[2026] JMSC Civ 03

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV02526

BETWEEN	**EVAL GIVANS**	**CLAIMANT**
AND	**SHEVAR SIMPSON**	**FIRST DEFENDANT**
AND	**STEVE LINDO**	**SECOND DEFENDANT**
AND	**MELISSA LINDO**	**THIRD DEFENDANT**

IN OPEN COURT

Mr Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant

Mr Anthony Armstrong instructed by Campbell McDermott for the Second and Third Defendants

HEARD: February 4 & 7, 2025 & January 12, 2026

NEGLIGENCE – MOTOR VEHICLE COLLISION– NO PROPER LOOKOUT – BURDEN OF PROOF – CAUSATION – LIABILITY – PERSONAL INJURIES – QUANTUM

WINT- BLAIR J

[1] On December 22, 2014, shortly before 8:00 am, the claimant was lawfully riding as a pillion passenger on a motorcycle owned and operated by Shevar Simpson, the first defendant. This motorcycle, registered 8043H, was travelling along the Bog Walk main road in the parish of St. Catherine. On the same day, a bulldozer excavator was being transported on a motor truck registered CD1165. Both vehicles collided.

[2] Melissa Lindo, the third defendant, owned the motor truck that Steve Lindo, the second defendant, operated. In this claim, the claimant seeks damages for injuries, losses, and expenses incurred and is no longer proceeding against the first defendant.

[3] The claimant relies on the agreed medical report of Dr Jithendra Vijayendra (Oasis Health Care) dated the 26th day of August 2016[1]. He was diagnosed with the following injuries:

a) Grade 2 compound fracture of the midshaft of the right femur
b) Residual shortening of the right lower limb
c) Stiffness of the knee and muscle wasting
d) 49% of lower extremity impairment
e) 20% whole person impairment

Particulars of Negligence

[4] The claimant particularised the negligence of the second defendant as follows:

(i) Driving at too fast a rate of speed in all the circumstances.
(ii) Failing to maintain control over motor vehicle registration number CD 1165.
(iii) Failing to keep the required distance between the two motor vehicles.
(iv) Failing to apply his brake within sufficient time or at all.
(v) Causing motor vehicle registration number CD 1165 to travel too closely to motor vehicle registration number 8043H, thereby causing a collision between the claimant and the machine motor vehicle registration number CD1165 was conveying.
(vi) Causing a collision between the claimant and the machine motor vehicle registration number CDI165 was conveying.
(vii) Failing to see motor vehicle registration number 8043 H within sufficient time or at all.
(viii) Driving along the said road in a careless manner.
(ix) Failing to have any or sufficient warning signs, alerts and/or notices of the machine that motor vehicle CD 1165 was conveying.
(x) Failing to properly secure the said machine on the said vehicle.

---

[1] Exhibit 10

(xi) Causing the said machine or a part or parts of the said machine to protrude off the vehicle and into the driving path of the first defendant.

(xii) Failing to stop, slow down, swerve, or otherwise conduct the operation of the said motor vehicle so as to avoid the said accident.

The Defence

[5] In his defence, the second defendant admits the date, location, that the claimant was a pillion on the motorcycle, and that there was a collision involving the motor truck, which he was lawfully driving at the relevant time. The second defendant added that his truck was being 'piloted' by another vehicle whose occupants displayed red flags to warn other road users to proceed with caution.

[6] The second defendant argues that the collision was caused or significantly contributed to by the first defendant, as while he (the second defendant) was stationary on the road, the first defendant overtook the line of traffic that had pulled to the far left of the carriageway. The first defendant drove the motorcycle so negligently that it caused the claimant's right leg to come into contact with an excavator being transported on the motor truck. The second defendant commenced an ancillary claim against the first defendant seeking orders for indemnity and/or contribution, costs, and interest.

The Evidence

[7] It is agreed that the collision occurred on December 22, 2014. On the material date, the weather was bright and dry. There is a river to the left of the road as one approaches Bog Walk, and rocky terrain to the left of the driving lane as one heads toward Spanish Town. There is no challenge to the fact that both vehicles were travelling in opposite directions.

The Claimant's Evidence

[8] In his witness statement, Mr Evans gave evidence that he was lawfully proceeding along the Bog Walk Main Road from Spanish Town as a pillion on a motorcycle when, upon reaching a section of Bog Walk Main Road near the Sligoville

entrance, he saw the truck heading towards Spanish Town, conveying a Bulldozer excavator.

[9] It was minutes before 8 am, and he and Mr Simpson were heading to Bog Walk for a 9 am appointment. He observed the car ahead swerve to avoid the truck because the excavator was protruding onto the opposite side of the road, which was the side they were riding on.

[10] Mr Simpson also swerved but was unsuccessful. A part of the excavator was protruding onto their side of the road, and it hit Mr Simpson on the arm and the claimant on his right leg, causing both to be thrown from the motorcycle. The claimant fell further to the left of the road, nearly landing in the river. When the claimant tried to stand, the shattered bone in his right leg was protruding through the skin, and he felt "faintish." The claimant denied that there was a pilot vehicle before the truck, nor was the truck stationary at the time of the collision.

[11] After the collision, the second defendant continued driving and was stopped by passersby who took the claimant to Spanish Town Hospital, where he was admitted. The claimant said at the hospital he lost consciousness, regaining it some five hours later. He underwent several wound washes due to infection at the fracture site. The protruding bone was infected, and the doctors' attempts to salvage the bone were unsuccessful. He had several surgeries, including open reduction of the limb to remove the shattered part of the bone and surgery for internal fixation with nails to hold the fractured area together.

[12] During his stay in the hospital, the claimant was on IV antibiotics and other medications. The doctors conducted weekly blood tests and swabs for the infection in his leg. He used his savings to cover his medical bills, some of which were paid in his friend Andrew Leslie's name. He remained in the hospital for nine months and was discharged on September 13, 2015. His doctors directed him to attend regular clinical follow-ups and prescribed antibiotics and analgesics.

[13] Being bedridden for months consequent upon his leg injury resulted in the claimant undergoing multiple physiotherapy sessions. His injuries made mobility difficult, requiring him to rely on his mother for daily assistance. He used double crutches for four months after hospital discharge and then switched to a single crutch for an additional month.

[14] As a result of the accident, he was unable to work for nineteen months. As a mason, his monthly salary was Eighty Thousand Dollars ($80,000.00). When he resumed work, he struggled with his usual duties because he was often in pain and could only handle lighter tasks. This made it very hard to find work, which significantly reduced his earnings.

[15] Before the accident, he was always very active. After the accident, his right leg is now shorter than his left. He is no longer able to enjoy his accustomed social and leisure activities as he is restricted by the pain and stiffness in his right knee. He is unable to stand or walk without feeling pain and now walks with a limp.

[16] Before the accident, he was an active cricketer and was captain of his cricket team. He no longer plays cricket or any other sport because he cannot run or move as quickly as he used to. He is also not able to climb stairs without pain. His doctor advised him to raise the heel of his footwear and to take pain medications because, to date, he experiences frequent pain, both of which he did. His life has now been reduced to daily pain. At night-time after work, he has immense pain in his right leg such that he has to rest it. He states that the injury has significantly affected him physically and mentally.

[17] During the nine months he was admitted, his mother would visit him. The claimant had to pay her fare as she was not in a position to pay for her own transportation. His mother visited him at the hospital every day over those nine months, at a cost of $1000.00 round-trip. He also visited the clinic once per week for four months after he was discharged in a chartered taxi at a cost of $1000.00 per round trip. He also received physiotherapy at the hospital for 6 months after being discharged.

However, clinic visits were separate from physiotherapy sessions, and he would charter a taxi each time he had to attend for physiotherapy. He completed six months of physiotherapy, once per week. The claimant tendered exhibits 1 to 10 in respect of his claim for expenses incurred in relation to the injury to his leg.

[18] In cross-examination, the claimant stated that he was a pillion passenger on a motorcycle of unknown make, but he recalled it was a small 150cc motorcycle. The collision occurred on the two-way road at Bog Walk Gorge. That morning, he was heading from 10 Mission Road to Riversdale. He stated that it was minutes to 8 am and he was to meet someone at 8:30 am in Bog Walk.

[19] The road was dry, with white lines. It was not a sunny morning, as Bog Walk does not receive sunlight that early, but he could see clearly ahead of him. He was at the rear of the motorcycle and agreed that he was seated almost touching the rider. The motorcycle driver was not obstructing his view ahead. A car was travelling ahead of the motorcycle. He said that before the vehicle swerved, there was approximately 6 – 10 feet between the car and the motorcycle.

[20] The motorcycle was travelling in a single lane. It was not travelling fast, nor was the car, which was travelling at approximately the speed limit for the Gorge, which was 50 km/h. The motorcycle was travelling at approximately 40 km/h when it was behind the car. At approximately 6–10 feet away, the claimant observed the car swerve to the left toward the Rio Cobre River. The claimant did not know much about the accident; the car did not brake at any time and safely passed the motor truck.

[21] The claimant witnessed the first defendant swerve to avoid the truck coming from the opposite direction. He was not sure if there was anything in front of that truck. He was going around the corner when the car swerved, and the motorcycle also swerved; that was when the accident occurred. When the motorcycle swerved, he found himself flying to the left. He said that he thought there was a van in front of the truck, but it was not close to the truck. The motorcycle passed the van, and

when they came around the corner, there was the truck. Upon approaching the corner, the car reached the corner, and the claimant was going around the corner. The truck was also coming around the corner. The car swerved, and midway into the corner, the motorcycle swerved to the left. The motorcycle was travelling at about 40 kilometres per hour. The motorcycle driver did not apply the brakes; he merely "geared down" the motorcycle. The car made it safely past the trailer, and when the motorcycle swerved to the left, the truck hit the claimant's right femur, throwing him to the far left of the road. He went pretty close to the river, and when he stood up, he saw his bone through his leg.

[22] He stated that the vehicle travelling ahead of the trailer had no reason to stop before the swerving began. He said that he was seated on the motorcycle with his feet positioned close to the rider; his legs were not ajar. He disputed the suggestion that, while the car ahead of him was passing the truck, the driver of the bike drove between the truck and the car. He also disagreed that it was while the driver of the motorcycle was going between the truck and the car that he, the claimant, became injured. He stated that the first defendant is a family friend whose right fingers were broken by the excavator. The first defendant did not overtake.

[23] Dr Jithrenda Vijayendra, an orthopaedic surgeon, gave evidence that he prepared a medical report for the claimant dated August 26, 2016.[2] In cross-examination, Dr Vijayendra stated that the report he prepared was dated August 26, 2016. He first saw the claimant as a patient on April 12, 2016, at the Oasis Medical Facility Centre. On August 15, 2016, he examined the patient. The doctor explained that he had seen the patient on three occasions in total, and that was the last time he saw the claimant. The first time he saw the claimant was on April 12, 2016, less than four months apart. He confirmed that when he wrote the section on page 4

---

[2] Exhibit 10

titled “present position,” it reflected the patient’s condition at the last time he saw him before preparing the report.

[24] He stated that on page 3, under “investigations,” the note indicating “X-ray of right femur 12 Jan 2016: healed fracture of mid shaft of femur with implant in situ” was his note made after reviewing the X-ray findings. He reviewed the X-rays and documented the healed fracture of the midshaft of the femur. He explained that the line below the X-ray findings, which indicated a Grade 2 compound fracture, reflected the clinical finding and diagnosis. Although the initial diagnosis was a Grade 2 compound fracture, by August 15, 2016, the fracture had healed.

[25] He stated that the patient’s ability to perform regular duties was based on his last examination on August 15, 2016, rather than on the first examination. He confirmed that he had not seen the patient since then. Based on the claimant’s problem, the doctor stated that he did not think the claimant could fully recover because of the shortening of the limb and wasting of the muscles. It is unlikely that he would fully recover or return to normal.

[26] He acknowledged that he had not recently examined the patient; therefore, his comments regarding the patient’s current condition were not based on a recent examination of the claimant. He stated that, if he had recently examined the claimant, he could provide his opinion on the claimant at that time. This opinion was from August 15 2016, when he was last examined and at that time, the claimant was not fit to do regular duties

[27] He recommended physiotherapy, which the patient was already undergoing, and encouraged its continuation, as well as the continuation of muscle-strengthening exercises, aimed at improving the claimant’s physical condition.

The Second Defendant’s evidence

[28] The second defendant gave evidence that the accident occurred at approximately 10:45 am while he was operating his trailer (a “low boy”) from Bog Walk to Spanish

Town with an excavator aboard. He was being directed by a pilot vehicle ahead, which was used to guide the truck, and it cleared the roadway to allow him to navigate traffic safely, particularly when heavy equipment, such as an excavator, was being transported on the trailer.

[29] At the time of the accident, the pilot vehicle had come to a complete stop because it was approaching a corner. The second defendant was approximately 40 feet from the pilot vehicle. The pilot vehicle stopped vehicles approaching from the opposite direction to allow the second defendant to manoeuvre the trailer around the corner.

[30] The second defendant awaited instructions from the pilot vehicle, and as soon as he got the green flag from the flagman aboard the pilot vehicle, he began driving very slowly. He observed a motorcyclist with a pillion aboard approaching from the opposite direction. The motorcyclist was overtaking a line of traffic, placing the motorcycle in the middle of the roadway and very close to a trailer and a car approaching from the opposite direction. The motorcyclist was forcing his way between the truck and the car.

[31] At this point, the second defendant stopped. He observed in his rear-view mirror that the pillion's foot had caught the track of the excavator, and both rider and the pillion were thrown into the air and fell onto the roadway. The second defendant exited the trailer where he saw the motorcycle driver on the right side of the road, in front of a car, and the pillion and the motorcycle beside the trailer. Shortly thereafter, passersby arrived and assisted by transporting both injured men to the Spanish Town Hospital.

[32] The police arrived at the scene and instructed the second defendant to move the trailer to a safer, wider part of the roadway, which he did. He then placed the motorcycle aboard the pilot vehicle, went to the Bog Walk Police Station, reported the incident and left the motorcycle there.

[33] He received no further information about the men or the incident because he did not have an opportunity to obtain their contact information amid the chaos following the accident. Furthermore, he does not believe he was at fault in this accident; the motorcycle driver was solely at fault, as the truck was stationary at the time of impact.

[34] In cross-examination, the second defendant stated that the excavator that he was conveying on the day in question had a width of nine feet. As he transported the excavator in the Bog Walk Gorge it would not have protruded into the right lane. He was not sure of the width of the lane, but he went to the scene after he was contacted by the insurance company. He said the truck is 8 feet wide, with a 6-inch projection on each side.

[35] The Bog Walk Gorge is his daily route. He had been travelling there for about 4 years. The truck was narrow, and he was always on his side. The excavator was travelling on a lowboy. The length of the lowboy was 45 feet, and the length of the excavator was 23 feet. He agreed that the entire stretch of the Bog Walk Gorge is not a straight road and that there are more corners in the Bog Walk Gorge than straight road.

[36] Prior to the incident, he regularly transported an excavator on a lowboy as part of his daily tasks. He was experienced in handling this type of equipment and had previously transported an excavator of that size through the Bog Walk Gorge on a lowboy. Due to the many corners in the Gorge, there are occasions when transporting an excavator like this, he has to go to the right-hand side of the road to manoeuvre around the corner. That is why he has a pilot vehicle to stop the incoming vehicles where necessary. The pilot vehicle was not a Jamaica Constabulary Force vehicle, nor was its driver a police officer.

[37] On the day of this incident, his truck was being ‘piloted’ by Steve Lindo Snr with a flashing light and a red flag. This private citizen had an obligation to stop motorists approaching the excavator. Holding the red flag was Ian Hayles. Mr Hayles was

employed by the company for which the defendant was pulling equipment, Midoc Equipment. On these occasions, the second defendant always provided the flagman.

[38] When asked about paragraph 4 of his witness statement, he agreed that the pilot vehicle was approximately 40 ft from his vehicle as it approached the corner. He said they were 40 feet or more from the corner and still on the straight. The second defendant testified that the pilot vehicle need not stop approaching vehicles; it only had to signal them to exercise caution when a large truck was approaching.

[39] However, on this particular day, he saw the pilot vehicle stopping the vehicles coming from the opposite direction. He disputed that this was necessary for him to round the corner safely. The pilot vehicle did not need to stop the vehicles because the corner was not too deep for the truck to go around it. The truck could have gone around it without going over on the right side of the road. He said that the corner did not play any role in the accident because at the time of the collision, he was on a straight stretch of the Bog Walk Gorge road. He confirmed that he was approximately 40 feet from the corner and that the accident occurred at approximately the same distance.

[40] He described the morning as busy and that he observed vehicles travelling in the opposite direction. When the pilot vehicle began stopping those vehicles, he observed them slowing, with some pulling to the extreme left of their lanes while others did not. When he stopped 40 feet from the corner, he was entirely within the left lane; not even his hand could fit between the excavator and the hillside.

[41] He could see clearly along the straight stretch of road for 40 feet ahead of him. He was not stationary when he first saw the claimant riding the motorcycle; he stopped only after the motorcycle overtook the line of traffic. When he stopped, the motorcycle was within visible range of his truck, but he could not estimate the exact distance. The motorcycle was on his side of the road, slightly over the white line by inches.

[42] At that moment, the right side of his truck was less than ten inches from the white line. The space on his left could not have been even a foot, as when he opened his door, it touched the hillside. The excavator he was transporting extended an additional six inches beyond the truck, making it roughly four inches from the white line. He could tell the distance from the white line because he had a rearview mirror, which allowed him to see that he was not over the line at any point. Once he stopped, he could determine the exact position. He disagreed that driving his truck 10 inches from the white line would have been very close. Similarly, he disagreed that the excavator being about 4 inches from the line meant it was very close, explaining that, when transporting such equipment, that distance is not considered close.

[43] The truck itself was about fifteen feet long, excluding the lowboy, and the excavator was in the middle of the lowboy. The motorcycle the claimant was riding on did not collide with any part of the truck or the lowboy. The lowboy was on the inside. When overtaking, the motorcycle was partially on his side of the road because its handlebars were wider. The vehicle the motorcycle was overtaking was both in front of the second defendant and beside him at the same time. He saw the pillion's foot become caught in the track of the excavator; while his truck was stationary.

[44] There was one flagman that day; two people were in the pilot vehicle, one driving and the other serving as the flagman. He confirmed that the reference in his witness statement to "flagmen" was incorrect. The flagman did not exit the vehicle; instead, he signalled from the vehicle, which was positioned along the roadway to warn oncoming traffic that heavy equipment was approaching. The vehicles coming from the opposite direction pulled to the extreme left of the roadway. He confirmed that it was true in his witness statement that while the second defendant was stationary along the roadway, the first defendant proceeded to overtake the line of traffic which had pulled to the extreme left of the roadway and so negligently rode motor cycle registered 8043H that he caused the claimant's right leg to come into contact with the excavator which was being conveyed by the second defendant.

[45] He agreed that the left and right lanes were of equal width, although the right lane had a short wall. He denied that the excavator protruded into the right lane on the day of the accident. He insisted there was indeed a pilot vehicle and agreed that while the pilot was present, the pilot fully performed the function of warning motorists because cars were passing easily; the issue arose only because the pillion's foot projected out and the rider's foot projected in. He agreed that he did not have warning markers attached to the excavator to indicate that it was wider than the body of the truck. He explained that this was because the excavator was not wide. They had the pilot, and such warnings were typically used only when equipment protruded approximately 1 foot beyond the truck. When the machine extended beyond the white line, police assistance would be required.

[46] He disagreed with the suggestion that the truck was moving when the collision occurred, as the motorcycle had crossed onto his side. He maintained that the motorcycle came over the white line because the driver was trying to fit between the car and the truck. He explained that he was the truck driver and saw the motorcycle approaching with its handlebars on his side. He acknowledged that nowhere in his defence or witness statement had he mentioned that the motorcycle had come onto his side of the road, explaining that he had never been asked that question, so he simply stated what happened: that the motorcycle was attempting to pass between the vehicles.

[47] He denied the suggestion that the accident occurred because he was carelessly conveying the excavator, as he had been traveling from Ocho Rios along his usual route. He confirmed that the police had instructed him to move the trailer to a wider section of the roadway so as not to block traffic, and that he had driven approximately a kilometre down the road to a wider area near a house and shop.

[48] In explaining why he had stopped 40 feet from the corner, he stated that the pilot would usually signal oncoming vehicles, and that he personally stopped because he saw the motorcycle pull from behind the line of traffic as it passed the pilot vehicle. At paragraph 4 of his witness statement, he stated that "*at the time of the*

accident, the pilot vehicle had come to a complete stop because we were now approaching a corner and I was approximately 40 ft from the pilot vehicle." In response, he stated that he did not stop because of the pilot vehicle. However, he affirmed that in paragraph 5, he awaited instructions from the pilot vehicle, and as soon as he got the green flag from the flagman aboard the pilot vehicle, he began driving very slowly. He stated that he began driving when he got the green flag; he had already started slowing down before the pilot vehicle signalled him, as there was a distance between them.

[49] In re-examination, he stated that he stopped because he knew the motorcycle could not make it between the truck and the car. He also stated that the car travelling the opposite direction was beside him and that it was minutes to eight in the morning so it was a busy time.

[50] In response to questions from the Court, the second defendant explained that a lowboy is used to transport tractors. It is not like a flatbed as it is lower, about 1ft from the ground or less and in line with the truck. He explained that the flagman's purpose was to signal other vehicles, and the red and green flags were used for oncoming traffic. When asked about his evidence that he awaited the instruction from the pilot vehicle, he responded that sometimes he would not go. Hence, the flagman signalled both him and the oncoming vehicles. His understanding was that the green flag was directed at him specifically, indicating that he should proceed and not for oncoming traffic. He said he knew this because Mr Hayles was calling him, and they had to travel slowly because heavy equipment was being transported.

[51] He agreed that his evidence was that the pilot vehicle stopped, but that he did not. When asked why, he said he stopped as well as that he did not stop; he responded that he was awaiting instructions from the pilot vehicle, and stopped because he knew he had a corner to go around. He acknowledged that this section of road was straight. He also confirmed that his evidence was that he stopped because of the motorcycle. He said that he stopped twice: once at the corner and once because

of the bike. He stated that it was the first stop that required him to await instructions from the pilot vehicle, approximately 40 feet from the corner, and that he could still see the pilot vehicle because the corner was not very deep; it was more like a bend to the left. His vehicle was left-hand drive.

[52] Upon further cross-examination from questions asked by the Court, the second defendant stated that when he reached the straight stretch of road and was about 40 feet from the corner, he stopped the vehicle. He did not stop because the flagman stopped him; rather, he stopped so that the flagman could signal the vehicles coming around the bend before he himself approached it. He did not move again until he saw the flagman give the green flag. As he began moving toward the corner, he then saw the motorcycle coming from behind another vehicle. Upon seeing it, he stopped again. When asked whether what he had just said was different from what appeared in paragraphs 3(iii) and 3(iv) of the Defence, he replied that it was not.

[53] When he was awaiting instruction from the pilot vehicle, he was stationary, and having stopped before receiving any instruction, the flagman had been calling him. He then stated that the red and green flags were used to signal oncoming motorists because the pilot vehicle was ahead of him on the road. Red meant stop and green meant go. When he saw the green flag from the pilot vehicle that day, he understood that the flagman was signalling him because of the way the flagman was calling and signalling. He acknowledged that the signalling system used during the transportation of heavy equipment is such that the flags may apply to both him and the oncoming motorists.

[54] Upon further re-examination, he stated that he stopped twice. On the first occasion, he stopped for the pilot vehicle to get more distance from him to go around the bend to signal the oncoming vehicles. On the second occasion, when he drove off, he saw the pilot vehicle pass, and the motorcycle came from behind the traffic as the pilot vehicle passed. Between the first and second stops, he did not travel more than 5 feet.

Submissions

[55] Counsel for the claimant relied on the case of **Claudia Henlon v Sharon Pink**,[3] to submit that in proving negligence, the four requirements are (1) the existence in law of a duty of care; (2) a breach of the duty of care by the defendant; (3) a causal connection between the defendant's careless conduct and the damage; and (4) that the particular kind of damage to the particular claimant is too remote. Counsel relied on the authority of **Annmarie Logan v Marlon Lawrence**,[4] to submit that it is the claimants who have the onus of satisfying the court on a balance of probabilities that the necessary elements of negligence have been established. The case of **Andre Morrison v Marlon Virtue**[5] was also relied on to submit that a driver has a legal duty under both common law and the Road Traffic Act to exercise reasonable care while operating his/her unit on a road and to take all necessary steps to avoid an accident. It was further submitted that according to the Road Code, in respect to the carrying of loads, all loads carried must be secured and must not protrude so as to cause a danger to other road users and that a driver must not overload a vehicle.

[56] The second defendant's case is that on the day in question, he had stopped his trailer along a straight stretch of road approximately 40 feet from a corner/bend in the Bog Walk Gorge. While stationary, the claimant, who was a pillion on a bike, collided with an excavator that he was transporting on a low-boy. The excavator protruded beyond his truck and the low-boy. He gave no warning, signs, or notice that the excavator protruded beyond his truck and the low boy. In particular, there was no sign or warning on the excavator itself indicating that it protruded beyond the low boy. When he stopped his trailer, he was 10 inches from the white line. The excavator was 4 inches from the white line. The bike that the claimant was

---

[3] [2017] JMSC Civ 144
[4] [2025] JMSC Civ 07
[5] [2021] JMSC Civ. 21

travelling on did not collide with the vehicles, yet it was overtaking. The bike did not collide with the truck or the low boy carrying the excavator. The accident occurred when the handle of the bike that the claimant was on collided with the protruding excavator. When asked about the absence of warnings provided about the dangerous protrusion of the excavator, the second defendant said: "*No we don't normally do that - if it's a foot wide we would do that*."

[57] The system the defendants employed to warn motorists of this oversized vehicle consisted of a pilot vehicle and a flagman. The pilot vehicle travelled some 40 feet ahead of the defendant's vehicle on that day. The defendants employed a system of using flags whereby the flags signalled to both the defendants and oncoming motorists. When the defendant moved off and proceeded towards the corner, it was because the flagman waved a green flag outside of the pilot vehicle. It was the second defendant who decided whether to engage the assistance of the police in transporting this type of equipment. He was of the view that there was no need to involve the police to pilot the protruding excavator.

[58] On the second defendant's own case there is an admission of liability for the collision. If the first defendant was overtaking at the time, there is no evidence from the second defendant that the first defendant overtook carelessly. The first defendant did not collide with any of the vehicles that day, whether to his right or left. The collision occurred with the dangerously protruding excavator, for which the second defendant provided no warning, which is a clear breach of the Road Traffic Act and the common law duty of care that the second defendant has towards the claimant.

[59] Counsel argued that the second defendant is an unreliable witness because his evidence conflicts with his statement, contains inconsistencies, and omits details from his pleadings and witness statement. These inconsistencies go to his credibility.

"Suggestion: It [the bike] did not come over to your side of the road?

Answer: Yes he did. He came over the white line sure because he was trying to fit between the vehicle and the truck. But you know dem a dally. Dem a try fit.

Question: Do you agree that nowhere in your Defence did you say he come over on your side?

Answer: I wasn't asked that. I was telling what happen. He was trying to go between the vehicles that all I know

Question: Do you agree with me that nowhere in your Witness Statement did you say he came over on your side

Answer: It's not there

Question: Do you agree that not once before now have you stated that the bike came over unto your side

Answer: I agree"

[60] This omission is significant, undermining the second defendant's credibility. He claimed the bike was on his side of the road when overtaking, yet he failed to mention this before the trial. His evidence should be rejected.

[61] The claimant's evidence is that the truck was not piloted by any vehicle and was moving when hit by the motorcycle. After the collision, the second defendant kept driving but was stopped by passersby.

[62] The claimant was lucid, calm, humble, and genuine, speaking confidently and truthfully. Uncontradicted and unshaken in cross-examination, his credibility is affirmed. The Court should accept his evidence as truthful. On both the claimant's account and the second defendant's account, the defendant is liable. There is a preponderance of evidence that supports this submission. The claimant, therefore, urges a finding in his favour on the issue of liability.

[63] Regarding general damages, counsel submits that the medical evidence speaks to the incapacity of the claimant to continue in his occupation. Dr Vijayendra states in his report:

> *"Mr. Givans states that he is a mason by occupation. He was off from the work for 16 months since the accident and started working April 2016. Since he resumed his work he had difficulty to do his regular duties due to pain and can manage to do only lighter duties. He was experiencing loss of mobility and postural difficulties which had an impact on his earnings. Mr. Givan's injuries were entirely consistent with the account of the accident. His fracture has fully healed with residual shortening of the right lower limb, stiffness of the knee and muscle wasting...*
>
> *In my opinion he is not fully fit to do his regular duties."*

[64] The claimant's injuries are such that he has a distinct disadvantage on the labour market. In corroboration of what the doctors indicate as to the claimant's permanent impairment and the effect upon his ability to work, the claimant relies on paragraph 15 of his witness statement.

[65] Accordingly, it is submitted that it is beyond dispute that the claimant would be entitled to an award under the heading of Handicap on the Labour Market. Counsel relied on the authority of **Icilda Osbourne v George Barnes and others**,[6] where the Court awarded a global sum of $500,000.00, to the claimant with a 5% whole person permanent disability.

[66] In **Carline Daley v Management Control Systems**,[7] an award of $1,200,000.00 for Handicap on the Labour Market, was made and in the case of **Robert Minott v South East Regional Authority**,[8] the award was $2,000,000.00. In the case of **Ryan Walker v Brahams Equipment Limited**,[9] the award made was $3,000,000.00 The sum of $3,000,000.00 is a reasonable sum under this head.

[67] Counsel argues that Dr Vijendra's evidence confirms the claimant's ongoing, permanent pain from injuries sustained over 10 years ago, requiring lifelong treatment and lifestyle changes. See **Vinroy McDermott v Mohan Rigg**.[10]

---

[6] Claim No. 2005 HCV 294
[7] Claim No.2008 HCV 00291 delivered on the 4th May 2012
[8] [2017] JMSC Civ 218 delivered on the 20th October 2017
[9] [2024] JMSC Civ 191 delivered on the 6th February 2024
[10] Khan Vol. 6, pg. 44

Regarding special damages, the agreed medical expenses total $260,568.00, and the agreed receipts exhibited support this claim.

[68] At the time of the accident, the claimant was a mason heading to work. He explained his loss of earnings, which the defendants did not challenge. Although he has no documentary evidence—expected given his occupation—the Court should accept his testimony as the best evidence. See **Desmond Walters v Carlene Mitchell**[11] where the Court of Appeal held that a sidewalk vendor should be awarded loss of earnings, despite the absence of documentary proof of her earnings. It is submitted that the claimant's unchallenged evidence be accepted.

[69] The claimant's evidence regarding his undisputed transportation expenses was contained in paragraph 21 of his witness statement. It is submitted that transportation expenses in the sum of $310,000 have been proven.

[70] Counsel for the defendant states that the main issue is straightforward and fact-sensitive. The question is which party the court can rely on. The law and principles are well known and settled.

[71] The main factual issues are whether the second defendant swerved his truck causing the excavator to hit the claimant, whether the first defendant overtook vehicles and caused the claimant to hit the excavator, whether the defendants were speeding, and whether their vehicles slowed down or stopped.

[72] It is submitted that the second defendant's recount of the collision is more reliable and credible than the claimant's. His visual demonstrations during cross-examination clearly show where liability lies.

[73] In **Balvine Moore v Marlon D'Aguilar**,[12] Lindo J stated that when two accounts oppose, the court must analyse evidence to determine which is more probable.

---

[11](1992) 29 JLR 173
[12] [2017] JMSC Civ 118

She cited section 51(2) of the Road Traffic Act, which requires all road users, including motorcyclists, to take actions to prevent collisions.

[74] Counsel relied on **Bourhill v Young**,[13] **Esso Standard Oil v Ian Tulloch**,[14] and **Glenford Anderson v George Welch**[15] to submit that in the instant case, the motorcyclist failed to take any action to avoid the collision, instead overtaking when it was unsafe and unreasonable to do so. Counsel relied on the Law Reform (Contributory Negligence) Act, Section 3(1), and **Nance v British Columbia Electric Company**[16] to submit that if the court finds both parties negligent, the claimant bears more negligence than the second defendant.

[75] The court saw and heard Dr Jithendra Vijayendra, whose August 26, 2016, report. diagnosed the claimant with a compound comminuted fracture of the mid right femur, right limb shortening, muscle wasting, and 20% whole person impairment. The doctor first saw the claimant on August 12, 2016, and again on August 15, 2016. At that time, his report described the fracture as healed after X-ray.

[76] In **Hopie Lawrence v Lorenzo Gill**[17] the claimant suffered extensive injuries to include, a head injury with loss of consciousness, fracture of the right femur, fracture of the third rib, fracture of the right tuberosity and fracture of the superior ramus of the pelvis. He was assessed as having a 32% whole person impairment and awarded $488,952.21 in January 1998; that figure, updates, to $3,939,403.08.

[77] Similarly, in **Donald Russell v Bruce Bryan**,[18] the claimant also suffered extensive injuries including bilateral fractures of neck of right and left humerus, a comminuted fracture of upper 1/3 of shaft of left femur fracture of the left patella, a fracture of the left public ramus and multiple lacerations of the forehead, chest,

---

[13] [1943] AC 92
[14] (1991) 28 JLR 533
[15] [2012] JMCA Civ. 43
[16] [1951] 2 All ER 448
[17] Suit No. C.L. 1993 L042
[18] Suit No. C.L. 1992 R079

right upper thigh, right upper calf, left knee and lower leg. He was assessed with a whole person impairment of 22% and was awarded $1,200,000.00 in May 1999, which updates to $3,390,942.42

[78] In **Ronald Webb v Antonio Rambally**,[19] the claimant was awarded $400,000.00, which updates to $1,983,216.78. The injuries sustained were a linear fracture of the occipital bone, alleged unconsciousness for two (2) days, fracture of the neck, fracture of the right arm, fracture of the left tibia and fibula and fracture of the femur.

[79] The injuries in the cases cited were greater than or comparable to the claimant's. The award should be reduced to reflect these differences. A range of $2,500,000.00 to $2,800,000.00 for general damages is suggested.

[80] Issues

i) Whether there was a duty of care owed by the defendants to the claimant.

ii) Whether the defendants caused the accident that resulted in the injury and loss to the claimant

iii) Whether the defendants are liable to the claimant for negligence.

iv) Whether the doctrine of Res Ipsa Loquitor applies.

v) Whether the claimant is entitled to compensation from the defendants.

Discussion

[81] This court relies on the trite law of negligence. It is for the claimant to establish to the requisite standard, that is, on a balance of probabilities, that the defendant owed him a duty of care, that there was a breach of that duty, and that foreseeable damage resulted. Where a claimant seeks to prove damage caused by the defendant’s negligence, the claim must be proved on the balance of probabilities. Establishing a duty of care requires showing foreseeable damage and a close

[19] Suit No. CL1990 decided on November 18, 1994

relationship between the parties that justifies assigning liability. If the defendant's negligent act is the primary or significant cause of the injury, he may be held liable.

[82] The claimant must demonstrate that the defendant's negligence directly caused or substantially contributed to any injury, loss and damage claim. Also, section 51(2) of the relevant Road Traffic Act provides:

> *"Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid a collision, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."*

[83] The common law rule is that when two vehicles approach each other from opposite directions, each must drive on the left or near side of the road to allow the other to pass. Failing to comply with this rule constitutes prima facie evidence of negligence.[20] There is, however, the rule of the road that drivers must yield the right of way to larger vehicles.

[84] The Court, having heard and seen the witnesses and having considered the evidence, finds the following facts and inferences:

1. The motor truck registered CD1165 is owned by the third defendant and was being driven by the second defendant at the material time. The claimant was the pillion passenger on the motorcycle driven by the first defendant.

2. It is undisputed that the collision occurred on the Bog Walk Main Road and that both the motor truck and the motorcycle were going in opposite directions, approaching each other. The claimant was on a motorcycle travelling toward Bog Walk, and the motor truck was travelling toward Spanish Town.

---

[20] Charlesworth & Percy on Negligence, 10th edn, 2001, p. 653

3. In cross-examination, the claimant gave evidence of seeing a van driving some distance before the truck: "*The van wasn't that close to the truck, so when we came around the corner, there was the truck*":

   "*Q: you are saying there was a van in front of this truck*

   A: yes, we passed it before the truck"

4. This is evidence which supports the inference that a vehicle was ahead of the truck; it was a van.

5. There is no evidence of a pilot vehicle from the claimant because he was not asked anything about a pilot vehicle in cross examination. In fact, no evidence regarding the description and actions of a pilot vehicle was found anywhere in the second defendant's witness statement; its appearance was elicited only during cross-examination. I therefore find that while there was a van driving ahead of the motor truck, as to whether it was a pilot vehicle, the evidence of the second defendant as to the flags used, the operator of the flag and the conduct of the driver and flagman in the pilot vehicle is considered a recent fabrication and neither cogent nor reliable evidence.

6. The claimant was asked what direction the driver of the bike swerved, and he responded to the left, which is towards the river. This means the first defendant was moving toward the near side of the road in his correct driving lane, and not toward the truck but away from it.

7. The reason the motorcycle swerved to its left was to avoid the back of the excavator, which was too close to the claimant and first defendant, and by so doing, the driver of the motorcycle was taking some steps to avoid the collision.

8. Despite taking these steps, the excavator hit the driver on the hand and broke his right fingers. It also hit the claimant on the right femur.

9. It is the second defendant's evidence that the motorcyclist was overtaking a line of vehicles and that the motorcycle had positioned itself between the truck

and a car when the collision occurred. If this is to be accepted, then the claimant was not thrown backwards onto the car when struck; rather, he was flung across the road, landing almost in the river. Both the claimant and the second defendant saw a car. The claimant said the car in front swerved, and the motorcycle swerved. The inference is that the motorcycle remained behind the car and that the first defendant mirrored the car driver's actions to avoid colliding with the excavator. I accept the claimant's evidence on this point.

10. During cross-examination, the claimant was asked if the car was passing the truck when the first defendant went between them; the claimant denied this. In re-examination, the second defendant explained he stopped the truck because the motorcycle pulled out from behind the traffic line and could not pass between the truck and the car, and he stated, *'...this can't make it, it's going to touch, I stopped. He couldn't pass between the truck and the car*.' This statement is not in the second defendant's witness statement. However, it can be inferred that a car was between the van and the truck, indicating that the vehicles were not being stopped by a pilot vehicle to assist the trailer around the corner, as the second defendant claimed in his witness statement. The line of vehicles was said to have stopped, and even if some drivers failed to stop, the purported pilot vehicle was too far from the truck and it allowed vehicles to overtake it and get in front of the trailer. Therefore, any purported pilot vehicle present could not be said to have been functioning properly. I find that no pilot vehicle was operating that day.

11. The claimant said the driver of the car ahead of the motorcycle swerved to avoid the excavator, and the motorcycle also swerved. The claimant's testimony suggests that the motorcycle remained behind the car, swerving to avoid the excavator. The swerve explains why the claimant fell to the side of his correct driving lane, which was beside the river. The second defendant, who also saw the car, does not say it swerved. I reject the second defendant's evidence by omission on this point.

12. The evidence from the second defendant regarding the point at which the accident occurred is inconsistent. In cross examination, he said he the pilot vehicle had come to a complete stop because it was approaching a corner. The truck also stopped for the pilot vehicle to signal vehicles around the bend before the truck got to the bend. "*I stopped before I got instructions from him; he was the one who called me.*" He, meaning the flagman, gave the green flag, and the second defendant began driving very slowly forward before the bend. When he saw the motorcycle, he stopped again. He also testified that the motorcycle driver was solely at fault, as the truck was stationary at the time of impact. These are contradictory positions which conflict with the defence filed on February 26, 2018.

13. The Court questioned the second defendant to clarify his evidence. The second defendant said he stopped twice: first, forty feet before the bend, and second, upon seeing the motorcycle overtake the traffic line. He moved less than five feet between these stops. A flagman was on the pilot vehicle, signalling to oncoming traffic with a green flag, and when the truck stopped, the flagman signalled to move forward with the same green flag. This raises the issue of how the second defendant knew whether the green flag indicated to his truck or oncoming traffic to proceed. No explanation was provided on this matter. Additionally, his inconsistent evidence did not clarify whether the truck was stationary or moving at the point of impact.

14. The claimant's witness statement indicated that the car in front of the motorcycle had to swerve to avoid the protruding excavator, implying that both the motorcycle and the truck were moving towards one another. I accept the claimant's account and dismiss the second defendant's inconsistent statements, noting that the evidence he provided under cross-examination does not accord with his witness statement nor his defence.

15. When two vehicles approach from opposite directions, the point of impact is where both arrive simultaneously on the roadway. Since the motorcycle was

accelerating toward the bend and the truck was approaching from the opposite side, it is more likely they met near or at the bend, since the motorcycle was travelling faster. Thus, the collision was more likely to have happened close to or within the bend, as the claimant has said.

16. For the motorcycle to have collided with the excavator such that the second defendant could observe the collision in his rear view mirror, it must have successfully navigated the corner and passed by the front of the truck. This is evidence from the second defendant, which I accept, as it is reasonable to infer that the need to make a wide left turn caused the rear of the truck to be too close to oncoming traffic at the bend.

17. The rear of the trailer would have been positioned further into the claimant's driving lane to facilitate the turn. This explains why the second defendant claimed he stopped to let the pilot vehicle stop oncoming traffic. He was aware that the bend in the road required encroaching onto the opposite lane. I therefore reject his claim that the bend was not that sharp. His evidence that he stopped the truck to allow the pilot vehicle to stop traffic conflicts with his later statement that there was no need to stop traffic because the bend was not that deep for him to go around.

18. Moreover, the second defendant's testimony that the excavator was only four inches from the white line while moving suggests a higher probability that it would protrude into the opposite lane during the turn. The excavator would extend into the driving lane of oncoming vehicles, which should have stopped well before the curve. I find that the rear of the trailer swung outward around the bend and, in a glancing blow, struck the claimant, which threw him from the motorcycle towards the side of the road.

19. I reject the second defendant's version of events on the day of the collision based on the absence of evidence in his witness statement given as lengthy

and inconsistent explanations at trial. I note his admission that the excavator carried no flags or any warnings to caution other motorists.

20. The first defendant was travelling at 40 km/hour and did not apply the brakes to the motorcycle. He downshifted and swerved to avoid the collision. Downshifting and braking would have been considered more reasonable in the circumstances. The first defendant, therefore, did not take all reasonable precautions to prevent the collision.

[85] The inconsistencies identified affected the credibility of the second defendant. On a balance of probabilities, the claimant's version of events is more credible than that of the second defendant and is accepted by this Court.

Blameworthiness

[86] Res ipsa loquitur arises in this claim based on the evidence. The Court having decided the evidence it accepts, finds that each defendant, being a user of the road, owed a duty of care to the claimant as a pillion passenger and user of the road. This is a common law duty of care owed by a motorist to other road users to exercise reasonable care. Section 51(2) of the relevant Road Traffic Act imposed a duty on all drivers to take the necessary steps to avoid a collision.

Res Ipsa Loquitur

[87] In order to discharge the burden of proof placed upon him, it is usually necessary for the claimant to prove specific acts or omissions on the part of the defendant which will qualify as negligent conduct. The maxim is applied when the mere fact of the accident tells its own clear and unambiguous story and raises the inference of negligence so as to establish a prima facie case against the defendant. The two requirements for the application of the maxim are (i) that the "thing" causing the damage be under the control of the defendants or his servants and (ii) that the

accident must be such as would not in the ordinary course of things have happened without negligence.[21]

[88] The second defendant was required to convey the excavator in a manner that was safe to other road users. He did not do so; there was no stop, caution, or slowing of motor vehicles moving along the roadway, and there were no notices, flags, or signs affixed to the excavator.

[89] The first defendant failed to brake the motorcycle to yield to the larger vehicle when it came around the bend. It is for the claimant to prove facts from which liability could properly be inferred. Even if the first defendant had been speeding, that alone does not constitute negligence. (See **Tribe v Janes**[22] and **Barna v Hudes Merchandising Corp**[23]). Speed is negligent only if it prevents the offender from reacting reasonably in an emergency. In this claim, however, the claimant's evidence is that the first defendant did not apply the brakes; he merely downshifted. In swerving to avoid the collision, the first defendant took some steps, but not all the reasonably available steps, to prevent it. This constitutes an admission that the motorcycle driver contributed to the collision by failing to brake, coupled with the claimant's description of the swerve. The first defendant failed to keep a proper lookout and failed to exercise reasonable care to avoid the collision. He ought to have been proceeding with sufficient caution and given himself the time necessary to stop if the need arose.

[90] Both defendants are responsible for the claimant’s injuries, as neither exercised reasonable care nor took all necessary precautions to avoid the collision. Having found that both drivers were negligent in the operation of their respective vehicles that morning, it is necessary to determine the extent of each defendant's liability.

---

[21] Winfield & Jolowicz on Tort 13th Ed. pages125-126
[22] (1961) 105 Sol Jo 931
[23] (1962) 106 Sol Jo 194.

[91] The duty of care for motorists was summarised in the case of **Cecil Brown v Judith Green & Ideal Car Rental**[24] where McDonald-Bishop, J (as she then was) emphasised that both common law and statute require motorists to exercise reasonable care while driving and to take all necessary precautions to prevent accidents. I find that both the first and second defendants are liable for the collision.

Apportionment

[92] A just and equitable result is to be arrived at in the particular circumstances of the case, and the exercise is one of broad judgment, and counsel's views must also be considered. The second defendant is more blameworthy, as the oncoming trailer carrying the oversized excavator could do far more damage than the motorcycle. The resulting damage is taken into account in assessing blameworthiness. There is no evidence that the claimant has contributed to either the damage sustained or his own injury.

[93] In **McGhee v National Coal Board**,[25] the proposition stated was that a defendant will be liable to a claimant if the defendant's breach of duty has caused or materially contributed to the injury suffered by the claimant, even if there are other factors for which the defendant is not responsible, which contributed to the injury. The above principle is relevant not just for the purposes of establishing liability in each defendant but is relevant when considering the question of apportioning damages.

[94] In the case of **Natalie Gray v Donald Pryce and Noel Newsome and Donald Pryce v Noel Newsome**,[26] Ms Gray, the claimant and passenger in a taxi, was injured and filed a claim against Mr Pryce, a van driver. Mr Pryce acknowledged his involvement in the accident but claimed that a third party, Mr Newsome, who

---

[24] Claim No. 2006 HCV 0256
[25] [1972] 3 All ER 1008
[26] [2015] JMSC Civ. 118

was driving another motor vehicle, caused the collision by suddenly crossing his path. Ms Gray later added Mr Newsome as the second defendant, while Mr Pryce filed an ancillary claim against him, seeking damages for repairs to his vehicle and Ms Gray's injuries. Mr. Newsome denied any liability, however, the court found that liability for the collision should be shared between Mr Pryce and Mr Newsome, with Pryce being 75% responsible and Newsome 25%. In arriving at the decision, P.A. Williams, J, stated that:

> *"[65] In determining the apportionment of liability one instructive authority is that of* ***Brown v Thompson [1968] 2 All ER 708*** *as noted in Bingham's and Berryman's Motor Claim Cases, 10th edition paragraph 22. It was there held inter alia: "...regard must be had not only to the causative potency of the acts or omissions of each of the parties but to their relative blameworthiness (citing The Miraflores 1967 1 AC 826)."*
>
> *[66] I also bear in mind the point made by Lord Pearce in* ***Uden v Associated Portland Cement Manufacturing Ltd*** *[1965] 2 All ER 213 at page 218. He reminded that the question of apportioning blame "is one of fact, opinion and degree."*
>
> *[67] In all the circumstances as I have found them to be both liable and I find a fair apportionment of liability is 75% to Mr. Pryce and 25% to Mr. Newsome."*

[95] Having weighed all the circumstances of this case as to causation and blameworthiness, I am led to the conclusion that the second defendant is more blameworthy for the accident than the first defendant. It is his act of navigating the bend with the oversized vehicle without taking the necessary precautions which was mainly responsible for the collision. There is no mention that at any time the second defendant sounded the horn as he travelled along the road. There was inadequate warning to other motorists of the presence of the excavator on the bend, and his vehicle was capable of greater damage.

[96] I apportion 80% liability to the second defendant, as it is my view that he should assume greater responsibility for the accident. The driver of the motorcycle is 20% responsible. He was under a duty to brake and slow down, not merely to downshift and swerve the motorcycle, to prevent the collision. The fact that he swerved, geared down and still collided with the excavator demonstrates that he was driving

at an excessive speed in the circumstances. I will now determine the quantum of damages to which the claimant is entitled.

Special Damages

[97] Undisputed transportation expenses: The claimant was admitted to the Spanish Town Hospital on December 22, 2014 and discharged from the ward on September 13, 2015. Nine months and nine days over which time his mother visited daily. She paid $1,000 per day to and from the hospital, an expense borne by the claimant as his mother could not afford it. These trips totalled $266,000.00.

[98] The claimant attended 15 physiotherapy sessions at the hospital over six months, for $1,000 per return trip, for a total of $15,000.00. His clinic days were separate, and he returned to the hospital for those sessions at $1,000.00 per return trip. He went one day per week for six months, for a total of $24,000.00. In total, for transportation costs, an award will be made in the sum of $305,000.00.

[99] The agreed medical expenses total $260,568.00, and the claimant is entitled to an award in this sum without further proof. See **White v Crawford.**[27]

[100] The claimant gave evidence of his loss of earnings, which the defendants did not dispute. Counsel referred to **Desmond Walters v Carlene Mitchell**[28] to support the contention that the lack of documentary evidence is typical for the claimant's occupation. The claimant's evidence is that, as a result of the accident, he was unable to work for a period of nineteen months, and as a mason, his monthly salary amounted to Eighty Thousand Dollars ($80,000.00).

[101] Loss of earnings capacity is a head of special damages. It must be pleaded and strictly proved. Evidence may be oral or documentary, and the Court recognises that where a claimant is self-employed, this is not readily ascertainable. Although

---

[27] 27 JLR at page 259
[28] (1992) 29 JLR 173

it is accepted that the claimant led evidence as to the effect of his impairment on his ability to work, this specific head was never pleaded. While I accept that the evidence of occupation and earnings is unchallenged, the claimant did not, in his oral evidence, indicate where he was working at the time of the collision, or who his employer was. Whether he was paid or to be paid for that job. There was insufficient evidence to make a finding. Therefore, in the absence of an application to amend the pleadings and the insufficiency of the evidence on this head, the sum claimed is not being considered.

General Damages

[102] In reviewing the authorities in **Naaman Smith v Venley Williams & Lexon Munroe**[29] the plaintiff suffered from a swollen, tender right thigh with no neurovascular deficit and a comminuted trochanteric fracture of the right femur. His doctor assessed total permanent disability as a result of the accident at 62% impairment of the lower extremity, equivalent to 29% whole person impairment. General damages, pain and suffering, and loss of amenities were awarded in the amount of $1,300,000.00, with interest at 3% per annum, accruing from November 1999; the amount now stands at $9,255,223.88, using the January 2025 CPI of 143.1.

[103] In **Louise Brown v Thomas Chen And Michael Mendez**[30] the plaintiff sustained a transverse fracture of mid-thigh of the right femur, a displaced transverse fracture of the mid-shaft of the left leg, a 1 cm shortening of left leg, osteoarthritis in the knee joint, a ten percent (10%) permanent partial disability of whole person (and not of the said limb as stated in the written submissions). She was hospitalised for three (3) months and three (3) weeks and thereafter spent two (2) months in bed

---

[29] SUIT NO. C. L. 1996 S301 reported at page 40 of Recent Personal Injury Awards made in the Supreme Court of Judicature Jamaica, volume 5, compiled by Ursula Khan

[30] SUIT NO. C. L. 1995 B 120 reported at page 5 of Recent Personal Injury Awards made in the Supreme Court of Judicature Jamaica, volume 5, compiled by Ursula Khan

after release from the hospital. General damages, Pain and Suffering, and Loss of Amenities were awarded in the sum of $800,000.00, with interest at 6% from July 1998, which updates to $6,188,108.00

[104] In **Vinroy McDermott v Mohan Rigg**,[31] relied on by the claimant, the claimant therein was diagnosed with a malunited femoral fracture of the right femur with an angular deformity of 10°, limb length discrepancy of 3 cm, fibrosis of the quadriceps muscle, especially the vastus lateralis, with adherence to the femur and plate and permanent partial disability of 25%. An award of $1,900,000.00 was made, which updates to $9,375,517.24 using the consumer price index as at January 2025. Counsel for the claimant stated that a rounded-down sum of $9 million is appropriate in the circumstances, as the claimant sustained a 20% permanent lower-limb disability.

[105] Counsel for the defendant relied on **Hopie Lawrence v Lorenzo Gill**[32] where the claimant suffered a head injury with loss of consciousness, fracture of the right femur, fracture of the third rib, fracture of the right tuberosity and fracture of the superior ramus of the pelvis. The right lower limb was shortened and externally rotated. The thigh was swollen, deformed, and tender. He was assessed as having a 32% whole person impairment and, contrary to counsel's submission, was awarded $700,000.00 for pain and suffering and loss of amenities in March 1998. That figure has been updated to $5,627,528.09.

[106] In **Donald Russell v Bruce Bryan, Alder Ellis, Neville Lopez and Leighton Lopez,** [33] also relied on by the defendant, the claimant suffered bilateral fractures of neck of right and left humerus, comminuted fracture of upper 1/3 of shaft of left femur, fracture of left patella, fracture of left pubic ramus and lacerations over forehead, chest, right upper thigh, right upper calf, left knee and lower leg. He was

---

[31] Suit No. CL 2002/M199 Delivered April 2, 2004
[32] Suit No. C.L. 1993 L042
[33] Suit No. C.L. 1992/ R079 reported at Khan's vol. 5 p.l3.

assessed with a whole person impairment of 22% and was awarded $1,200,000.00 in June 1999, which updates to $8,943,750.00.

[107] According to the medical report of Dr Jithendra Vijayendra, the instant claimant was diagnosed with a Grade 2 compound fracture of the midshaft of the right femur, residual shortening of the right lower limb, stiffness of the knee and muscle wasting, with a 49% lower extremity impairment, and a 20% whole person impairment. It is his evidence that he was hospitalised for nine months.

[108] It is well established that the assessment of damages is comprised of both subjective and objective elements. The injury sustained forms the objective part and the effect of the injury upon the life of the claimant the subjective part. In the case of **H.W. West & Sons v Shephard**,[34] Lord Morris said:

> *"[I] f it is remembered that damages are designed to compensate for such results as have actually been caused. If someone has been caused pain then damages to compensate for the enduring of it may be awarded…Apart from physical pain it may often be that some physical injury causes distress or fear or anxiety."*

[109] Pain and suffering depends on the claimant's awareness of and capacity for suffering. There is compensation for both physical and mental suffering. (See **Lim Poh Choo v Camden and Islington Health Authority**.)[35] Sykes, J (as he then was) interpreted the dictum of Lord Scarman in **Lim Poh Choo**, in **Kenroy Biggs v Courts Jamaica Ltd and Peter Thompson**[36] stating that where a claimant suffers a substantial loss and is acutely aware of his suffering and undoubtedly suffers greatly from his injuries, then the award is going to be a high one. Sykes, J also in **Icilda Osbourne v George Barnes et al**[37] made it clear that a court is not compensating an abstract claimant but the one before the court.

---

[34] [1963] A2 All E.R. 625 at 633 D-G
[35] [1980] A.C. 174
[36] Claim No. HCV 00054/2004 (unrep.) delivered on January 22, 2010
[37] Claim No. 2005 HCV 294 (unrep.) delivered on February 17, 2006

[110] The Court undertook its own research and unearthed in the Harrisons'[38] the case of **Hepburn Harris v Carlton Walker**.[39] In that case, the injuries suffered were a fracture of the upper end of the tibia and fibula with an unusual fracture of the acetabulum socket. Consequential injuries include wasting of the quadruped muscles, swelling around the upper third of the left lower leg, scarring, ¾ shortening of the left leg and pain in the left hip. Professor Golding, Orthopaedic Surgeon, assessed the impairment at 50% of the left leg and 20% of the whole person. That claimant was recommended for hip replacement, had persistent pain and was placed in a plaster cast for a total of seven weeks. He was hospitalised for the time he was placed in a cast between December to April. When he was discharged, he spent three months in bed. The claimant could no longer stoop or stand for extended periods and had a limping gait, resulting in hip pain. He lost his ability to garden, swim, and drive a minibus, which had been his occupation. He had attendant anxiety and depression. The Court awarded damages for pain and suffering and loss of amenities in the sum of $100,000.00, and for handicap in the labour market, in the sum of $22,500.00. The award for general damages using a CPI of 148.05 for November 2025 updates to $5,900,000.00. That case is similar to the case at bar, and the updated award is more appropriate to the present case**.** In light of the foregoing, the following orders are made by this Court.

Orders

[111] The court makes the following orders:

1. Judgment for the Claimant against the Second and Third Defendants.

2. The claim against the First Defendant is dismissed.

3. The ancillary claim of the Second Defendant is dismissed.

---

[38] Page 244
[39] SCCA No. 40/90; December 10, 1990

4. The Claimant is awarded special damages in the sum of $565,568.00 with interest thereon, at the rate of 3% per annum from December 22, 2014, until the date of this judgment. Liability is apportioned at 80% to the Second and Third Defendants.

5. The Claimant is awarded general damages in the sum of $5,900,000.00 with interest thereon at a rate of 3% per annum from September 29, 2017, until the date of this judgment. Liability is apportioned at 80% to the Second and Third Defendants.

6. Costs apportioned at 80% are awarded to the claimant against the Second and Third defendants to be agreed or taxed.

.....

Wint- Blair, J