



[2016] JMSC Civ. 144

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN THE CIVIL DIVISION  
CLAIM NO. 2011HCV04465**

<b>BETWEEN</b>	<b>DEVON HIGGINS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>URIAH CAMPBELL</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>WINSTON CAMPBELL</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>ORVILLE SENIOR</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND BETWEEN</b>	<b>ORVILLE SENIOR</b>	<b>ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>URIAH CAMPBELL</b>	<b>1<sup>ST</sup> ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>WINSTON CAMPBELL</b>	<b>2<sup>ND</sup> ANCILLARY CLAIMANT</b>

**CONSOLIDATED WITH:  
CLAIM NO. 2011HCV04716**

<b>BETWEEN</b>	<b>SHANICE BROWN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>URIAH CAMPBELL</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>WINSTON CAMPBELL</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>ORVILLE SENIOR</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**CONSOLIDATED WITH:  
CLAIM NO. 2013HCV05319**

<b>BETWEEN</b>	<b>SHANICE BROWN</b>	<b>CLAIMANT</b>
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<b>AND</b>	<b>ORVILLE SENIOR</b>	<b>DEFENDANT</b>
<b>AND BETWEEN</b>	<b>ORVILLE SENIOR</b>	<b>ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>URIAH CAMPBELL</b>	<b>1<sup>ST</sup> ANCILLARY DEFENDANT</b>
<b>AND</b>	<b>WINSTON CAMPBELL</b>	<b>2<sup>ND</sup> ANCILLARY DEFENDANT</b>

Ms. Chantal Campbell instructed by Kinghorn & Kinghorn for the Claimants.

Mrs. Suzette Campbell instructed by Campbell & Campbell for the 2<sup>nd</sup> Defendant/Ancillary Defendant.

Ms. K. Michelle Reid and Mrs. Camille Wignall-Davis instructed by Nunes Scholefield Deleon & Co. for 3<sup>rd</sup> Defendant/Ancillary Claimant.

***Motor vehicle collision – duty of drivers – liability of parties – assessment of damages.***

**Heard: 25<sup>th</sup> – 26<sup>th</sup> May, 18<sup>th</sup> July and 24<sup>th</sup> August 2016**

**STRAW J**

### **The Parties**

[1] The claimant, Mr. Devon Higgins is seeking to recover damages from injuries received whilst a passenger in a taxi cab, Toyota Corolla licenced PD5640 which was being driven by the 1<sup>st</sup> defendant/1<sup>st</sup> ancillary defendant, Mr. Uriah Campbell. He is the servant/agent of the 2<sup>nd</sup> defendant/2<sup>nd</sup> ancillary defendant, Mr. Winston Campbell who is the owner of the said vehicle. This taxi came into contact with a Toyota Tacoma Xtra-cab pick-up registered 7491 DS which is owned and was being driven by Mr. Orville Senior, The 3<sup>rd</sup> defendant/ancillary claimant.

[2] This claim was originally consolidated with Claim No. 2011 HCV 04716 –Shanice Brown v Uriah Campbell et al. and Claim No.2013 HCV 5319, Shanice Brown v Orville Senior et al. However, at the commencement of trial, Ms. Chantal Campbell, Counsel for both claimants made an application to have the last two aforementioned claims

severed from Mr. Higgins' claim as Ms. Shanice Brown was absent. She also made an application for the claim involving Mr. Higgins to be treated as a test case in relation to the liability of the parties. Both attorneys, Mrs. Suzette Campbell for 2<sup>nd</sup> defendant and Ms K. Michelle Reid for the 3<sup>rd</sup> defendant agreed to these applications. Therefore the ruling of this court on the issue of liability in claim No. 2011 HCV 04465 will be binding in relation to the other related claims.

[3] It is to be noted that in the case at bar, Mr. Uriah Campbell was never served with the Claim Form or Particulars of Claim, so although he is described as the 1<sup>st</sup> defendant/1<sup>st</sup> ancillary defendant, his appearance in court is merely in the capacity of a witness on behalf of Mr. Winston Campbell.

### **The Pleadings**

[4] Mr. Higgins is contending that both defendants were negligent in the operation of their respective motor vehicles which resulted in both being involved in a collision on the 1<sup>st</sup> of May 2011. The particulars pleaded against both are identical and are set out below:

#### **Particulars of Negligence of 1<sup>st</sup> and 2<sup>nd</sup> Defendants PD5640**

- (i) Driving at too fast a rate of speed in all the circumstances.
- (ii) Failing to apply his brake within sufficient time or at all.
- (iii) Colliding into motor vehicle registration number 7491 DS.
- (iv) Failing to stop, slow down, swerve, or otherwise conduct the operation of the said.
- (v) Failing to have control of the said motor vehicle.
- (vi) Failing to see the said motor vehicle registration 7144 EM [sic] within sufficient time.

**Particulars of Negligence of 3<sup>rd</sup> Defendants 7491DS**

- (i) Driving at too fast a rate of speed in all the circumstances.
- (ii) Failing to apply his brake within sufficient time or at all.
- (iii) Colliding into motor vehicle registration number PD 5640.
- (iv) Failing to stop, slow down, swerve, or otherwise conduct the operation of the said.
- (v) Failing to have control of the said motor vehicle.
- (vi) Failing to see the said motor vehicle registration PD 5640 within sufficient time.

**[5]** However, he makes a further and specific averment against Mr. Uriah Campbell that he failed to safely overtake the Toyota Tacoma pick-up, that both vehicles collided and that the taxi cab lost control, hit an embankment and overturned. Mr. Higgins is also relying on the doctrine of Res Ipsa Loquitur.

**[6]** In his Amended Defence filed on the 13<sup>th</sup> of June 2014, Mr. Winston Campbell avers that while the taxi cab was in the process of overtaking the pick-up, Mr. Senior suddenly moved his vehicle to the right of the roadway. It is further averred that this action resulted in a collision between both vehicles which caused the left tyre of the taxi cab to burst. Mr. Uriah Campbell, then lost control of the vehicle which overturned. He also sets out the Particulars of Negligence of Mr. Senior as follows:

**Particulars of Negligence of 3<sup>rd</sup> Defendant**

- (i) Failing to keep any or any proper look out.
- (ii) Swerving or veering his vehicle to the right without first ensuring it was safe to do so.

- (iii) Swerving or moving his vehicle to the right when it was dangerous to do so by reason of the presence of the 2<sup>nd</sup> Defendant's vehicle which was overtaking the 3<sup>rd</sup> Defendant's vehicle.
- (iv) Failing to see or to heed the presence of the 2<sup>nd</sup> Defendant's vehicle on the roadway.
- (v) Failing to allow the 2<sup>nd</sup> Defendant's vehicle to overtake his vehicle along the roadway.
- (vi) Driving in a reckless and dangerous manner.
- (vii) Driving without due care and attention.
- (viii) Failing to stop, to slow down, swerve or to so manage his motor vehicle so as to avoid the accident.

**[7]** Finally, he avers that the accident was caused and /or contributed to by the negligence of Mr. Senior. For his part, Mr. Senior denies the Particulars of Negligence pleaded against him and avers in his statement of case that Mr. Uriah Campbell wholly caused and/or materially contributed to the accident by his negligence, the particulars of which are set out below:

**Particulars of Negligence of the 1<sup>st</sup> Defendant, Uriah Campbell**

Mr. Uriah Campbell was negligent in that he:

- (a) Failed to have any or any adequate regard for his own safety whilst using a public road.
- (b) Failed to keep any or any proper look out.
- (c) Drove in a reckless and dangerous manner.
- (d) Failed to give any or any indication of his intention to overtake and overtook at a time when it was unsafe and/or manifestly dangerous to do so.

- (e) Failed to see or heed and/or observe the presence of this Defendant's motor vehicle.
- (f) Failed to have any or any sufficient regard for other road users and in particular this Defendant.
- (g) Colliding into the right side of this Defendant's motor vehicle, from the right quarter panel to the front.
- (h) Failed to stop, slow down, brake, swerve or otherwise manoeuvre the said motor vehicle so as to avoid the said collision.

**[8]** He also adopted the particulars of negligence pleaded against the Campbells at paragraph 6 of the Claimant's Particulars of Claim as listed above. He also denies that the doctrine of Res Ipsa Loquitur is applicable as the claimant has alleged that he was at all material times aware of how the collision took place.

**[9]** In the Ancillary Claim brought by Mr. Senior against the Campbells, he avers that it was the negligent driving of Uriah Campbell that caused the collision and requests that he be indemnified against the claimant's claim and costs, a just and equitable contribution in respect of any sum which Mr. Higgins may recover against him as well as damages. He has, however, set out no particulars in relation to the issue of damages.

### **The Issue of Liability**

The first issue for the court's determination is whether the claimant has proved that one or both drivers are responsible for the collision. There are certain facts which are undisputed by the parties and are set out below:

- On the 1<sup>st</sup> of May 2011, there was a collision between both motor vehicles as described above with both drivers.
- Mr. Higgins was a passenger in the back seat of the taxi cab. There were 5 passengers in the vehicle.

- The accident occurred along the Philadelphia main road in the parish of St. Ann while both vehicles were traveling in the same direction heading towards Brown's Town.
- Mr. Uriah Campbell was in the process of overtaking Mr. Senior's vehicle when both vehicles collided. The taxicab then swerved left, hit a wall and overturned.
- The Philadelphia main road is wide enough to allow two trucks to pass each other travelling in opposite directions at the same time.
- At the time of overtaking, there was no traffic traveling from the opposite direction so the right lane was free and unimpeded.
- The Philadelphia main road is winding with some sections being relatively straight. There is no dividing line in the middle of the road which is asphalted and in good condition.
- In the vicinity of the accident site, there is a rocky embankment to the left of the road and a gully/ditch to the right as one proceeds to Brown's Town.

### **Evidence of Claimant**

[10] Mr. Higgins stated that the taxi was travelling behind the pick-up for about 5 seconds before Mr. Campbell made the decision to overtake. He first saw the pick-up when it was about 20 feet away driving on its left side. He was not sure of the speed it was going. He would not say that the taxi was going at a fast speed and neither could he say if it was going faster than the pick-up, but he also said that the taxi was driving at a fast speed when overtaking. Mr. Campbell tooted his horn before he commenced to overtake.

[11] In his witness statement he had indicated that Mr. Campbell decided to overtake around a corner but later explained that what he meant was "just as he left the corner". He described the vicinity of overtaking as "on a small straight, about 15 feet of straight." There was another curve ahead on the right hand side and where the accident took place was "kinda curvy". In that vicinity also was a bus stop on the right with the gully behind the bus stop. The pick-up was still on its left side when Mr. Campbell started to

overtake and the front of the taxi had passed the open back of the pick-up when both vehicles began to rub on each other.

[12] It is the evidence of Mr. Higgins that both rubbed against each other for a distance of 150 feet. He described this rubbing as a wrestling match between the two vehicles. During that process, he asked Mr. Campbell what had happened to his brakes and that he had replied “you no see the other driver want to push me over the gully”. At that time the left front wheel of the taxi burst, the pick-up stopped suddenly, Mr. Campbell then swerved towards the left and the vehicle collided into a cap wall and overturned.

[13] Mr. Higgins was unable to say if the pick-up had moved to its right after Mr. Campbell started to overtake, but he states that both vehicles were very close. He also cannot say whether the pick-up took up more than half the driving section of the road, neither can he say if the pick-up was attempting to prevent the taxi from overtaking. Importantly, he also cannot say whether the taxi failed to keep a straight path or whether it drove too close to the pick-up.

#### **Evidence for the 2<sup>nd</sup> Defendant**

[14] Mr. Uriah Campbell stated that he was going at about 40-45 kmph at the time. He saw Mr. Senior’s vehicle ahead of his at 25 to 26 feet away. Since there was no vehicle approaching from the opposite direction, he switched on his indicator, tooted his horn and commenced the overtaking of the pick-up. The pick-up was not going that fast but certainly faster than 10-15 mph. However, at another stage, he said the pick-up was travelling faster than his vehicle and he would not agree that it was driving slow when he first saw it. The pick-up took up one side of the road, its left side.

[15] He further stated that he started to overtake still doing 40-45kmph and the front of his vehicle had reached the right front door of the pick-up when the pick-up swerved right into the path of his vehicle. At that point, he tried to swerve right (away from the pick-up) but before he could do so, the right front tyre of the pick-up hit his left front tyre causing the tyre to burst. The pick-up stopped on impact but he lost control of the taxi



due to the burst tyre and it passed the pick-up, hit the left embankment and overturned on the left side of the road.

[16] In relation to the contact between both vehicles, he denied that the vehicles were wrestling on the road before the tyre blew out as described by Mr. Higgins. He stated that the “rubbing” and bursting of the tyre happened fast, although Mr. Senior had held his vehicle on the road, the contact did not last “a little while”. He agreed that Mr. Higgins asked him what happened to his brakes but this was at the time he was overtaking and trying not to go over in the ditch. As Mr. Higgins asked him this question, the tyre blew out.

[17] He also admitted that he answered Mr. Higgins by responding “if him no see the man want to send him over the gully”. He did ask himself why the driver was trying to push him over the gully, but it never crossed his mind that he would fall over into the gully. He stated that there is a slight corner in the vicinity where the gully is situated and that there are no rails to prevent a car from going over. The area where he overtook is about 120 to 125 feet away from that corner.

[18] Mr. Campbell has asserted that he acted carefully by staying on his side of the lane and that he slowed down to avoid a collision. It is his belief that Mr. Senior tried to prevent him from overtaking and this is what caused both vehicles to come into contact.

[19] While he admitted that there are houses on the left side of the road and in particular, one house on that side in the vicinity of the accident site, he denied that any vehicle could have driven onto the embankment as Mr. Senior testified he did. He agreed also that there is a cut out to the embankment on left but stated that there is no part of the embankment you can drive up on to get to the house.

### **Evidence for the 3<sup>rd</sup> Defendant/Ancillary Claimant**

[20] Mr. Senior told this court that on the morning in question he was travelling with family members in the pick-up. The vehicle is a left hand drive and his wife was in the

right front passenger seat. His mother-in-law and 2 children were on the back seat while there were 4 other family members in the open back section of the vehicle.

**[21]** He was driving on his left side of the road about 1 foot from the left embankment and maintaining a speed of 20-30 kmph/ 10-15 mph. He explained that he is able to appreciate and drive close to the left embankment because his vehicle is a left hand drive. He first noticed the taxi behind him about 30-35 feet away while checking his rear view mirror.

**[22]** According to him, the taxi was doing about 45kmph and a short time later it braked harshly behind him, about 12 feet away. At this time, he was about 12 feet from a left hand bend and on approaching the bend, the taxi made a sharp swing from behind him to overtake him. He places a bus stop on the right hand side near that bend.

**[23]** He denied that Mr. Campbell had tooted his horn or gave any other indication of an intent to overtake. Mr. Senior also stated that he maintained his position keeping as close as possible to his left. The taxi began to overtake him at a fast speed and when it reached to the right side of his vehicle, he felt the pickup shake. The taxi was rubbing against it and continued dragging along his vehicle for a couple of seconds. He denied that this was for a distance of 150 feet.

**[24]** He explained that there was no place for him to go other than the embankment. He pulled his vehicle to the left by bringing the left front wheel up on a left sand embankment by a house to that side of his road and stopped the vehicle once he felt the rubbing. He accepted that there was some inconsistency in his evidence as at one point he said he was still driving when it was rubbing.

**[25]** He explained however that when the vehicles started to rub, his vehicle was still in motion for a couple seconds, then it stopped. There was nothing he could do to avoid the cars rubbing and he kept the same speed. It is Mr. Senior's contention that there was no need for the taxi to have driven so close to his vehicle but the taxi did not keep a straight course as it overtook but went sharply to the left lane, crashed against a wall on the left and went up into the air.

**[26]** Mr. Senior denied that he heard the sound of any tyre bursting and said the tyres were spinning in the air after the collision. He observed no burst tyre, although he had made no physical checks but he saw them spinning. In relation to the damage to his vehicle, there were scratches from the cab section up to the right quarter panel. The right front bumper and undercarriage close to it was also damaged.

**[27]** The court actually visited the vicinity outside the court house where Mr. Senior's car was parked. At that time there was no damage to be seen but he pointed out the relevant area of damage and gave evidence as to certain dimensions. The length of the pickup was estimated at 14 feet, the length of the open back at 5 ½ to 6 feet, the width of pick up at about 4 feet. He pointed out the damage area on the right side as extending from the back wheel to front wheel which was estimated at 6 feet.

**[28]** Mr. Senior agreed that he was on his left side and Mr. Campbell on the right side so there would be space between the two vehicles. He cannot say therefore why the rubbing took place, but it is his opinion that Mr. Campbell did not keep straight because if he had, the vehicles would not have rubbed. He places the point of collision of the taxi into the wall at the point where both vehicles had passed the corner he spoke of within 5 feet. He agreed however that the accident did not take place on a corner. After that accident, he stated that he was in shock and his children were crying.

**[29]** His wife, Mrs. Senior, gave evidence on his behalf although she stated that they were presently separated. She supported his evidence in relation to the number and composition of persons travelling in the pick-up. She stated that her husband was going at 20-30kmph and driving near the left hand embankment. She explained that her husband always drove more to the left hand side and he was about 9 inches away from the embankment. She indicated she was able to observe this from her position in the front passenger seat. She also stated that where the accident took place, there is an embankment but the embankment had stopped by an entrance to a home.

**[30]** It is her evidence that at a particular point on the road, Mr. Senior, who she referred to as Orville, said something to her and went further to his left after looking in

the rear view mirror. At that point, the road was not winding. She could see straight ahead but there was a little bend ahead. Ten (10) seconds later, she saw the other vehicle, then her husband's vehicle began to shake for another 5 seconds. Orville had slowed down and Mr. Campbell's vehicle was on the right. She had heard no horn and while she agreed there was singing in the pickup, it was not that loud.

**[31]** When she looked to her right, she saw the taxi passing and rubbing against the pickup. Orville pulled to the left embankment and brought the vehicle to a stop. The other car kept rubbing it for 5 seconds then it cut into the left lane at a fast speed, hit the concrete wall by a house, went up into the air and overturned. The car then spun on its top with the 4 tyres spinning. She stated that there was nothing wrong with the tyres as after the incident, it was pushed out of the way easily. She said she did not see the tyres blow out and she denied that both cars were wrestling and that her husband had swerved to the right at any time.

**[32]** In relation to where the overtaking took place, she stated that there was a precipice right across from that location. The rock that the car collided into was situated in a little bend, a turn in the road after the collision area. But this was not the bend she had spoken of previously that she could see ahead of her. That bend was still ahead of them. In relation to where the accident took place, this was on a straight part of the road from where Mr. Campbell overtook to where the car and rock collided. From where their car stopped to the site of collision was a distance of 12-13 feet. But from where she first saw the taxi overtaking to the crash site would be further back than the 12-13 feet. She agreed also that her husband's car did not take up all of the left side of the road.

### **Counsel for the Claimant's Submissions on Law and Facts**

**[33]** Ms. Chantal Campbell referred the court to sections 51 (1) and (2) of the **Road Traffic Act, 1938** as well as case law relevant to the duty of drivers. The sections of the said Act are set out below:

*51.-(1) The driver of a motor vehicle shall observe the following rules—a motor vehicle*

*(a) meeting or being overtaken by others traffic shall be kept to the near side of the road. When overtaking other traffic the vehicle shall be kept on the right or off-side of such other traffic:*

*Provided that an animal being led or driven, may be passed or overtaken on whichever side is the safer;*

*(b) being overtaken by other traffic shall be driven so as to allow such other traffic to pass;*

*(c) shall not be driven alongside of, or overlapping, or so as to overtake other traffic proceeding in the same direction if by so doing it obstructs any traffic proceeding in the opposite direction;*

*(d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;*

*(e) proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road;*

*(f) proceeding from a place which is not a road into a road or from a road into a place which is not a road, shall not be driven so as to obstruct any traffic on the road;*

*(g) shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead;*

*(h) shall not be permitted to travel backwards further than may be necessary for turning or reasonable purpose.*

*(2) 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 an accident, 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.*

[34] Counsel referred the court to judgements of my sisters Thompson- James J and McDonald Bishop J (as she then was) in the respective cases of **Jowayne Clarke (bnf Anthony Clarke) and Anthony Clarke v Daniel Jankine**, Claim 2001/C211 delivered on October 15, 2010; and **Cecil Brown v Judith Green and Ideal Car Rental**, Claim No. 2006HCV02566 delivered on October 11, 2011. In **Jowayne Clarke**, Thompson-James J summarized the law on the duty of drivers (at page 14):

*A driver of a vehicle on the road owes a duty of care to take proper care and not to cause damage to other road users whom he reasonably foresees is likely to be affected by his driving. In order to satisfy this duty he should keep a proper look out, avoid excessive speed and observe traffic rules and regulations.*

McDonald Bishop J in **Cecil Brown** gave the following summary (at paragraph 34):

*It is clear that there is, indeed a common law duty as well as statutory duty for motorist to exercise reasonable care while operating their motor vehicle on a road and to take all necessary steps to avoid an accident.*

[35] Counsel submitted that at least one of the two defendants should be held liable but that it was open also to the court to find both sets of defendants liable. She stated that the claimant made it clear he could not say what or who was the initial cause of the rubbing or which vehicle went on the other party's side. She referred the court to the reasoning of my brother, Campbell J in **Pamela Thompson et al. v Devon Barrows et al.** Claim No. CL 2001/T143 delivered on the 22<sup>nd</sup> of December 2006.

[36] At paragraph 12 of his judgement, Campbell J referred to **Davidson v Legett 1969 Current Year Book 2417** where that court applied the dicta of Denning L.J. in **Baker v Market Harbourough Industrial Co-operative Society**. In that case, it was held that where there was a motor vehicle collision in the middle of the road and the evidence is insufficient to enable the judge to decide which of the drivers is to blame, he ought to conclude that they are equally culpable. Campbell J also stated that the rule applied even if it is perfectly feasible that neither was negligent.

[37] In relation to the principle of Res Ipsa Loquitur, she stated that it is best explained in circumstances, that where the accident in the ordinary course of things

does not happen if proper care is used, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

### **Credibility of the Witnesses**

**[38]** Counsel for the claimant, Ms. Campbell has asked that the court assess Mr. Campbell as untruthful as at one point he admitted he was fearful he would go over into the ditch, however this position changed when he said he had no fear of going over into the gully and the possibility had not crossed his mind. She submitted also that he was not to be believed when he said Mr. Senior swerved to his right and caused the tyre to blow out.

**[39]** On the other hand, she also submitted that, although Mr. Senior has said he was of the view that Mr. Campbell did not keep to his correct side of the road, he was unable to say definitely that he did so. She also asked that the court consider his evidence that he kept to his left and that Mr. Campbell was on the right overtaking and that under those circumstances there would be space between both vehicles. While he asserted in the witness statement that Mr. Campbell did not keep straight while overtaking, his explanation for this inconsistency is to the effect that if the vehicle had kept a straight course it would not have rubbed his vehicle.

**[40]** In relation to Mrs. Senior's evidence, she has submitted that she is also not a witness of truth. There is a discrepancy in the evidence between herself and her husband. While she speaks to Mr. Campbell's vehicle continuing to rub her husband's after her husband had stopped, this was not part of her husband's testimony. Secondly, the evidence reveals that there is an insufficient basis for her to arrive at the conclusion that the left front tyre of the taxi did not burst as she did not actually examine the tyres after impact. Thirdly, Counsel contends that Mrs. Senior's ability to observe how close her husband kept to his left side is questionable as she was the front passenger on the right hand side so she would be unable to give a proper estimate. In the final analysis, she submitted that both defendants should be held jointly liable.

**Submissions on behalf of the 2<sup>nd</sup> Defendant/2<sup>nd</sup> Ancillary Defendant**

[41] Mrs. Suzette Campbell has submitted that the preponderance of evidence from the claimant as well as Mr. Uriah Campbell and even Mrs. Senior is to the effect that Mr. Campbell overtook on a straight part of the road. She also asked the court to consider that Mr. Senior's evidence did speak to the collision taking place on the straight but he resiled from this during cross-examination when he stated that the reference to collision was in the context of the taxi hitting the wall.

[42] She submitted that Mr. Higgins supported the evidence of Mr. Campbell that he tooted the horn before overtaking and that it is entirely possible that the Seniors failed to hear it as there was singing and chatting in the pickup. It is also possible that Mr. Senior would not have been able to see the taxi's indicator.

[43] It is Counsel's contention that the only outstanding issue would be whether Mr. Campbell chose to overtake at a point along the roadway when it was dangerous to do so, given the presence of a precipice to his right. The evidence is that it was deep and had no guard rails. In assessing this, she has asked that the court bear in mind that neither Mr. Higgins nor Mr. Campbell testified that the precipice was directly across from the point of collision in contrast to the evidence of the Seniors.

[44] On that point, she stated also that in any event, it would not matter where the ditch was positioned since all the parties had agreed that the road was wide enough to allow two vehicles to pass at the same time. In that event, there would be no danger posed by Mr. Campbell travelling too near to the ditch as he would have had to leave the roadway to fall into the precipice.

[45] Counsel submitted further that Mr Campbell did not overtake in a dangerous manner. She posited that since the length of the pickup was about 14 feet and the damage to its right side was about 6 feet, the taxi would have travelled a distance of 8 feet past the pickup before there was a collision.



[46] She has said that the question to be answered is what caused the contact between both vehicles and submitted that the evidence of Mr. Higgins is instructive. While he did not see the pickup swerve right, he said both vehicles wrestled each other for about 150 feet before the tyre blew out. This evidence therefore supports the evidence of Mr. Campbell that the driver of the pickup was attempting to push him towards the precipice and had swerved right into the taxi's path.

[47] Counsel also questioned the credibility of the Seniors concerning their insistence that Mr. Senior kept near to the left embankment on the entire journey that morning. There was nothing proceeding from the opposite direction and she has asked that the court find that there is a plethora of evidence to infer that Mr. Senior moved right into the path of the taxi. There is no evidence from any of the witnesses that Mr. Campbell did not keep a straight course and there is no evidence that can be relied on that Mr. Campbell caused or contributed to the accident by failing to steer a straight course.

[48] Finally, Counsel has asked the court to consider whether the defendants took reasonable steps to avoid the accident. She referred to the principle as set out in **Nance v British Columbia Electric Railway Co. Ltd.** [1951] AC 601, where Viscount Simon stated as follows (at page 602):

*Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle.*

[49] It is Counsel's submission that the evidence reveals that Mr. Senior failed to comply with the duty stated at section 51 (2) of the **Road Traffic Act**, as set out above. The evidence of Mr. Higgins is that Mr. Senior kept driving his vehicle and was wrestling with the taxi and only stopped when the tyre burst. Mr. Senior's evidence is also inconsistent as he stated that at one point he did not stop and at another point that he stopped on an embankment. Mrs. Senior also contradicts her husband's evidence as she merely stated that he pulled closer to the embankment but does not say he stopped on impact. She submits that on a balance of probabilities Mr. Senior did not do sufficiently to avoid the accident.

### **Submissions on behalf of 3<sup>rd</sup> Defendant/Ancillary Claimant**

**[50]** Counsel, Ms. K. Michelle Reid has submitted that the claimant has to prove on a balance of probabilities that the defendant owed him a duty of care, that the defendant by some act or omission was in breach of that duty and as a result of the breach, the claimant suffered injury or damage. She says that the court's assessment of Mr. Higgins' credibility is crucial to whether or not Mr. Higgins has made out a case against Mr. Senior.

**[51]** It is her contention that Mr. Higgins has failed to give a credible account of how the accident occurred. He placed the pick up on the left side of the road at all times and has not alleged that it swerved to the right, nor that Mr. Senior tried to block Mr. Campbell nor that he sped up while he was being overtaken.

**[52]** Ms. Reid has also asked the court to find that Mr. Higgins' testimony that both vehicles rubbed for 150 feet is incredible and is not supported by any other witness. It is her submission that Mr. Higgins' hope is that the court finds both drivers negligent and this is demonstrated by his response to questions about the speed of the taxi prior to overtaking. She posited that if the taxi was doing the same speed as the pick up as suggested by Mr. Higgins, then the pickup would have remained 20 feet ahead. She submitted that the taxi must have been travelling at a faster speed to reach directly behind the pickup.

**[53]** She has asked that the court reject Mr. Higgins' evidence that he asked Mr. Campbell about his brakes as nonsensical as the accident happened quickly and Mr. Campbell stated that he had no fear of going over into the gully. However, in the event that the court accepts that the question was asked, this was only because the taxi was being driven fast.

**[54]** Counsel also submitted that the sole reason why both vehicles rubbed was due to Mr. Campbell's failure to safely overtake while driving at a fast speed. In relation to Mr. Campbell, the court should assess him as a questionable and unreliable witness. Firstly, he has given inconsistent evidence. Secondly, he was operating an overloaded

taxi, transporting one passenger too many. He was not aware of the speed limit for a residential area although he had been operating in that area for some time. Finally, he came out of the taxi and left the scene while the passengers were still in the vehicle. It is her assessment that this demonstrated wanton and careless behaviour and contradicted his evidence that he is a good driver.

**[55]** In relation to other aspects of his testimony, she submitted that he gave no evidence as to why Mr. Senior would have swerved right. There was no right turn in that vicinity and no evidence of potholes on the left side. Counsel also asked the court to consider that he is the only witness who does not speak to the vehicles rubbing.

**[56]** In relation to the evidence of the Seniors, she submitted that the character of Mr. Senior is consistent with his evidence as he assisted in removing the passengers from the taxi. Both himself and Mrs. Senior gave evidence as to his driving close to the left side and both gave cogent reasons for this position. Mrs. Senior also spoke to the speed her husband was doing and any discrepancies in relation to a previous overtaking attempt does not go to the root of the issue as the taxi braked harshly behind the pick up on the first occasion.

**[55]** Counsel also asked the court to consider the evidence in relation to the width of the road given by Mr. Senior and the width of the vehicle. If one accepts that the road is about 15 feet in width and that the width of the pickup is 4 ½ feet and that Mr. Senior was 1 foot away from the embankment, then there would have been an additional 1 ½ to 2 feet between his vehicle and the imaginary white line (in the middle of the road.)

**[57]** She submitted that this distance is not expansive and it is within this context that Mr. Senior's evidence that the taxi was on the right side must be viewed as at no time did he say the taxi was fully positioned on that side. She has submitted also that the 6 feet long scratch along the right side of the pickup supports the evidence that Mr. Senior brought his car to a stop along a sand embankment and there was no right and left tyre impact.

**[58]** In assessing the evidence of Mrs. Senior, counsel has submitted that she is a simple and honest witness who has no motivation to lie as she is separated from her husband at this time. She supports his evidence in all material aspects. The court should have no difficulty therefore in finding that Mr. Campbell overtook in a reckless and dangerous manner, drove too fast in the circumstances and as a result rubbed against Mr. Senior's vehicle and lost control of the taxi.

**[59]** On the other hand, it is her contention that the court should also find that Mr. Senior followed the requirements of the Road Code, was well within the speed limit and drove to his extreme left. Whilst being overtaken, he maintained his position to the left and did not increase his speed. It is her contention that the weight of the evidence is against any conclusion that Mr. Senior swerved to his right and that Mr. Campbell was solely responsible for the accident.

#### **Analysis of the Evidence and the Applicable Law**

**[61]** It is accurate to state that Mr. Higgins could not assist the court in any meaningful way in relation to the cause of the accident except for some peripheral issues that took place prior to the collision. He was in the taxi and I accept that Mr. Campbell tooted his horn. I accept also that it is possible the Seniors did not hear as they were engaged in family activities in the pickup. However, his evidence that both vehicles rubbed and engaged in wrestling for 150 feet before the left tyre of the taxi blew out is not credible for two reasons. Firstly, both Mr. Senior and Mr. Campbell denied this. Mrs. Senior also disputes this. Mr. Campbell said it happened fast and I accept this to be so.

**[62]** Secondly, I accept that Mr. Campbell rushed to overtake as soon as he left a corner. Both Mr. Higgins and Mrs. Senior speak to this fact. Mr. Higgins said the taxi overtook on a little straight, about 15 feet of straight. Mrs. Senior said that when her husband, Orville, spoke to her and went further to his left, the road was not that windy and she could see straight ahead. Both these witnesses as well as

Mr. Campbell spoke to another corner ahead of the straight section. Mr. Campbell said he overtook on this straight.

- [63]** Mrs. Senior stated further that the rock that the taxi collided into was situated in a little bend, a turn in the road after the collision area. She estimated that the distance from where their car stopped to that site of the collision was only 13 feet. If one puts together 15 feet of straight with 13 feet, this would be substantially less than 150 feet.
- [64]** Mr. Senior also spoke to a distance of 12 feet from a left hand bend when the taxi made a sharp swing and then the collision into the wall, 5 feet from the bend. The distance again is substantially less than what Mr. Higgins is alleging. I bear in mind also the evidence of Mrs. Senior that this little bend she spoke of is not the bend she had said originally was ahead of them. That bend was still in front of them after the accident.
- [65]** I accept therefore that Mr. Higgins was so traumatized by his experience that he does not properly recall all the details as to what took place. The preponderance of the evidence is against any wrestling for 150 feet. I consider also that Mr. Senior was travelling with family members both inside the pickup and in the cab section. They were on a family outing. It is to be noted that neither Mr. Higgins nor Mr. Campbell have suggested that before Mr. Campbell positioned himself to the right to overtake, that Mr. Senior sped up or attempted to block him.
- [66]** I would have to ask therefore, why Mr. Senior would choose to endanger his family members and cause damage to his pick up by deliberately swerving to the right in an effort to prevent the taxi completing this manoeuvre when it was already positioned to his right and had actually cleared the cab section of the pickup. I did find that Mr. Senior was somewhat truculent when giving his testimony and possible exaggerating about the manner of Mr. Campbell's first attempt at overtaking, as I bear in mind that this evidence and the anxiety it caused him was missing from his witness statement. But what is clear is that he

was somewhat resentful of Mr. Campbell's behaviour that day especially in light of the fact that Mr. Campbell left the scene of the accident while the passengers were still in the vehicle. However, I do not find that he was behaving as either Mr. Higgins suggested or as Mr. Campbell has stated.

**[67]** It is clear also and I accept that Mr. Senior was not driving as fast as Mr. Campbell. If he was, as Counsel has submitted, it is highly unlikely that Mr. Campbell would have been able to reach behind Mr. Senior and position himself to overtake as soon as the corner had been turned. I accept also that Mr. Senior was driving close to his left embankment. I found both himself and Mrs. Senior to be truthful and credible about this aspect of the evidence and I found the reasons given by both to be compelling.

**[68]** I accept also that at some point after both vehicles rubbed, Mr. Senior stopped. I do not find there to be any material inconsistency in his evidence on the point as it is clear that once the vehicles made contact it would take Mr. Senior even 2 or more seconds to appreciate what was happening and to stop. His explanation was to this effect that when the vehicles started to rub, his vehicle was still in motion for a few seconds, then he stopped. I find this to be extremely credible.

**[69]** He said also that he pulled over to the left by bringing his left front wheel up on a left sand embankment by a house to that side of the road. In relation to this point, I note that Mr. Campbell has stated that the left embankment is not along the entire stretch of the road and that there are houses on the left. He confirmed also that in the vicinity of the accident site there is one house on the left and there is a cut out to the embankment.

**[70]** While he has denied that there is any part of the embankment that you can drive up to get to houses, his evidence does support the possibility that Mr. Senior could have placed his left tyre on what he described as a sand embankment. It is to be noted also that Mr. Senior did not speak to driving up to any house, but the placement of a tyre. Mrs. Senior did not speak to a sand embankment or

specifically stated that he pulled up onto the embankment, however she did say he pulled the pick up to the left embankment. I bear in mind that he would be in a better position to describe what he did. She would have been on the right side and would not have had the same opportunity to view. The evidence of the Seniors is credible and cogent on this point.

**[71]** I accept however, that the left tyre of the taxi did burst after both the cars rubbed. I prefer the evidence of Mr. Campbell and Mr. Higgins on this point. I accept that Mr. and Mrs. Senior may not have recalled every vivid detail based on the experience and what they saw as the taxi swerved to the left. I also accept that this is the reason why the taxi swerved to its left before colliding. If the tyre did not burst, it is difficult to accept why Mr. Campbell could not have maintained control of the vehicle since the evidence is that the vehicles merely rubbed together and not that there was a violent collision.

**[72]** I note also that both Seniors did not examine each tyre after the collision. Mr. Senior spoke to being in shock and that his children were crying. He heard shrieks and screams coming from the taxi. I sincerely doubt that any particular attention was paid to the tyres. I do not accept their evidence that all the tyres were sound. I agree with Counsel's submission that the fact that the tyres were spinning in the air or that the vehicle was pushed out of the road without difficulty after the collision is an insufficient basis for any such inference to be drawn.

**[73]** The major issue to be settled is what caused the vehicles to rub in the first place leading to the burst tyre and ultimately the collision into the cap stone. Apart from the assessment made above, there are some other factors that assisted the court in coming to a determination in this matter.

**[74]** Firstly, the description of the accident site. It is clear and I accept that Mr. Campbell commenced his overtaking on a straight part of the road. However, I also accept that it was not a long stretch. While it is agreed that there was no traffic proceeding from the opposite direction, Mr. Campbell would have a duty of

care to ensure that he could safely overtake and get back into his left lane before negotiating that bend that was approaching.

- [75]** Secondly, I accept that the ditch on the right hand side also affected his driving that day. Mr. Senior testified that there was a bus stop on the right hand side near the bend where Mr. Campbell swung out to commence overtaking. Mr. Higgins stated the gully was behind the bus stop. Whether it was exactly across from him or some feet ahead of him would be of no moment. What is clear is that he had not only a bend to contend with but also a ditch.
- [76]** He has admitted that Mr. Higgins asked him what happened to his brakes and that he replied to the effect that the man wanted to send him over into the gully. This is a clear indication that the presence of the gully was important to his state of mind. He has however given evidence to nullify that state of mind by saying that it never crossed his mind that he might fall into the gully. I find this to be nonsensical however and untrue.
- [77]** It is his evidence also that he did not know why Mr. Senior was trying to push him in the gully and he asked himself that question. If this is true, then why would he now say he had no such fear if it operated sufficiently on his mind when he spontaneously answered Mr. Higgins. The fact however that he now denies this also causes me to question his credibility as to what actually took place.
- [78]** I bear in mind also that he was already doing 40 to 45kmph before overtaking and while I do not accept that Mr. Senior was also travelling at that speed, Mr. Campbell would have sped up in order to complete the process of overtaking. It is my opinion therefore that the combination of these factors, the terrain and the speed operating together caused Mr. Campbell to veer too closely to the pick up on his left at some point. Although he had safely passed the cab section of the pickup, he did not properly maintain the taxi in a safe position. I believe this was so based on my findings above.



**[79]** I do accept that the contact of both vehicles did cause the left tyre of the taxi to burst, however this was caused by the negligent driving of Mr. Campbell in the first place. I do not find that there is any credible evidence to suggest that Mr. Senior contributed to the accident. I accept that he fulfilled his duty at the time of being overtaken. I accept that he stayed as close as possible to his left side, he did not speed up, nor did he attempt to prevent Mr. Campbell from overtaking. I also accept that he stopped as soon as he appreciated that the vehicles were rubbing.

**[80]** Mr. Campbell failed to have control of the motor vehicle registered PD 5640 and failed to keep his vehicle off side motor vehicle registered 7491DS and as a result he did not exercise sufficient care to safely overtake the latter mentioned vehicle. He is therefore solely responsible for this accident that resulted in injuries to the claimant, Mr. Devon Higgins.

### **Assessment of Damages**

**[81]** Mr. Devon Higgins is relying on five (5) medical reports from Dr. Denton Barnes dated 16<sup>th</sup> of March 2012 and 9<sup>th</sup> of February 2016, Dr. Guyan Arscott dated 19<sup>th</sup> of March 2012, Dr. Micas Campbell dated 18<sup>th</sup> of April 2012 and Dr. Ijah Thompson dated 9<sup>th</sup> of May 2011.

**[82]** His evidence is that he lost consciousness after the taxi overturned. When he regained consciousness, he was still strapped in the vehicle. He had a large wound on his face and in his head and his face was covered in blood. He was taken to St Ann's Bay Hospital where he was admitted for 3 days. He received stitches to his face and head. He had pain in his left hand, left foot, back and head which was also swollen.

**[83]** He was discharged from the hospital on the 5<sup>th</sup> of May 2011 and was at home for 6 months, but had to return to the hospital for therapy, check up and dressing. Although he was released from the hospital, he continued to experience

excruciating pain so he visited Dr. Micas Campbell and Dr. Ijah Thompson at Palms Medical Complex where he was treated by both doctors.

**[84]** Mr. Higgins stated that his body has not felt the same since the accident. It slows him up and he has to wear a cap on his head when he is going out as he feels uncomfortable when persons ask him what happened to his face. He speaks also of having memory loss and difficulty retaining and recalling information. He stated also that he resumed his job as a painter in 2012 but since the accident, whenever he has to use a ladder it affects his performance due to intense pains in neck, back and foot.

### **Particulars of Injuries**

**[85]** The particulars speak to the following injuries

- Pain to back with standing
- Lower chest pain
- Neck pain
- Pain to left hip
- Blurred vision
- Multiple lacerations and bruises to his body
- Partial loss of right upper eyelash
- Neck disability index 20 to 50
- Back strain
- Knee strain whiplash injury with grade 2 whiplash associated disorder.

**[86]** Based on the medical certificates, Mr. Higgins was allowed to amend the Particulars of Claim at the trial to add the following injuries:

- Cerebral concussion
- Large laceration to scalp.
- Multiple soft tissue injuries.
- Facial disfigurement

- Hyper pigmented scars
- injury to the supra orbital nerve
- 7% impairment.

[87] Ms. Campbell has asked the court to have regard to all the medical certificates in coming to a decision as to an appropriate award for pain and suffering and loss of amenities. Although Dr. Arscott assessed him as having 4% whole person impairment as a result of the scarring, Dr. Barnes assessed him at 5%. She has stated that while Counsel took issue at the beginning of the proceedings with certain aspects of Dr. Barnes medical reports (5% assessment for facial scars and 1% assessment for loss of the supraorbital nerve) these are within his area of expertise. She stated further that Dr. Barnes is required to treat injuries and diseases that affect the musculoskeletal system which includes the bones, joints, ligaments, tendons, muscles and nerves.

[88] She has asked the court also to be guided by the principles as expressed by my brother Sykes J in **Icilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & Anor.** Claim NO.2005 HCV 294. Sykes J, at paragraph 3, stated that he was guided by the principles enunciated by both Lord Morris and Lord Devlin in **H. West & Sons Ltd v Shephard** [1963] 2 All ER 625 at pages 633 D-G and 636E respectively. Sykes J summarized these principles at paragraph 4 of his judgment:

*The principles derived from these passages are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite some time is part of the subjective portion of the assessment...The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant...*

### **Findings of Doctors**

[89] Based on the medical reports, he would have first been seen by Dr. Denton Barnes at the above-named hospital. On examination the following findings are

noted by the said doctor to include orbital hematoma, abrasion to right cheek, irregular laceration over the parietal area of the scalp extending to the frontal area and the right supra-orbital area of the scalp; the cranial vault was visible below the laceration and the abdomen was soft.

**[90]** Dr. Barnes assessed him as having cerebral concussions along with large scalp laceration and hematoma and multiple soft tissue injuries. He was discharged on the 5<sup>th</sup> of May with oral medication and for further review as an outpatient. Dr Barnes stated that on the 11<sup>th</sup> of May, Mr. Higgins was reviewed and reported no significant complaints. However he stated that the final outcome and prognosis of his condition could not be stated at that time as that would have required further evaluation.

**[91]** Dr. Thompson saw him at Palms Medical Complex on the 9<sup>th</sup> of May and stated that despite adhering to medical advice and treatment, Mr. Higgins reported persistent pains and discomforts which included the following:

- Insomnia
- Pain to back on standing
- Lower chest pains
- Pains to left knee and hip and neck
- Blurred vision
- Partial loss of right upper eyelash.

**[92]** After examination, Dr. Thompson assessed him provisionally as having back and knee strain, healing bruising on left wrist, left forearm, and shoulder, healing lacerations to centre of forehead scalp, right forehead, healing extensive bruising to right face and forehead, resolving tender swelling to scalp, resolving hematoma, post concussion headaches, healing disfiguring large laceration to face and scalp and whiplash injury with grade 2 whiplash associated disorder. He treated him appropriately and stated that his injuries were serious with risk of permanent impairment.

- [93] He stated also he would require 3 months of rehabilitation and that the scars to his face would cause permanent cosmetic derangement. He also recommended at least 6 sessions of rehabilitation physiotherapy and stated that long term disability could not be predicted at that time.
- [94] Mr. Higgins was seen by Dr. Micas Campbell on the 10<sup>th</sup> October 2011 at the same medical complex where he saw Dr. Thompson. At that time the doctor noted moderate discrete tenderness at c3-c6 posterior vertebra of neck, pains in back, pains to both lower and upper limbs, discomfort to right leg and ankle, left hip tender and left collateral ligament of the knee. He also noted the multiple bruising as described previously. There was a follow up visit on 13<sup>th</sup> of April 2012. At that time, Mr. Higgins was still complaining of discomfort to shoulder, arms, posterior regions of the neck. When he was referred to an orthopaedic surgeon as well as the physiotherapist, Mr. Higgins indicated that he was feeling better. At that time he was diagnosed finally as having traumatic brain injury, facial disfigurement, post traumatic stress disorder, knee strain, back strain and multiple soft tissue injury. Dr. Campbell also noted that there was a risk of early osteoarthritis to the affected joints. Again an undetermined amount of rehabilitation physiotherapy sessions were recommended.

#### **Examination by Dr. Guyan Arscott**

- [95] Dr. Arscott is a cosmetic and reconstructive surgeon who examined Mr. Higgins on 5<sup>th</sup> March 2012. Dr. Arscott noted a raised hypertrophic hyperpigmented scar extending from the frontal scalp to right medial eyebrow; a hypertrophic hyperpigmented transverse scar over the right forehead; hyper pigmented scar involving the right temporal scalp; raised hypertrophic scars over right eyebrow and upper eyelid, multiple raised hypertrophic hyperpigmented scars over the right intra orbital and cheek area, residual hypertrophic scars over the tip of his nose and lower lip and an area of hypertrophic hyperpigmented scar over the dorsum of his right wrist; raised hypertrophic hyperpigmented scar over dorsum of his left foot.

**[96]** Dr. Arscott indicated that the scars are permanent and that corrective surgery would provide approximately 60% improvement to the majority of the facial scars and that he may also benefit by approximately 40% to 50 % if the scar over his left foot is revised. He assessed Mr. Higgins as having 4% whole person impairment due to the multiple facial scars.

### **Final Medical Report of Dr. Denton Barnes**

**[97]** Mr. Higgins was reassessed by Dr. Barnes on the 6<sup>th</sup> of March 2012. At the time of his examination, he reported headaches, difficulty with holding up his head for long periods, easy fatigability of his neck, neck pain and back pain, numbness in forehead and scalp due to the laceration, sustained pains in left ankle and hip. He reported that he had been off work for 7 months and also had difficulty climbing a ladder which was integral to his work as a painter.

**[98]** Apart from the scarring, Dr. Barnes found that there was severe scar tenderness with numbness in the distribution of the supraorbital nerve from forehead extending to scalp, mild spasm of paraspinal muscles on the neck, spasm of paraspinal muscles in lumbar region. His assessment was as follows:

- Head injury with cerebral concussion and post concussional syndrome
- Whiplash injury of the neck and mechanical back pain secondary to muscle strain
- Lacerations to face and injury to right supraorbital nerve.

**[99]** Mr. Higgins was also advised to use a cream in an attempt to desensitize the scar and to see if the sensitivity would decrease over time. On his last visit to Dr. Barnes on the 22<sup>nd</sup> of January 2016, he was assessed as having mild spasm of the paraspinal muscles and altered sensation in the distribution of the supraorbital nerve. Dr. Barnes assessed him as having 5% whole person disability due to multiple facial scars, 1% whole person disability due to intermittent headaches and 1% whole person impairment due to sensory loss of the supraorbital nerve.

[100] Dr. Barnes stated also that his infrequent headaches could sometimes affect his activities of daily living and disability to work consistently. It is his opinion that these headaches associated with post concussional syndrome can improve at time and symptoms tend to wear off after some period. However no improvement was expected to the right supraorbital nerve but that a program of acclimatization would allow him to sensitize the area and the hypersensitivity would recede with time but not totally. In relation to the whiplash injury and mechanical back pain which was due to the deceleration injury he sustained, setting was expected. Dr. Barnes stated that while he may need intermittent analgesia, he should be able to continue normal living. He opined that as a painter, "it is likely he will be able to continue however he should be restricted to painting on the lower level as he might get headache and dizziness in significant sunlight or dizziness if he is on a ladder."

[101] It is to be noted that at the commencement of the trial, counsel, Ms. Reid objected to this medical report of Dr. Barnes dated 9<sup>th</sup> February 2016, being treated as an expert report as at the time of trial the requisite period granted for the defendants to ask questions had not expired. This objection was taken as the report contained diagnosis and reassessment of impairments which she stated were inconsistent with the evidence of another expert, Dr. Arscott and in any event, outside the realm of Dr. Barnes' expertise. Counsel for the claimant stated that she did not wish to delay the trial so the document is in essence being treated as hearsay evidence and it is for the court to accord it the relevant weight.

### **Submissions on the Medical Reports by Counsel for the 2<sup>nd</sup> Defendant**

[102] Mrs. Suzette Campbell has submitted that the court should only have regard to the medical reports of Dr. Denton Barnes and Dr. Guyan Arscott as the medical reports of Dr. Thompson and Dr. Campbell are written on the same letterhead but there is no indication that he was seen personally by either doctor. She referred the court to the case of **Jhamiellah Gordon v Jevon Paul Devere**

**Chevannes** [2012] JMCA Civ 41, a decision of the Court of Appeal. In that case Panton P, at paragraph 12, stated that the evidence of the expert had to be restricted to the examination she said she had conducted on the patient.

[103] However, in the case at bar, firstly, neither Dr. Thompson nor Dr. Campbell are being treated as expert witnesses. The medical reports are before the court for an assessment as to weight. Secondly, Dr. Thompson clearly indicates that he saw Mr. Higgins on the 9<sup>th</sup> of May 2011. Dr. Campbell has noted findings in relation to the 9<sup>th</sup> of May in his report as well as findings for the 10<sup>th</sup> October 2011 and 13<sup>th</sup> April 2012. The presenting complaints for the 9<sup>th</sup> of May 2011 are almost identical with one particular differentiation, Dr. Campbell speaks to a presenting complaint of depression and anxiety which is absent from Dr. Thompson's report. The inference is therefore to be drawn that Dr. Campbell was the examining doctor on those three (3) dates. This is somewhat supported by Mr. Higgins as he stated he saw these two doctors on the same date. It is noted however that Dr. Campbell records no findings made on the 9<sup>th</sup> of May 2011.

[104] These medical reports were served on the defendants by Notice of Intention to Tender in Evidence Hearsay Statement. This application of Notice of Intention is done by virtue of section 31 E of the **Evidence Act** which allows the documents to be tendered without calling the witnesses. The defendants had the right by virtue of section 31 E(3) to require that the maker of the statement be called as a witness. This was not done. I do accept therefore, based on the evidence before me that Dr. Thompson saw Mr. Higgins on the 9<sup>th</sup> of May 2011 and Dr. Campbell on all three (3) dates mentioned.

[105] However, Counsel for the 2<sup>nd</sup> defendant has also asked that I consider an inexplicable conflict in the report of Dr. Campbell as his report speaks to three (3) visits by Mr. Higgins. However on the date of the report (18<sup>th</sup> of April 2012) it is recorded on the last page that only one consultation had been done to date. I would agree that this is somewhat problematic albeit speculative as Counsel did not request that the doctor be present in court. However, taking all these things



into consideration, I will be according greater weight on Dr. Thompson's report than the report from Dr. Campbell.

**[106]** Finally, Mrs. Suzette Campbell has submitted that the injuries listed by both doctors are not mentioned and were in fact ruled out by Dr. Barnes who first examined and treated the claimant. For example she has listed certain findings of Dr. Barnes in his first report at page 2 as follows:

- Cervical spine had no deformity spine
- Full range of movement of the cervical spine
- No tenderness in the lumbar spine
- Full range of movement in the lumbar spine
- Radiographs of his thoracolumbar spine were normal.

**[107]** It appears Counsel is asking me to compare these findings to Dr. Thompson's examination on the 9<sup>th</sup> of May which speaks to complaints of pain to back standing and the others listed above in that report. I note also on page 2 of Dr. Thompson's report that while the thoracic and neurovascular are listed as normal, the doctor finds discomfort to posterior neck, back (to lumbosacral region and lumbar spasm), discomfort to right distal leg and ankle, tender hip and left knee and tender lower chest wall similar to the findings of Dr. Campbell for the 10<sup>th</sup> of October, 2011.

**[108]** However, Ms. Campbell has also submitted that Dr. Barnes would have seen him in hospital on the 4<sup>th</sup> when he had no significant complaints and on the 11<sup>th</sup> as an outpatient when he also had no significant complaints. She poses the question therefore from whence these complaints on the 9<sup>th</sup>?

**[109]** Again these should have been questions put to the doctors. On the face of it also, I cannot say what Dr. Barnes would have described as a 'significant complaint.' However, even from the 11<sup>th</sup> he indicated that Mr. Higgins was advised to monitor his status and to return if he had any further symptoms. He also noted that any impairment could not be calculated at that time as he would

require further review. It is not apparent to me that there is any material discrepancies or that I should speculate as to the correlation or lack thereof in relation to all these reports.

[110] As I have already indicated, the defendants would have had opportunity to request that these doctors be called to give evidence and to pose questions to Dr. Barnes in relation to his first report. Mr. Higgins stated that he had back pains while in the hospital. No such record is made by Dr. Barnes. However, on the 6<sup>th</sup> of March 2012, Dr. Barnes is making an assessment to include mechanical back pains secondary to muscle strain. Bearing in mind the injuries which included cerebral concussions, large scalp laceration hematoma and multiple soft tissue injuries, it is not incredible that he could have been diagnosed with pains at various parts of the body. On the 9<sup>th</sup> of May, Dr. Thompson had found his injuries to be serious with a risk of permanent impairment.

[111] The case at bar can also be distinguished from the case of **Cherry Dixon-Hall v Jamaica Grande Limited** SCCA 26/2007 relied upon by Counsel. In that case, the Court of Appeal approved the decision of the trial judge who refused to accept the evidence of a doctor who had treated the claimant in 2003 some months after the incident causing injury. He had treated her for injuries different from those of the doctor who had originally treated her. He also spoke of a flare up of a pre-existing condition that she indicated was due to the fall she had sustained. She stated that the pre-existing medical condition had existed from 1998. However, there was no any indication that he had independently diagnosed her with the recurrent medical condition. The report appeared to be based only on what she told him and the claimant had not informed the original doctor of the pre-existing condition.

[112] The court found that there was nothing in the expert's report to show that he could speak from his own knowledge of the 1998 diagnosis to ground a trigger and response relationship between the fall and pre-existing condition (see: dicta of Harris JA, at paragraphs 36 and 37). In relation to the other injuries, the court

also found that the report was speculative and was only a rehearsal of injuries which the claimant informed him she had sustained. Causation had not been established. The court also found that if she had sustained a particular injury she would not have failed to disclose it to the original doctor. [Per Panton P at paragraphs 17 and 18; and Harris JA at paragraph 39].

[113] There is a distinction to be made with the present case as Mr. Higgins would have seen all 3 doctors from or within days of the date of the accident as well as follow up visits within 5 months and continuing. It would be difficult to maintain any argument that the findings of the doctors are speculative and based merely on the say so of Mr. Higgins.

[114] It is to be noted also, that when Dr. Barnes assessed Mr. Higgins in March 2012, Mr. Higgins was still complaining of headaches, neck and back issues, pain in left ankle and hip. Dr. Barnes at that time did find mild spasm of muscles in neck although there was full range of movement. He also found spasm of paraspinal muscles. At that time as indicated earlier, he assessed him as having head injury with cerebral concussion and post concussional syndrome, whip lash injury of neck and mechanical back pains secondary to muscle strain. On the last visit on 22<sup>nd</sup> of January 2016, he still retained the mild spasms of paraspinal muscles of the neck but it is to be noted that, in spite of the level of symptoms reported, he was only assessed as having 1% impairment of the whole person based on his headaches. In relation to the whiplash injury of neck and mechanical back pains, Dr. Barnes noted that he had improved significantly.

### **Submissions by Counsel for the 3<sup>rd</sup> Defendant/Ancillary Claimant**

[115] Counsel, Ms K. Michelle Reid asked the court to bear in mind that the reports of Drs Campbell and Thompson, unlike those of Drs Barnes and Arscott were not in evidence as expert reports but tendered into evidence as hearsay documents. She submitted also that the reports of Drs. Campbell and Thompson both speak to the 9<sup>th</sup> of May 2011 and that it is unlikely that Mr. Higgins saw both these

doctors on that date as he stated in his evidence. I have already indicated my findings on this aspect of the submission by Counsel for the 2<sup>nd</sup> defendant, Mr Winston Campbell.

[116] Although both these doctors at Palms Medical Complex spoke to prescribing medication for Mr. Higgins, counsel has questioned the fact that Mr. Higgins had not presented any receipts pertaining to any such medication. I am not sure why this is a complaint as he has not made claims in relation to these. As it relates to the credibility of Mr. Higgins, I would accept that such prescriptions were received as it is very clear and uncontested that Mr. Higgins suffered serious injuries in the motor vehicle accident.

[117] Ms. Reid also submitted that apart from the six (6) receipts tendered between May 2011 and July 2011 for physiotherapy sessions, there has been no more evidence of any such further treatment after the referral by Dr. Campbell in April 2012. She is suggesting that this has a twofold effect. It is either that he was feeling better as he told Dr. Campbell in spite of his many complaints or he failed to mitigate the effect of his injuries by not continuing with physiotherapy.

[118] In relation to Dr. Barnes' latest medical report, Ms. Reid challenged it in relation to two of the assessments, the 5% impairment rating for the multiple scars and 1% rating for injury to the right supraorbital nerve. I will be placing no reliance on these 2 ratings as the claimant chose to present his case in spite of the objections by the defendants as stated above. The Further Notice of Intention to tender this medical report was filed on the 25<sup>th</sup> of February 2016. However, both Counsel for the defendants stated that they were only served on the 17<sup>th</sup> of May 2016. The rules allow Counsel 28 days to pose questions to the expert (see: Rule 32.8 (2) (c) of the **Civil Procedure Rules**, 2006 as amended and the case was commenced on the 25<sup>th</sup> of May 2016.

[119] In assessing an award of damages, I will however be placing reliance on the 1% whole person impairment in relation to headaches as there was no issue taken with this assessment and he clearly suffered a head injury. I will also be relying

as well on the 4% impairment rating of Dr. Arscott in relation to the scarring. I accept that Mr. Higgins suffered from injuries including loss of consciousness, cerebral concussions with large scalp laceration and hematoma with multiple soft tissue injuries. He was kept in hospital for 4 days, but continued to experience pains to back, lower chest, neck, left hip, left knee. The cerebral concussions resulted in post concussion headaches and he was diagnosed as having whiplash injury as well as mechanical back pains.

**[120]** Counsel, Ms Reid has also submitted that Mr. Higgins failed to continue further physiotherapy after this was recommended by Dr. Campbell in April 2012. She submitted also that he brought no proof that he had received medical attention between 2012 and 2016 in spite of the fact of complaints being made to Dr. Barnes in 2016. She asked the court to consider also that Dr. Barnes' final report indicated that on the 22<sup>nd</sup> of January 2016, Mr. Higgins was found to have full range of motion in the lumbar spine and no spasm and neurological deficits in the lower limbs. She submits that the only positive findings related to mild spasm of the paraspinal muscles of the neck. She has also submitted that any persistence in relation to the latter was due to Mr. Higgins' failure to mitigate his loss by the use of physiotherapy after April 2012.

**[121]** It is difficult to accept that these pains were unrelenting up to March 2016 as he did express to Dr. Campbell that he was feeling better in April 2012, although he denies that he said that. There is also no evidence as submitted by counsel that he continued physiotherapy although it was recommended. Further treatment therefore may have reduced the longevity of any pain experienced by Mr Higgins up to 2016. The question as to what is reasonable for a claimant to do in mitigation of damages is a question of fact. It is possible he could have decided to bear under residual pain but he has not indicated that to the court. I will therefore allow a minimal discount in relation to the issue of mitigation as I arrive at a figure that would take into consideration the inconveniences suffered by Mr. Higgins.

[122] The scars to his face are permanent and these scars have caused him a certain level of stress and anxiety as he has expressed. The injuries also caused 6 to 7 months interruption in terms of daily living and occupational ability and it is suggested that he may have ongoing issues with sunlight and ladders as a painter. However, although he has expressed that his body is not the same, Dr. Barnes' last report speaks to the fact that he has improved significantly. He is also affected by an area of hypersensitivity in relation to the scar to the supraorbital nerve but that is expected to decrease over time.

[123] Although he has expressed issues with his memory, there is no assessment or exploration of this by any of the medical doctors who examined him so he has not put the court in a position to properly assess this. In relation to the possibility of earlier onset osteoarthritis to the affected joints, there is no evidence of this as yet, it being 5 years later.

### **Submissions on Damages by Counsel for the Claimant**

#### **General Damages**

[124] Counsel for the claimant referred the court to the following authorities of **Pamella Thompson et al. v Devon Barrows, Henry Kennedy and Errol Reid** Claim No CL 2001/T143 delivered on December 22, 2006; **Kennesha Harris (infant by mother and next friend Beverly Harris) v Hall et al.**, Khan, Volume 4 page 77; **Bernice Clarke v Clive Lewis and Lyneire Ashman** suit No. C.L.2001/C234; **Marie Jackson v Glenroy Charlton and George Harriot**, Khan Vol. 5, page 167. She has asked the court to award the amount of \$6,500,000.00 for pain and suffering and loss of amenities as she considers his injuries to be more serious than the injuries suffered by the claimants in the first three aforementioned authorities but less than the last.

[125] Counsel, Mrs. Suzette Campbell has referred the court to the authorities of **Alexander Garwood v Lincoln Quinland**, Khan volume 6, page 190 and **Beverley Griffiths et al. v Leroy Campbell**, Khan 4, page 153. Counsel Ms.

Reid cited the cases of **Gerald Reid v Alexton Gyles and United Estates Ltd. [2015] JMC Civ. 73** and **Shyan Walters v Ingrid Bernard [2014] JMISC CIV. 169** as instructive. She submitted that a sum of \$1,800,000.00 is reasonable for pain and suffering and loss of amenities.

- [126] None of the above cases can be regarded as totally on par as they relate to injuries suffered by Mr. Higgins. In **Shyan Walters**, the claimant sustained abrasion to right arm and forearm, dislocation of right thumb, nasal bridge laceration, abrasion to right and left shoulders, tenderness to knee and ankle joints, grade 1 to 2 lateral collateral ligament strain, possible meniscal tear, 2 broken upper incisor teeth and multiple scars to body including the face. The medical evidence confirmed that he would require extensive scar revision surgery and a serial excision for the scar to the left lower lip. My brother, Batts J, awarded \$1.2 million in October 2014 for pain and suffering but stated that he was discounting that amount by \$350,000 as he was awarding the separate amount of \$698,000 for future medical care.
- [127] The actual amount awarded therefore for pain and suffering was in the amount of \$850,000. This award updates to \$ 872,556.39 using the July consumer price index (CPI) of 232.1. In **Walters**, there was no impairment rating in relation to scars, in fact Batts J said that the scars were almost imperceptible. He was also kept off work for 3 months in contrast to Mr. Higgins disability which lasted 6 to 7 months. I am of the view that Mr. Higgins' injuries were more serious.
- [128] In **Gerald Reid**, the claimant sustained deep abrasions to right posterior chest wall with tenderness on deep palpations, abrasion to right posterior auricular and mastoid area of scalp, mild concussion injuries with soft tissue abrasion, severe right tempero-parietal and occipital headaches, severe tenderness and swelling in the right tempero-manibular joint with difficulty opening mouth, severe tenderness and spasm in the neck whiplash worst on right side, severe tenderness and swelling in the right shoulder and moderate lower back pain and

spasm in middle of back. He was awarded the amount of \$1,675,000.00 in April 2015 which updates to the amount of \$1,742,570.60.

[129] While the claimant in this matter had some similar issues as Mr. Higgins, Mr. Higgins suffered loss of consciousness, cerebral concussions with large scalp laceration. Dr. Barnes had stated that his cranium was visible on admittal to hospital. There is also no disability rating in relation to **Gerald Reid**.

[130] In **Beverley Griffiths**, the claimant had loss of consciousness, some lacerations, black eye, a puncture wound to back of head, permanent bald patch on back of head and 2 scars over forehead and right cheek which would be permanent cosmetic disfigurement. She was awarded the amount of \$220,000.00 for pain and suffering as well as a separate sum of \$ 56,000.00 for future medical expenses on the 25<sup>th</sup> of June 1997. This award updates to \$1,176,001.84. However it falls woefully short of assisting this court in terms of comparable injuries and there is no whole person impairment rating.

[131] In **Alexander Garwood**, the claimant was unconscious on admittal to hospital and had lacerated wounds to left knee, right eye, lower lip and right chin. He lost two upper incisors and right canine was loose. He was diagnosed as having head injury with loss of consciousness. He would be in need of teeth reconstruction and upper and lower (six teeth) dentures. On assessment by Dr. Cheeks, 7 years later, there was nothing remarkable except a scar to right eyebrow and right side lower face. Dr. Cheeks did not expect him to develop any complications from the head injury and found that the throbbing headache was a stress type headache carrying a zero rating. He was awarded \$950,000.00 for general damages in March 2008. This updates to \$1,794,100.00. The distinctions with the case at bar are clear. The range of awards suggested by both counsel for the defendants are therefore unrealistic.

[132] In relation to the cases cited by Counsel for Mr. Higgins, I agree with her submission that the award made in **Marie Jackson** is above what should be



considered as a comparable award. Ms. Jackson suffered pains in the neck, left rib cage and left elbow with severe pains persisting to the lower back and neck. She was diagnosed with L4/L5 lumbar disc prolapsed with a permanent impairment of 8% of the whole person. An award of \$1,800,000.00.00 was made on the 4<sup>th</sup> of May 2001. The updated award is \$7,279,665.45. I consider that Mr. Higgins' disability relates to scars which may be reduced by future surgery. The other disability of 1% refers to what Dr. Barnes describes as infrequent headaches.

[133] In terms of both the objective and subjective element, the award in **Marie Jackson** would be disproportionate in the present circumstances. In **Pamela Thompson**, one of the claimants, Tanya Scott, suffered injuries from a motor vehicle collision. Her left head was bashed in and her left hand was bleeding. She remained in hospital for 4 days and was then transferred to National Chest Hospital and then to Kingston Public Hospital (KPH). She was diagnosed by Dr. Arscott with the following injuries:

- Obvious large wound with soft tissue loss and bone exposure involving the left temporal parietal scalp forehead extending unto the left ear.
- The upper half of the pinna of left ear was completely lost
- Deep wounds and abrasions over the left and right shoulder
- Wounds and abrasions over the dorsum of her left hand

[134] Skin grafting was done in relation the scalp and she was unable to eat for three weeks. When she first saw her face she was horrified. She had scarring and deformity to left hemiface. She remained at KPH for one month and had three surgeries at National Chest Hospital. Dr. Ottey certified that she was suffering from post traumatic stress disorder as well as an adjustment disorder with depressed mood and stated that she was functioning at 55% of her full overall psychological functioning. She was paranoid when travelling by motor cars and wore hats as she was badly scarred and considered herself ugly. At the time she was a young divorcee. And my brother Campbell J found that her prospects for

remarriage had been greatly diminished. She was unable to work in her hairdressing business due to the weakness in her hands. Cosmetic surgery with tissue expansion was recommended to provide 50 to 60% improvement. The court awarded her an amount of \$2,350,000.00 for pain and suffering and loss of amenities in December 2006. The updated award is in the amount of \$5,454,350.00. No separate award was made for post traumatic stress disorder.

[135] Contrary to submissions by counsel, I disagree that Mr. Higgins suffered more serious injuries. He had a serious head wound just like Ms. Scott. While he did have other injuries associated with the trauma including whiplash and mechanical back pains that must be considered, he was out of hospital in 3 days. Ms. Scott was there for at least one month and went through 3 surgeries. She was diagnosed with psychological issues. The award apparently included an assessment for this including post traumatic stress disorder as well as the scars. Although both Mr. Higgins and Ms. Scott had disfigurement, Mr. Higgins has no need of tissue expansion. I do also consider the impact of facial disfigurement on a woman to be greater than the male of the species. Any award made to Mr. Higgins ought not to be in this range.

[136] Similarly, I find that the case of **Kennesha Harris** to be somewhat incomparable, however it is useful as a guide. She was a 7 year old child who was hit by a motor car. Apart from 1 abrasion, 2 lacerations and 1 incised wound, she had an extensive gloving injury on the left leg below the knee joint to the ankle and proximal portion of the dorsum of the foot involving skin and muscle groups of calf. She was hospitalized for just over 1 month. She was left with gruesome scarring which was hypertrophied and had a 'green lizard appearance'. Plastic surgery was recommended which involved scar revision including tissue expansion. She was awarded \$400,000.00 in October 1992 for pain and suffering and loss of amenities. The updated award is in the amount of \$ 5,413,411.08. She also received an award for future medical care.

[137] Finally in, the case of **Bernice Clarke**, the claimant suffered injuries in a motor vehicle collision in January 2002 and lost consciousness for a while. She had pains all over her body including her head, eyes, shoulder and foot. She spent one day in hospital. The medical report indicated that she suffered serious injuries and she was diagnosed with mild cerebral concussion and there was no permanent disability she spoke to experiencing pain for three months during which she could not pursue her trade as a higgler. At the time of trial in April 2003, she complained that she still had headaches when walking in the sun and she could not walk as far as she used to and still at times suffered from back pains. She was awarded an amount of \$550,000.00 for general damages. The updated award is \$1,942,702.78. I would agree with Counsel that Mr. Higgins suffered more serious injuries.

[138] In **Harrisons Assessment of Damages, 2<sup>nd</sup> edition, 2011**, page 1 the learned author makes the point that in comparing awards for physical injuries one is comparing like with like and although no two cases are ever the same, justice requires consistency between awards.

[139] Before coming to a conclusion on the issue of an appropriate award, I will have to consider the issue of future medical care.

### **Future Medical Care**

[140] Counsel for Mr. Higgins, has asked that I award an amount for the corrective surgery referred to by Dr. Arscott in his medical report. This would provide 60% improvement approximately of his facial scars as well as 40% to 50% improvement to the scar over his left foot. The cost is stated to be \$380,000.00 in his medical report dated March 2012. Counsel has asked the court to update that amount using the CPI of June 2016 which would convert that figure to \$484,434.00.

[141] Both Counsel for the defendants have objected to any such award as the Particulars of Claim has no pleading in relation to the cost of future medical care.

They both referred to the court of appeal decision of **Norman Beckford v Jasmine Barrett and Maurice Davis** SCCA90/91 delivered on the 6<sup>th</sup> of November 1993 where Wright JA stated that it was unfortunate that no amount could be awarded under this head since no such claim was alleged in the pleadings.

[142] While amendments to the Particulars of Claim can be made even after submissions have been made, there has been no such application. All the parties made submissions in writing and this does appear to be an unfortunate oversight on behalf of Mr. Higgins' counsel. She had applied for other amendments to the statement of case at the commencement of trial.

[143] However, since I am unable to award the amount for future medical care (and there is no evidence that Mr. Higgins has refused to mitigate his injuries by refusing to do corrective surgery) it is my opinion that any award made for pain and suffering will not be discounted to reflect the potential improvements to Mr. Higgins' scars by virtue of the corrective surgery. I will therefore award the amount of \$4,800,000.00 for pain and suffering and loss of amenities, having discounted the amount of \$200,000.00 for failure to do further physiotherapy as recommended from 2012. I will also be granting interest at the usual period (the date of service of the Claim to the date of judgment) as I see no valid reason for restricting interest on general damages from the date of the amendment as submitted by Counsel, Ms. Reid.

### **Disposition**

[144] Judgment granted to the claimant against the 2<sup>nd</sup> defendant. Judgment granted to the 3<sup>rd</sup> defendant against the claimant and to the ancillary claimant against the 2<sup>nd</sup> ancillary defendant.

### **Special Damages**

In relation to the above, Ms. Chantal Campbell has asked me to make the following awards as pleaded and agreed between the parties:

Transportation	- \$ 7000.00
Receipts for medical reports	-\$188,000.00
Physiotherapy receipts	<u>-\$12,500.00</u>
<b>Total</b>	<b>\$207,500.00</b>

Interest at 3% from the 1<sup>st</sup> of May 2011 to 24<sup>th</sup> of August 2016.

### **General damages**

Pain and suffering and loss of amenities \$4,800,000.00 with interest at 3% from the 22<sup>nd</sup> of August 2011 to the 24<sup>th</sup> of August 2016.

Cost to the claimant against the 2<sup>nd</sup> defendant to be agreed or taxed.

Cost on the ancillary claim to ancillary claimant against 2<sup>nd</sup> ancillary defendant to be agreed or taxed.