic on the west bound side of Washington Boulevard to make a right turn onto the east bound side. On cross examination he said that from where he waited at the slip road, he could look up towards Washington Boulevard possibly as far as 30 car lengths away. If this is so, then had he looked to his right, as he ought to, he would have seen the claimant.

[28] The defendant was on a minor road attempting to cross a major road. It was the claimant and those travelling along the westbound side of Washington Boulevard who had the right of way. When it was suggested to the defendant on cross examination that his story about the claimant interposing himself between two vehicles is nonsense and that it was a lie, the defendant said that counsel was incorrect, and it was not a lie. This evidence aligns with the defendant's pleadings but is not consistent with his earlier direct evidence given in his witness statement. In his witness statement, he says that a vehicle in the left lane stopped to allow him to travel across, he inched out and stopped in front of it, waiting for someone in the other lane to also stop. It was when the second motor vehicle stopped, and

he began moving off that he saw a flash of movement to his right, he immediately stopped and as he did so, he felt the impact on his car. In his pleadings, he alleges that two vehicles travelling on the westbound side of Washington Boulevard, stopped, side by side to allow him to cross and the claimant rode between the two lines of traffic and "impacted" his vehicle. I do not find as credible, the defendant's evidence on cross examination that the claimant interposed between two lines of traffic that had stopped to let him through. In my view, if this were so, the damage to his vehicle would not have been to the left fog light on the front bumper. The damage would have likely been to the right side of his motor vehicle.

[29] Given the inconsistencies in the defendant's evidence and his pleadings and given the damage his motor car sustained; on a balance of probabilities, I find that the accident was caused solely by the defendant's failure to observe the presence of the claimant before attempting to cross the westbound side of Washington Boulevard. I therefore find that he breached the duty of care he owed to the claimant. It is notable that there is no denial by the defendant that he told bystanders that he did not see the claimant. In fact, the claimant was not cross examined on this aspect of his evidence. I also find it significant that there is no denial by the defendant that the claimant asked him whether he would fix his motorcycle and pay his medical bills and that he had responded that all his money had gone into back-to-school preparations for his children. It was also never suggested to the claimant that this part of his evidence was not true.

[30] Mrs Shand-Forbes cited the decision of Smith JA (Ag) in **Joshua Tucker v Lascelles Chin & Neil Chin** SCCA No 30 of 2000, unreported Court of Appeal decision delivered on May 21, 2001, and the court's reluctance in that appeal, to interfere with the trial judge's finding that it was highly improbable that the 2nd respondent drove out suddenly from a minor road unto a major road in circumstances where traffic on the major road was heavy, as that finding was not manifestly unreasonable. Counsel used this posture of the Court of Appeal to argue that it is highly unlikely that the defendant in the current case, would have

sped through heavy to moderate traffic on the westbound side of Washington. I do not accept this submission. In **Joshua Tucker,** the trial judge had clearly accepted that traffic on the major road in issue, had stopped to allow the respondent safe passage from a minor road onto the major road. For the reasons already stated, I do not accept the defendant's evidence that two vehicles stopped to allow him to cross Washington Boulevard and that the claimant rode between the two lines of

traffic that had stopped. I have found, on the evidence, that having waited for nearly 20 minutes to enter the intersection, the defendant was impatient, he attempted to beat the traffic and crossed the intersection without due regard for the claimant. The question then is whether he is liable to compensate the claimant for the losses the claimant alleges he suffered.

Are the claimant's losses caused by the defendant's breach of duty.

[31] Dr Saddler's assessment is that the claimant's musculoskeletal pain to the neck, shoulder and knees are secondary to the accident. I accept her assessment. It is consistent with the claimant's evidence that when the collision occurred, he fell from his motorcycle, hitting the road surface with his hands and knees. I find, therefore, that the claimant has shown that there is a causal connection between the defendant's breach of duty and his musculoskeletal pain to his neck, shoulder and knees. While I believe that the claimant would have had some bleeding from the defendant's car colliding into his left leg, it seems to me that the wound he received could not have been very serious or significant, because Dr Saddler made no mention or report of observing any abrasion or wound on the claimant when he first presented to her.

[32] The x-rays performed by the claimant revealed degenerative osteophytes at C4, C5 and C6, and a bony defect at the right distal styloid process suspicious for a chronic fracture, but no causal connection has been made by Dr Saddler between these findings and the collision. I will therefore have no regard to them in my assessment of the claimant's general damages.

[33] Part of the claimant's claim in general damages is for diminution in his earning capacity. He claims to still suffer pain and disability in relation to his right knee and wrists and that this impedes him in the performance of his duties as a delivery man and has stymied his prospects as a worker under the Canadian Farm Work Programme. The submissions of Mr Reitzin, counsel for the claimant, in respect of this aspect of the claim, focus solely to the claimant's alleged inability to perform

the duties required of him on the Canadian Farm Work Programme. Mrs Shand-Forbes submitted that I should not make an award under this head as Dr Saddler's medical report does not support this aspect of the claim. I agree with her. Dr Saddler's report does not lead me to find that the claimant has sustained any such disability. In fact, as observed earlier, she stated, as at the date of the claimant's last consultation with her on September 12, 2016, that there was no permanent deformity or disability secondary to the accident and that the claimant continues to perform work related activities.

[34] The claimant has not provided any reliable evidence of visiting with any other doctor since his last visit with Dr Saddler. When asked about this in cross examination, he could only say that he went to a doctor at "Apex in Portmore", he cannot recall his name, but he can: "get the information". If, since his last visit with Dr Saddler, he had gone to any other medical doctor to complain of pain and suffering resulting from the injuries he sustained in the August 2016 accident, I would have expected him to disclose to the defendant and the court, all the information in relation to that visit to support his personal injury claim. To simply say at trial, that he can: "get the information" is not good enough. Although he has given evidence of obtaining medical treatment in Canada, I am not satisfied that there is a causal connection between that treatment and the August 2016 accident.

[35] The claimant's evidence is that he returned to work at Jamaica Post 8 weeks after the accident. He also says that while in Canada he was earning CA $14.00 per hour and worked, 60 hours per week before he was injured. The accident was in August 2016, and his evidence on cross examination was that he first went on the

Canadian Farm Work Programme in 2017, which was after the accident. What injury is he therefore talking about when he says he was earning CA $14 per hour "before [he] was injured"? Was the medical treatment he says he received in Canada related to this injury. This part of his evidence raises more questions than it provides answers. I do not find it reliable. In the final analysis, he has not satisfied me of his inability to compete on the labour market as a result of the August 2016 accident. I will not make an award for diminution in earning capacity.

Quantum of damages

[36] In assessing the claimant's damages, I am to consider the nature and extent of his injuries, any disability caused by the injuries and the effect if any of the injuries on his pecuniary prospects. I have already endeavoured to show why I will not make any award for diminution in his earning capacity. Special damages pleaded of $25,000.00 were agreed. This represents travelling expenses and the cost of Dr Saddler's medical report. There are no pleadings in relation to a claim for motorcycle upkeep and mileage. Special damages must be specifically pleaded and proven. I will therefore make no award in relation to this alleged loss. I have no reason to doubt the claimant's evidence that he earned $80,000.00 per month from DonCross Limited as a delivery man and that he lost 8 weeks earnings because of his injuries. Mrs Shand-Forbes argued that in the absence of independent evidence such as pay slips I should decline to make an award under this head. However, in the absence of any evidence refuting the claimant's evidence that he worked at DonCross as a delivery man and earned $80,000.00 per month, I am prepared to accept it and will therefore make an award of $160,000.00 for loss of earnings making the total award of special damages $185,000.00.

[37] Several decided cases were cited as good comparable authorities for an award of general damages. I will not refer to all of them, but counsel can rest assured that I have considered them all. The decision in **Leroy Robinson v James Bonfield and Conrad Young** C.L1993 R11, reported in Khan's Volume 4 page 99, was

relied on by both counsel. In this case, the claimant suffered multiple abrasions to the left hand, tender swelling to the left elbow, abrasions to the eyebrows and a fracture of the right wrist arising from a motor vehicle accident. He was taken to hospital where his wounds were dressed, and a plaster cast placed on his fractured right wrist. The period of his incapacity was 8 weeks. On September 23, 1996, he was awarded general damages of $269,438.00 for pain and suffering and loss of amenities. That figure updates to $ 2,300,454.80, using the current consumer price index (CPI).

[38] Of the decisions cited by counsel, I find **Leroy Robinson v James Bonfield and Conrad Young** to come closest to being the best comparable authority, even though in my opinion, the injuries suffered by the claimant **Leroy Robinson,** were more serious than those suffered by the claimant before me. There was no fracture sustained by the current claimant, shown to have any causal connection with the accident. On first examination, Dr Saddler found spasm of the lateral neck muscles, and her ultimate assessment of the claimant was musculoskeletal pain to neck, shoulder, wrists and knees secondary to the accident. As observed earlier, she made no causal connection between the accident and either the chronic fracture to the right distal styloid or the degenerative osteophytes of C4, C5 and C6. Furthermore, she made no reference to any treatment of a fracture, or any follow up findings in relation to any such treatment.

[39] I find the decision in **Dalton Barrett v Poincianna Brown and Leroy Bartley**, Claim No. 2003 HCV 1358, reported Khan's Vol. 6, page 104, and cited by Mr Reitzin also helpful, even though the injuries suffered in that case appear to have been more serious than those suffered by the instant claimant. The Claimant, **Dalton Barrett,** was diagnosed with tenderness around the right eye and face, lumbar spine and left hand, pain in the lower back, left shoulder and left wrist, contusion to the lip, lower back and left shoulder along with mechanical lower back pains and mild cervical strain. Physical therapy was effective and within 10 months the Claimant was pain free with a PPD of 0% with a caution that lumbar pain could

resume upon prolonged driving. In November 2006, he was awarded $750,000 for general damages. Using the current CPI, this figure updates to $2,648,560.21

[40] Mrs Shand-Forbes argued that I should consider that the claimant failed to mitigate his losses because physiotherapy was recommended by Dr Saddler, and he did not do any. I agree with the submissions of Mr Reitzin that the duty is on the defendant to show that the claimant has acted unreasonably by not taking steps

to mitigate his losses. In this case the defendant has not discharged this duty. The evidence of the claimant is that he was unable to afford physiotherapy. The defendant has not provided any evidence to refute this assertion by the claimant. In **Dion Moss v Seargeant Reginald Grant and the Attorney General** [2017] JMCA Civ 13, Morrison JA (as he then was) writing for the Court of Appeal said this about mitigation and impecuniosity at paragraph 53: -

> "53] It is clear from the evidence that the appellant is saying that he did not have the funds to replace his airplane or to lease one. In this regard, he could be viewed in the same light as an impecunious claimant. In this connection, the authorities have settled the principle that if a claimant failed to mitigate his loss because of impecuniosity, this does not act to reduce the amount of damages he would recover. Therefore, as the authorities state, no argument based on mitigation could prevent full recovery by an impecunious claimant. See, for instance, **The Clippens Oil Company Limited v The Edinburgh and District Water Trustees (Et E Contra)** [1907] AC 291.".

I adopt this dictum.

[41] Considering the evidence of the claimant in relation to the pain he endured and its effects on his daily living, the length of his recuperation, the medical report of Dr Saddler and the comparable authorities cited above, I believe that a reasonable award to compensate him for his pain and suffering is $2,000,000.00. I include in my consideration, the fact that he suffered some stress attributed in part to

worrying about the consequences of the accident on his financial stability and sought counselling from the elders in his church.

Orders

[42] Having regard to the foregoing, I make the following orders: -

a) Judgment for the claimant against the defendant.

b) The claimant is awarded special damages of $185,000.00 with interest at 3% from August 9, 2016, to today's date.

c) The claimant is awarded general damages in the sum of $2,000,000.00 with interest at 3% from March 2, 2019, to today's date.

d) Costs to the claimant to be agreed or taxed.

A Jarrett
Puisne Judge