[2018] JMSC Civ 50

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV02477

BETWEEN	**MARJORIE BRYAN**	**CLAIMANT**
AND	**CLAUDETTE BUCHANAN-BURGESS**	**DEFENDANT**

Mr. Paul Edwards for the claimant instructed by Bignall Law

Mr. Kwame Gordon for the defendant instructed by Samuda & Johnson

Heard: 15th February 2018 and 17th April 2018

Negligence-Pedestrian hit by wing mirror of motor car whilst using roadway- Duty of Care-Contributory Negligence-Quantum of Damages

CORAM: Dunbar-Green J

The Claim

[1] This is a claim in negligence to recover damages for personal injuries, loss and damage. It arose from a collision between the claimant and a Mitsubishi Lancer motorcar owned and driven by the defendant. This was on 23rd August, 2010, along the Port Henderson main road in St. Catherine.

[2] The claimant alleges that she was a pedestrian walking "along the sidewalk" when the defendant's vehicle collided with her, causing her to fall to the ground. The accident, she claims, was wholly caused and/or contributed to by the negligence of the defendant.

[3] As a consequence, she suffered injuries to include:

(a) chronic mechanical lower back pain;

(b) acute cervical strain/whiplash;

(c) acute right elbow sprain;

(d) acute sprain to right ankle and hip; and

(e) soft tissue injury to right forearm, thigh and calf.

The Defence

[4] The defendant denies the allegations of negligence. She alleges that whilst driving along the Port Henderson Road, the claimant was observed conversing with a lady while "walking along the pavement alongside the said road" with their backs towards her. When she was abreast of the ladies, the claimant, without looking behind her, stepped from the pavement into the path of her vehicle and the left wing mirror collided with the claimant's right hand.

[5] The defendant claims that the collision was caused wholly or contributed to by the claimant's negligence.

Agreed Documents

[6] By consent, the following documents were admitted into evidence:

Exhibit I – Medical report of Dr. George Lawson dated 12th April, 2012.

Exhibit II – Medical report of Dr. Kurt Waul dated 11th April, 2012.

Exhibit III – Receipts from Dr. George Lawson dated 12th April, 2012.

Exhibit IV – Receipts from Nuttall Hospital dated 27th September, 2010 and 25th October, 2010.

Exhibit V – Receipt from Dr. Kurt Waul dated 4th April, 2012.

Exhibit VI– Questions and Answers put to Dr. Kurt Waul dated 5th and 6th February, 2018

February, 2018, respectively.

Claimant's Case

Evidence of Marjorie Bryan

[7] The claimant's Witness Statement filed 3rd December, 2014, with the exception of the second to last sentence in paragraph 5, was ordered to stand as her evidence in chief.

[8] The claimant stated that the collision occurred at about 5:30pm when she was walking along the concrete sidewalk on the left side of Port Henderson Road, in the direction of Spanish Town. She was walking by herself when she felt an intensely painful impact to the right arm and saw the left mirror of the defendant's car break free. As a consequence of the impact she was thrust forward, fell to the ground and felt pain to the right ankle and right arm. She was assisted from the ground by one Sherlyn Forsythe, at which point she began to feel pain in the lower back, right side and neck. On the said evening, she made a report at the police station and sought medical treatment from Dr. Kurt Waul.

[9] She stated further that due to persistent pain to the left elbow, neck, right forearm, right ankle, lower back, right hip and right thigh, she sought further medical attention from Dr. George Lawson on 25th August, 2010. She continued to experience pain and had difficulty lifting heavy objects with the right hand, walking briskly, running and sitting for long periods and rising to her feet from a sitting or lying position, among other debilitations.

[10] By way of amplification, the claimant stated that when the car hit her it did not stop and that she saw the defendant for the first time when she was at the police station. She denied that the defendant had examined her and gave her one hundred dollars.

[11] According to the claimant, she was walking on the pavement with another person, with their backs turned to the oncoming traffic. They were not conversing and at no time did she step off the pavement.

[12] Under cross-examination, the claimant said that there was not a lot of traffic on the roadway. She also said that cars were going in both directions, five of them in a line heading towards Spanish Town and that she had also passed vehicles in traffic whilst walking. She estimated the width of the roadway to be fifteen and a half feet and the pavement on which she walked at one foot in height and seven and a half feet in width. She said she had walked closer to houses which were to the left of the pavement. She denied stepping onto the roadway and disagreed that the pavement was sloped.

[13] In response to a question in relation to whether she had been walking and conversing with Miss Margaret Forsythe just before the collision, the claimant replied, “Yes”. She also told counsel that her face and the front of her body had hit the ground.

Evidence of Margaret Forsythe

[14] Miss Forsythe’s Witness Statement filed 16th February, 2015 was ordered to stand as her evidence in chief.

[15] She stated that she was walking about five feet behind the claimant and conversing with her daughter when suddenly she heard a loud shout from the claimant and saw her in a seated position on the sidewalk, clutching her right

hand. She also saw the defendant's motorcar speeding away in the direction of Spanish Town.

[16] In cross-examination, Miss Forsythe said that she had been walking beside the claimant, to her left, before the collision but insisted that she was being truthful that the claimant had been walking five feet in front of her. When counsel asked which version was true, she responded that the claimant was walking beside her to the right and her daughter was to the left with a baby.

[17] She also said that it was someone who had called out to her to say that her church sister was on the ground and had been hit by a car. At that time she had left and her back was turned to the claimant. She was unable to say anything about how the incident occurred.

Evidence of Dr. Kurt Waul

[18] Dr. Waul testified that he had not examined the claimant but prepared a medical report based on notes which he had seen.

[19] The answers he gave in Exhibit 6 are summarised as follows:

(i) the examining doctor had documented signs in the cervical spine and right thigh but these were omitted from the medical report because they had been described as vague and the patient had not returned to establish otherwise;

(ii) if the claimant had suffered severe acute injuries to her lower back it was improbable that she would have omitted it from her history. However, it was not unusual for patients to omit aspects of their history in circumstances where they suffered multiple trauma as in the instant case; and

(iii) the examining doctor had made no mention of the claimant sustaining injury to her right calf.

The Defence

[20] The evidence was given by the defendant. Her Witness Statement filed 16th February, 2015, with the exception of the last sentence in paragraph 5, along with amplification, was ordered to stand as her evidence in chief.

[21] The evidence, as set out in the Witness Statement, is consistent with the pleadings that the claimant and another person were walking on the pavement when she stepped into the path of the car without looking, and was hit by the left side mirror which broke.

[22] In amplification of her Witness Statement, the defendant told the court that traffic was not bumper to bumper and her speed was not more than forty kilometres per hour. She had observed "no broken bones, bruises, cuts, swellings or scratches." She had also asked the claimant why she had stepped onto the roadway but the claimant said that she had not done so. Out of generosity, she offered the claimant a thousand dollars which she accepted. Following the incident, she went to the Spanish Town Police Station and made a report.

[23] On being cross-examined, the defendant estimated the road width as being 23 feet. She said the curb wall was low and gave the estimated height as two feet but was unsure. She was very familiar with the roadway and would slow down on seeing persons using the sidewalk but on this occasion she had not done so. She testified that she had first noticed the claimant when she stepped off the pavement and that this occurred simultaneously with the collision.

[24] On further questioning she said, "I saw her walking and she stepped right off…Prior to her stepping off I saw someone else walking with her...I only saw two persons walking. When I saw them walking I did not toot my horn to alert them of my presence" (sic). She also said the claimant was "one step into the roadway, then the collision" and that the claimant was not very close to the curb when she was hit. When pressed she said she stopped when the claimant was seen stepping into the roadway, "not far from the point of impact".

[25] The defendant denied any encroachment on the pavement and that she had been travelling too close to the curb. She also denied that the claimant had fallen to the ground.

Analysis

[26] It is not in issue that the claimant was a pedestrian along the Port Henderson road, had been using the pavement prior to the collision, and was hit by the left wing mirror of the defendant's car.

[27] The issues to be determined are:

I. whether the collision was caused by the defendant;

II. whether the claimant was the author of her own injuries or contributed to them;

III. the nature and extent of the claimant's injuries; and

IV. the quantum of damages, if any, to be awarded to the claimant.

[28] In ***Glenford Anderson v. George Welch*** [2012] JMSC Civ. 43 at paragraph 26, Harris, JA stated the relevant principle that is applicable in a claim of negligence.

> *It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty. It is also well settled that where a claimant alleges that he or she has suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities.*

[29] It is therefore settled law that the burden rests on the claimant to prove her case on a balance of probabilities. She can discharge that burden by evidence which is established as proved and the inferences which the court may draw from proven facts (***Ng Chung Pui and Ng Wang King v Lee Chuen and Another*** Privy Council Appeal No. 1/1988 delivered on 24 May 1988, pp. 3,4 per Lord Griffiths).

[30] In relation to road users, whether they are pedestrians or drivers, there is a shared duty to use the roadway in a manner which is safe. This requires them to exercise reasonable care for themselves and others. The motorist also has a statutory duty to take such action as may be necessary to avoid an accident (Road Traffic Act, s. 51 (2). In the case of a driver, this would include travelling at a speed within the established limits, keeping a constant lookout for other users of the road, swerving, braking and/or tooting the horn where necessary, and observing traffic rules and signals (See also ***Bourhill v Young*** [1943] AC 92). The pedestrian must, among other things, never enter a roadway without first looking in both directions to be certain that there is no vehicle which is closely approaching.

[31] In the instant case, the claimant alleges that she was on the sidewalk, which was some seven feet wide, when she was hit by the defendant's vehicle. Counsel for the claimant has asked the court to find that the words "along the sidewalk" as used in the pleadings were consistent with her evidence. The defence countered by saying that those words meant that she was walking on the roadway.

[32] In ordinary usage, the phrase "walking **along** a sidewalk" means to be walking on it and those words are different in meaning from walking **alongside** a sidewalk" which is to be adjacent to it. The claimant's pleading that she had been walking "along" the sidewalk is consistent with her evidence that she was on it at the time of the collision. However, I do not accept this evidence as reliable or credible.

[33] The evidence was that the claimant had been walking closer to the houses on the left, which by her own estimation would mean that she had to be more than

three and a half feet away from the edge of the sidewalk. If that were so, I would have expected her to see or hear the vehicle before it collided with her because it would have had to leave the roadway and climb onto the sidewalk which she said was one foot high. It seems that the vehicle would have had to travel at least three and a half feet off the roadway before hitting her, and the front of it would have gone past her, as it is not in dispute that it was the left wing mirror that came into contact with her right elbow.

[34] Counsel for the claimant asked the court to infer from the evidence that the defendant's motorcar had mounted the sidewalk at the time of the collision. At no time did the pleadings or evidence say that the defendant's vehicle had mounted, encroached on or dismounted the sidewalk, and there is no evidence from which I could make such an inference.

[35] The claimant's witness was wholly unhelpful as to how the collision occurred because she conceded that she did not actually see it. This was in contradiction to the claimant's evidence that both of them had been walking and conversing just before the collision.

[36] In the circumstances, I find it to be more believable that the claimant had been on the roadway when she was struck. Although I did not find her to be wholly credible, I believe her that she had fallen to the ground on being struck and I also believe Miss Forsythe that her attention was called to her in a sitting position on the ground. I however, reject the evidence that she had fallen on her face as this was not borne out by the medical evidence, a point on which I have elaborated at paragraph 68.

[37] The defendant's evidence was also inconsistent. In her Witness Statement and evidence in court she said she had seen the claimant and another person walking on the pavement. But she also testified that she had first noticed the claimant when she stepped off the pavement, simultaneously with being struck by the vehicle. She eventually settled on the position that she had seen the

claimant walking on the pavement with another person and then the claimant stepped off the pavement. I accept the latter position as truthful.

[38] The defendant testified further that the claimant had made “one step” off the pavement onto the roadway and that the defendant was not very close to the curb when the collision occurred. I do not accept this statement as reliable. Having taken one step off the pavement, the claimant would have had to be close to the pavement, unless she had leapt into the roadway, which is not the evidence.

[39] The defendant also said that on seeing the claimant step onto the roadway she stopped the car, not far from the point of impact. I reject this evidence because it is inherently inconsistent.

[40] Although the defendant equivocated on her ability to measure distances, she did point out to the court what she estimated to have been the width of the Port Henderson roadway, which was some 23 feet. The claimant pointed out the width as being some 15 feet. The defendant also said that two coaster buses would be able to pass in opposite direction on the road. This would be more consistent with a width of 23 feet than 15. I therefore prefer the defendant’s evidence in this regard.

[41] The defendant gave no evidence as to the actual width of her car. She did not agree with counsel for the claimant that it was about five and a half feet wide. The court takes notice that an average-sized car is about five to six feet wide and a Mitsubishi Lancer is an average-sized car.

[42] On the evidence of the width of the roadway which I have accepted, the defendant’s side was some twelve and a half feet. This was more than ample space to have manoeuvred her vehicle, without colliding with the claimant who made one step off the pavement, and risking an encroachment on the opposite lane.

[43] In addition to that, the defendant saw the claimant as she stepped onto the roadway, but did not swerve, toot the horn, or bring the vehicle to a stop to avoid the collision. Neither did she slow down as she would have ordinarily done on seeing pedestrians on the pavement. It would have been foreseeable that a pedestrian could step off the sidewalk for any reason and she should have kept a sufficient distance from the curb to manoeuvre safely in such an eventuality.

[44] In the circumstances, I find that the defendant was driving close to the sidewalk without keeping a proper lookout and that she had not conducted herself in the manner expected of the reasonable and ordinarily skilled driver. As a consequence, her vehicle struck the claimant on the right elbow. She is therefore liable in negligence.

Contributory Negligence

[45] The principle of contributory negligence is that the damages awarded to the claimant should be reduced to the extent that her fault contributed to the injury or damage. The test is whether the claimant had taken proper care for her own safety (See ***Jones v Livox Quarries Limited*** [1952] 2 QB 608 and ***Lewis v Denye*** [1959] KB 540).

[45] I have already found that the claimant was not credible in her evidence as to how the collision occurred and I concluded that she had been in the roadway when she was struck. There was no evidence that at any time she had looked in the direction of vehicles travelling in the direction she was walking. In fact, it was her evidence that she had not seen the defendant's vehicle before it struck her.

[46] There was no explanation given to rebut the *prima facie* evidence of negligence. The claimant had not been using the pavement at the time she was struck and there was no evidence of any obstruction to the pathway or other reason for her not to have used the pavement. She had been struck partly because of stepping off the curb without being attentive to her own safety. For these reasons, I find that the claimant had not acted as a reasonable, prudent and careful pedestrian.

[47] On the facts of this case, as I have found them to be, the issue of contributory negligence has been proved. I find the liability to be thirty percent (30%). The defendant ought to have had in her contemplation that it is commonplace for pedestrians to step off pavements. The greater liability is therefore the defendant's, who drove close to the curb without keeping a proper lookout.

[48] I agree with counsel for the defendant that the cases cited by the claimant in respect to liability can be distinguished on the facts.

[49] In ***Adamson v Roberts*** (1951) SC 681 the pedestrian was walking along a pavement at a point where it narrowed by a projecting building. In order to pass, the pedestrian had to put one foot over the edge of the pavement into the gutter. She was struck from behind by a motor van as she did so. The defendant was aware of the projection and that pedestrians would have had to step in the roadway to negotiate the project. For these reasons a special duty was imposed on the driver in relation to the speed at which he travelled, the warning which he gave and the path of the road in which he directed his vehicle. In the instant case, as I have already said there was no evidence of any reason for the claimant to have not been using the pavement at the time of the collision.

[50] In ***Parkinson v Parkinson*** (1973) RTR 193, the pedestrians were walking 4 feet and 6 inches into the roadway. The defendant was negligent because the pedestrians were well into their side of the roadway which was wide enough for the defendant to have passed without incident. It was also found that the driver had seen the pedestrians in the road when he was some thirty eight yards away. In the instant case, the evidence is that the claimant had been on the sidewalk prior to the collision and at the point of collision she had stepped off the sidewalk into the roadway. There was no evidence of the distance that the defendant had been from her when she did so.

[51] In ***Chapman v Post Office*** (1982) RTR 165, the plaintiff was standing on the curb at a bus stop when she was hit by the wing mirror of a van. On appeal, the defendant was found fully liable because the plaintiff had been standing on the

curb. It was also found that had the plaintiff even leaned forward or gone an inch or two off the curb, the driver would have been negligent. My reading of the decision is that 'an inch or two' was so negligible that the plaintiff would be considered as being in the space reserved for a pedestrian at that distance from the curb. In the instant case, the claimant was not on the curb. The evidence is that she made one step off the sidewalk but there was no evidence of the distance away from the curb. In my view, it would be unreasonable to assess a "step" by an adult as being equivalent to movement of an inch or two, without more.

[52] In the circumstances, judgement will be for the claimant.

Assessment of Damages

[53] I now turn to the issue of damages. I will first look at the claim for General Damages. The claimant was a 33 year old higgler at the time of the accident. Her evidence of pain and suffering was supported by two medical reports.

[54] The particulars of injuries claimed are as follows:

(a) chronic mechanical lower back pain;

(b) acute cervical strain/whiplash injury;

(c) acute right elbow sprain;

(d) acute sprain to right ankle an hip; and

(e) soft tissue injury to right forearm, thigh, calf.

[55] The claimant stated in her Witness Statement that as a result of the accident she saw Dr. Waul on the said evening and received an injection for a sprain to the right elbow and right ankle. Two days later, on 25th August 2010, she saw Dr. George Lawson because of persistent pain in the left elbow, neck, forearm, right ankle, lower back and right hip and thigh. He prescribed analgesics. She made two follow-up visits.

[56] At the time of her Witness Statement in December 2014, she stated that she was still experiencing pain to the right arm, neck, lower back and right ankle. She was having difficulty lifting heavy objects with the right hand, walking briskly, running, sitting for long periods and rising to her feet from a seated or lying position. She experienced pain to the right ankle when climbing a flight of stairs and on turning her neck. She was unable to bend, crouch or squat without pain. She also experienced lower back pain during sexual intercourse which limited that activity. Her sleep had also been disrupted due to pains and she was unable to lie comfortably on her right side. She had been deprived of the pleasure of going out and enjoying herself.

[57] Medical Report, prepared by Dr. Kurt Waul, admitted as exhibit 2, reads, in part, as follows:

…When examined a female patient was seen in moderate painful distress and she walked with a limp. Significant findings were confined to her right, upper and lower limbs. The right elbow was moderately swollen with painful limitation of movement. The right ankle was moderately swollen with painful limitation of movement…Diagnosis: Mild to moderate sprain of the right elbow and moderate right ankle sprain…

[58] Medical Report of Dr. George Lawson, admitted as exhibit 1, reads, in part, as follows:

…Presenting Complaints: Painful swelling to left elbow; right forearm pain; neck pain; right ankle pain and swelling; lower back pain; right hip and thigh pain…she claimed she felt a sudden blow from behind and was awkwardly flung forward. She recalled stumbling forward and attempting to maintain her balance; she denied hitting her head, chest or abdomen…She was able to walk in unaided but displayed an antalgic gait…there was soft tissue tenderness to the upper posterolateral thigh and posterior calf tenderness; the ankle was swollen and quite tender with restriction of movement due to pain…stress testing and weight-bearing (ankle) provoked pain…bending was much reduced in fluidity, normal in

range but appeared to cause pain,…straight leg-raising elicited back pain bilaterally and right hip pain…there was left-sided soft tissue tenderness extending to involve the trapezius…lateral flexion was mildly restricted and patient complained of pain on the left only. Rotation: No significant restriction but with pain to the left. Right Elbow…there was an obvious swelling to the proximal posterior forearm; there was much associated tenderness of the soft tissues including all the muscle groups of the forearm…there was a decrease in the fluidity and ranges of motion at the elbow but no clinical evidence of bony injury or dislocation.

[59] Dr. Lawson treated the claimant with analgesics, advised on self-care and rest and she was to return with results of X-Rays to the spine, right elbow and right hip. She was reviewed on 1st September 2010 and 13th June 2011. No bone or joint injury was found based on x-rays of the spine, right elbow and right hip. She reported gradual reduction of pain to the neck, thigh, ankle and forearm but complained of ongoing lower back pain, especially when working. Dr. Lawson concluded that the limb and neck injuries responded to conservative measures and were not expected to result in any permanent impairment. On the third and last visit, some nine months after the accident, Dr Lawson made no objective findings in relation to the back injury despite her complaint. She was, therefore, referred for specialist evaluation, prescribed medication, and sent for physiotherapy. She was to be reviewed thereafter.

[60] There is no evidence that the claimant had acted on Dr. Lawson's advice or that she had received any other medical attention. I therefore find that there is no reliable evidence to support the claim of back pain subsisting beyond the first and second visits.

[61] It was Dr. Lawson's opinion that "the effects on social, domestic, leisure and employment," alleged by the claimant, "were not at variance with the clinical findings." However, I note that Dr. Lawson made no reference to employment or

sexual activity being affected and he made no findings as to the continuation of the effects.

[62] Dr. Waul said that the medical report became his responsibility because the examining doctor had migrated. This contradicts the claimant's evidence that she had been examined by him.

[63] Dr. Waul wrote, inter-alia: "…based on the doctor's original record Miss Bryan did complain of more symptoms than outlined in my medical report, however I choose (sic) to omit them because the doctor referred to the severity of the symptoms as being vague at the time he saw her, and given the fact that the patient didn't return to me stating otherwise…the doctor who saw Miss Bryan did record he elicited signs in the patient's cervical spine and right thigh other than the signs noted in my report…the doctor did not make mention in such detail that the patient originally sustained injuries involving her trapezius muscles at the time he saw her…as noted in answer 2 she did mention sustaining injuries to her right hip, however the doctor who saw her wrote them off as being vague at the time he saw her…the doctor who saw her did not make any mention of her sustaining any injuries to her right calf."

[64] In his answers, Dr. Waul also opined that "…if the patient had suffered severe acute injuries to her lower back during the accident it would have been improbable that she would have omitted it from her history, however (sic) on the other hand it is not unusual for patients to omit aspects of the history in the situations where they suffered multiple trauma such as this case."

[65] In cross examination, Dr. Waul was asked whether a hit on the elbow, caused by the wing mirror of a car which was moving in a line of traffic, could result in mechanical lower back pain and acute cervical strain/whiplash. His answer was that this would not be expected if the person did not fall and certainly not in an instance of slow moving traffic. He said that if she were thrown off balance there could be injury to the ankle but he would not expect that there would be left-sided soft tissue tenderness which extends to involve the trapezius to neck and cervical

spine or to the right calf and right thigh. It would also be unusual to suffer acute sprain to the right hip.

[66] In re-examination, Dr. Waul was asked whether it was possible to develop back pains as a result of falling on the face, having received an impact to the right arm. He said a force that was significant to "push one down…is significant to cause spinal injury…cause the spine to move erratically and possible to cause injury…to the lower and upper spine." (sic)

[67] I will disregard the aspect of Dr. Waul's evidence pertaining to what the claimant might not have disclosed at her medical examination. That was speculative. I do not agree with counsel for the defence that Dr. Lawson's diagnosis was based on what the claimant told him and not his objective medical findings. It is clear to me from Dr. Lawson's report that he made clinical observations and arrived at his medical conclusions, accordingly.

[68] I do not place weight on Dr Waul's response to questions about the claimant falling on her face because there is no medical evidence supporting that claim. In fact, Dr Lawson's report is that the claimant denied hitting her head, chest or abdomen. I find that this would have been an improbable outcome if she had in fact fallen on her face.

[69] Both medical reports indicated a right elbow sprain and right ankle sprain. Dr. Lawson found additional injuries, two days later, but I do not find any variance in the medical conclusions because Dr. Waul stated in his answers to questions posed by counsel for the defence, admitted at exhibit 7, that he was not the one who examined the patient and that he had reported less injuries than those indicated in the original medical document which he had reviewed.

[70] I find Dr. Lawson's diagnosis to be consistent with the particulars of injuries as pleaded and I have found no reasons to fault his medical examinations or findings. He saw the claimant two days after the accident and her first medical examination, and he reviewed her on two (2) occasions over a nine (9) months

period. In contrast, Dr. Waul did not examine the claimant and his report omitted symptoms which the examining doctor had said were vague in severity. Dr. Waul's evidence in court also contained some degree of speculation.

[71] In support of the claim for General Damages, the claimant cited ***Talisha Bryan v Anthony Simpson,*** Claim No. 2011 HCV 05780 (unreported); ***Dalton Barrett v Poncianna Brown anor,*** Claim No. 2003 HCV 1358, reported in Khan 6 at p. 104; and ***Melford Ricketts v Claudius Dennis,*** Claim No. 2006 HCV 04152 (unreported).

[72] In ***Talisha Bryan,*** the claimant sustained whiplash injury to the neck as a result of a motor vehicle collision in which she was a back seat passenger. After physiotherapy, she started feeling better but continued to experience occasional lower back pains especially when she sat for extended periods or bent to pick up objects. Damages were assessed in March 2014 (CPI: 214.6) and the claimant was awarded the sum of $1,400,000.00 for pain and suffering and loss of amenities which today would yield the sum of $1,617,893.76 using CPI of 248 at January 2018.

[73] In ***Dalton Barrett,*** the claimant suffered tenderness around right eye and face; tenderness in the lumbar spine; and tenderness in the left hand. He was treated and discharged. Four days later, he was observed to have been suffering from pain in the lower back, left shoulder and left wrist and contusion to the hip, lower back and left shoulder. Nine months later, because of continuing pain, he consulted an Orthopaedic Surgeon who diagnosed mechanic lower back pain and mild cervical strain. He was prescribed physical therapy which proved very effective and the claimant was pain free a few months later. There was no PPD. Damages were assessed in November 2006 (CPI: 99.6) and the claimant was awarded the sum of $ 750,000 for pain and suffering and loss of amenities which today would yield the sum of $1,867,469.88 using CPI of 248 at January 2018.

[74] In ***Melford Ricketts,*** the claimant sustained a whiplash injury for which he was incapacitated for four months. He complained of neck and lower back pain. He

was treated with analgesics and a soft cervical collar for six weeks. Physiotherapy was recommended but there was no evidence of that being done. He was awarded the sum of $950,000 for pain and suffering and loss of amenities, in May 2008. Counsel submitted that the updated sum is $1,800,000 but the court was not provided with the relevant CPI or the calculations.

[75] The defendant contends that the medical reports are incongruous and should not be relied on in determining an appropriate figure for General Damages. In the alternative, counsel submits that the court should rely on the medical report prepared by Dr. Waul "who saw the claimant first in time and [whose] assessment of her impairment [was] more in keeping with the mechanics of the accident." I do not agree with this submission, for the reasons outlined at paragraphs 58-71.

[76] ***Lenroy Lee v Commissioner of Police*** Suit No. C.L. 1988/J131 cited in Harrisons' Case Notes, 375 and ***Sherine Williams v AG*** [2016] JMSC Civ.12 were relied on. Counsel for the defendant submits that based on these two cases, the award should be between $200,000 and $400,000.

[77] In ***Lenroy Lee,*** the injury was a sprained ankle for which $8,000 was awarded in November 4, 1991, using a CPI of 11.60. The sum today would be $171,448.27 using CPI of 248.6 at January 2018.

[78] In ***Sherine Williams,*** the claimant was hit by a motorcycle and suffered an abrasion to the right elbow and leg, swelling and tenderness to the right leg and haematoma to the right posterior lateral aspect of the leg. She was fitted with a plaster of paris back slab which was worn for two weeks. Three and a half years after the collision she consulted an Orthopaedic Surgeon who found a healed superficial scar behind the right elbow; full range of movements in the right elbow, knee and ankle and that she walked without a limp. He was of the opinion that she suffered soft tissue injuries from which there not yet been full recovery and assessed her as having a 3% PPD of whole body. The PPD was arrived at from a physicial examination and history provided. The learned Judge did not find

the Orthopaedic Surgeon's report to be reliable or that the injuries were as serious as they were made out to be in that report. $700,000 was awarded in January 2016 for pain and suffering and loss of amenities, using a CPI of 231.3. The updated award is $752,356.24 using the CPI of 248.6 at January 2018.

[79] Of the cases cited by both parties, I find ***Dalton Barrett*** to be the most helpful. However, that case involved more injuries and those in common seemed more serious, as in the injury to face and specialist diagnosis of mechanic lower back pain and cervical strain. Dalton Barrett also followed the medical advice to undergo physio-therapy, which proved very effective.

[80] Bearing these factors in mind and making the necessary adjustments, I am of the view that an award of one million three hundred thousand dollars ($1,300,000.000) is appropriate for the injuries in the instant case.

Special Damages

[81] Special Damages were particularised as follows:

(a) medical reports visits to Dr. Lawson $47,500;

(b) office visit and medication (Dr. Waul) $12,000

(c) Nuttall Memorial Hospital X-Ray $11,400;

(d) Transportation $20,000; and

(e) Extra help for 10 weeks at $4,000 weekly $40,000.

[82] Receipts were exhibited to support the amounts paid to Dr. Lawson, Dr. Waul and Nutall Hospital. The claimant's evidence was that she paid $2,500 for transportation to and from the doctors' offices. This was not supported by receipts. However, I have considered that it is not the general practice for receipts to be issued for the use of public transportation in Jamaica and I do not

find the amount claimed to be unreasonable. The claim for extra help was not supported by any evidence and will therefore not be awarded

[83] I make an award of $72,500 for Special Damages.

Orders

[84] Accordingly, I make the following orders:

i. Judgment for the Claimant
ii. General Damages in the sum of $1,300,000.000 with interest thereon at a rate of 3% per annum from the date of service of the claim to the date of judgement
iii. Special Damages in the sum of $72,500 with interest thereon at a rate of 3% per annum from 23rd August 2010, to the date of judgment.
iv. Costs to the claimant to be agreed or taxed.
v. Liability for ii-iv herein apportioned as follows: claimant, 30%; defendant, 70%.