[2018] JMSC Civ. 17

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV03856

BETWEEN	**JOELLE MCCORKELL**	**CLAIMANT**
AND	**JAMAICA URBAN TRANSIT CO. LTD.**	**1ST DEFENDANT**
AND	**OSMOND BEERSINGH**	**2ND DEFENDANT**

IN CHAMBERS

Mrs. Denise Senior-Smith and Miss Olivia Derrett instructed by Oswest Senior-Smith and Company for the Claimant

Mrs. Kerry-ann Sewell and Miss Georgia Hamilton, instructed by Georgia Hamilton and Company for the Defendants

Heard: 28th July, 27th October, 2017, 4th, 11th, 22nd January, and 19th February, 2018.

Negligence - Motor vehicle collision - Child claimant - Whether the accident was caused by the negligence of the defendant's agent and/or servant - Whether accident caused or contributed to by the claimant - General damages - Anxiety disorder - Special damages

STEPHANE JACKSON-HAISLEY, J

BACKGROUND

[1] On January 22, 2008 the Claimant, Joelle McCorkell, a thirteen-year-old student, was a pedestrian along the Constant Spring Road when a bus owned by the Jamaica Urban Transit Company Limited (JUTC) which was being driven by Osmond Beersingh collided with her causing her to sustain injuries. On August 4,

2010 she filed a Claim Form accompanied by Particulars of Claim in which the JUTC was named as the Defendant. These documents were later amended to include Osmond Beersingh as the 2nd Defendant and the JUTC became the 1st Defendant. In the amended documents it was expressed that at the time of the accident the 2nd Defendant was employed as a driver of the 1st Defendant and was the servant and/or agent of the 1st Defendant. The 2nd Defendant was never served with the originating documents and so on February 12, 2013 a Notice of Discontinuance was entered in respect of the 2nd Defendant. The 1st Defendant is now the sole Defendant in this matter.

THE CLAIMANT'S CASE

[2] The Claimant seeks damages for negligence. She asserts that the agent and/or servant of the Defendant, Mr. Beersingh was negligent in that he:

a. Drove in a dangerous and/or reckless manner along the main road;

b. Drove without due care and attention and without due consideration for other users of the roadway;

c. Drove at too fast a rate of speed in all the circumstances;

d. Failed to keep a safe course;

e. Failed to acknowledge the presence of students;

f. Failed to apply his brake in sufficient time or at all;

g. Failed to exercise any or any proper control over the said motor vehicle;

h. Failed to stop, slow down, turn aside or in any other way to manoeuvre the said vehicle so as to avoid a collision.

[3] As a consequence of this accident, the Claimant indicated that she sustained the following injuries:

i. Capsulitis to the meta carpo-phalangeal joints (MCPJ's) of the right foot;

ii. Non-united undisplaced, avulsion fracture of the medial collateral ligament of the head of the proximal phalanx of the fourth toe;

iii. Healed avulsion fracture of the medial collateral ligament of the head of the proximal phalanx of the third toe;

iv. Subjective anterior knee pains; and

v. Memory lapses with behavioural changes

[4] By way of a Court Order further amendments were made to the Particulars of Claims to include other injuries suffered by the Claimant which are "mild depression" and "mild post-traumatic stress disorder" as well as other items under Special Damages which are included below:

The Particulars of Special Damages were set out as follows:

- Cost of Medical Report	$25,000.00
- Transportation (so far)	$31,000.00
- Medical Expenses (incurred so far)	$45,000.00
- Physiotherapy	$24,000.00
- Counselling	$72,000.00

[5] At trial the Claimant testified that on the morning of January 22, 2008 at around 6:30 she was standing at a bus stop with two of her friends when they decided to cross the road to go to the other side in order to take a bus going towards Constant Spring. A Coaster bus heading towards Constant Spring and cars heading in the opposite direction stopped to allow them to cross. As they were about to cross, a JUTC bus overtook the cars that had stopped, then swerved to go back into its correct lane and whilst passing them the back of the bus hit the Claimant. The impact caused her to spin around and fall hitting her head, right elbow, right toes, foot and knee resulting in a cut to her elbow and causing her to feel pain in her right foot.

[6] The Claimant when cross-examined explained that the Coaster bus had stopped directly across from the bus stop where she was standing and that the driver beckoned to her and stopped traffic. She indicated that the spot where the Coaster bus stopped was not a bus stop. She said the traffic that day was moderate. Further, that at the point of impact she had reached about three quarters of the way across the lane for vehicles going down towards Half Way Tree. She stated she did not actually see the bus prior to stepping out into the road, in fact the first time she saw the bus was when it swerved into the lane she was crossing and the back of the bus hit her right foot. She pointed out that both sets of vehicles had stopped, the ones going towards Constant Spring and the ones coming from Constant Spring. She said of the three girls she was the one closest to the traffic coming from Constant Spring but the other two girls were beside her.

[7] It was suggested to her that she was anxious to get to school and fearful of being late and it was this anxiety that caused her to rush across the street. She admitted that she was anxious and fearful of being late but denied rushing and said that she would not have had a need to. It was suggested to her that she darted into the road without ensuring that the way was clear and she did not agree with that suggestion. It was also suggested to her that the only swerve that the JUTC bus made was a swerve to the right in an effort to avoid colliding with her and she said the swerve was a swerve to the left. It was also suggested to her that because the traffic had stopped she did not check to see if traffic was coming before crossing but she did not agree with this suggestion.

THE DEFENDANTS' CASE

[8] The Defendant does not dispute the collision however, asserts that it was the Claimant who was negligent. In a Defence filed on October 14, 2010 the Defendant indicated that it was the Claimant and some school mates who suddenly and without warning stepped out into the roadway and into the path of the motorbus. Further, that the driver swerved to the right and managed to avoid

hitting the Claimant's school mates but the Claimant proceeded further out into the roadway thereby causing the collision.

[9] It is further averred that the said collision was caused solely or contributed to significantly by the gross negligence of the Claimant and the wanton disregard she showed for her safety. The Particulars of the Claimant's Negligence are set out as follows:

i. Failing to ensure the roadway was clear before entering;

ii. Entering the roadway when it was manifestly unsafe to do so;

iii. Failing to see the 1st Defendant's motorbus in time or at all to avoid the collision;

iv. Failing to heed or act upon the presence of the 1st Defendant's motorbus which was on the roadway;

v. Failing to keep any or any proper lookout;

vi. Failing to have regard or any sufficient regard for her personal safety; and

vii. Failing to stop or retract her steps as her school mates had done or take any other evasive action so as to avoid the collision.

The Defendant has put the Claimant to strict proof of the injuries, loss and expenses averred.

[10] At trial Mr. Osmond Beersingh was the only witness relied on by the Defendant. According to Mr. Beersingh, he was driving down Constant Spring Road in a line of traffic at approximately 10-15 kilometres per hour when he noticed a group of young ladies standing on the left hand side of the road. When he was close to where they were they all darted out into the road and into the path of the unit he was driving. He immediately swerved to the right to avoid hitting them. He applied his brakes. When he looked to the left he noticed that one of the young ladies was being propped up. On exiting the bus he realized that she had injuries to her right foot.

[11] When cross-examined he agreed that at that time of the morning there was traffic going down Constant Spring Road and that a lot of school children were on the road and that he would have to have regard for the school children. He was also aware that school children congregate at the bus stop in the vicinity of where the accident occurred. He agreed that he told his employer that the Claimant proceeded further into the roadway causing the collision. He disagreed that the safest thing to do was to step on the brake and said that, because of how they walked out, if he had done this they would have gotten hit directly. He agreed that there was traffic travelling ahead of him but denied that the coaster driver had beckoned to the girls to cross. He stated that he saw the girls step out when he was some 4 to 5 feet away from them. He said he had to serve first and then stop. It was the side of the bus that made contact with the Claimant.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[12] I am grateful to both counsel for their very comprehensive submissions. I have no intention of repeating them but will make reference to them where necessary. Counsel for the Claimant commenced by providing a synopsis of the evidence elicited at trial. In essence, her submissions were to the effect that the Court should find the Defendant liable and that the Defendant is liable through the negligence of Mr. Beersingh. She asked the Court to find that the Claimant has proven on a balance of probabilities that Mr. Beersingh drove without due care and attention and that he had good visibility of the Claimant and the other girls. Further, that a reasonable driver would in these circumstances have contemplated that these school children could attempt to cross the road and/or appreciate the possibility of them doing so by ensuring that he could stop to avoid hitting them if the possibility arose. She questioned how could he not have avoided the collision if he was keeping a proper lookout and pointed out that on his evidence he did not even attempt to change his speed. Further, that a reasonable driver travelling at 10 to 15 kilometers per hour and having first seen the girls from a distance of 20 feet away and then 4 to 5 feet away would have stepped on his brake forthwith. Based on his evidence it can be implied that he

was not in fact travelling at 10 to 15 kilometers per hour but rather at a faster speed which is why he had to swerve in an attempt to avoid colliding with the girls.

[13] She pointed out that there is a duty on a driver, driving in such an area where there are schools and pedestrians, to take precautionary measures. Another point that counsel asked that I examine carefully was the use of the words "stepped out", "rushed" and "darted". She pointed out that largely the suggestions made in cross-examination of the Claimant were to the effect that she had "stepped out" into the road. It was only later that the word "rushed" was used. However, in Mr. Beersingh's witness statement he used the word "darted". She therefore asked that in light of these inconsistencies, the aspect of Mr. Beersingh's evidence asserting "dart" be removed from the evidence under consideration by the Court. She submitted further that the careless action of Mr. Beersingh's ought to attract all blameworthiness in this case.

[14] With respect to the Law counsel relied on the case **Gough v Thorne** [1966] 3 All ER 398, a case in which a thirteen and a half year-old plaintiff was injured when a lorry driver outstretched his right hand to warn traffic coming along to stop and his left arm to beckon to her and her brothers to cross. The plaintiff then commenced crossing and after passing the lorry she was struck by a car driving at an excessive speed who failed to notice the lorry driver's outstretched arm. The Court found the driver of the car liable and the plaintiff contributorily negligence at one-third, in advancing pass the lorry without pausing to see whether there was traffic coming from her right. The plaintiff appealed and on appeal it was found that she was not negligent, as an ordinary child could not reasonably be expected to pause to see for herself whether it was safe to go forward when the lorry driver had beckoned to her to cross.

[15] Counsel urged the Court to find that there was no negligence on the part of the Claimant and to find that the Defendant is solely liable through the negligence of Mr. Beersingh.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[16] Counsel for the Defendant commenced her submissions by discussing the law with respect to negligence where children are involved. She examined the cases **Moyne v Poyner** [1975] RTR 127, **Robert Richard Barry v John Stanley Wynn** [2011] EWCA Civ. 710 and the Jamaican case **Duncan McKoy v Sonia Watson and Lauriston Watson** [2010] JMSC Civ. 34. The first two cases involved infant plaintiffs who were injured after coming out of parked vehicles. Counsel highlighted the test laid down in the **Moyne v Poyner** case which was noted in the **Barry v Wyn** case to be as follows:

> *"The test to be applied to the facts was this: would it have been apparent to a reasonable man, armed with common sense in and experience of the way pedestrians particularly children are likely to behave in the circumstances such as were known to exist in the present case, that he should slow down or sound his horn".*

[17] Counsel submitted that the entirety of the evidence given by the parties supports the version of Mr. Beersingh. In particular, the Claimant's evidence as to the point of impact corroborates Mr. Beersingh's account as according to her, at the point of impact she had reached three quarters of the lane going down which is consistent with his account that she had stepped or darted out into the road while the vehicle was about 4 or 5 feet away from her.

[18] She asked that the Court accept Mr. Beersingh's version with respect to the speed at which he was travelling as the Claimant gave no evidence as to the speed he was travelling and so his evidence in this regard is unchallenged. Further, the Claimant made no mention of the bus travelling in an erratic manner or losing control which would be suggestive of speed and furthermore the relatively minor injuries sustained by the Claimant are not suggestive of such a large motor vehicle coming into contact with her in the manner she outlined.

[19] It was further submitted that Mr. Beersingh's failure to toot his horn in these circumstances was not negligent as the Claimant and her school mates were standing at the bus stop on the side of the road heading to her school so he had

no reason to think that they would suddenly launch themselves into the road in an attempt to cross.

[20] Counsel submitted that the Claimant's evidence, indicating that the back of the bus collided with her, should be rejected as this is inconsistent with her evidence that she and her friends attempted to cross the road "abreast" as it would have been impossible for the back of the bus to collide with her in the manner she described without some other part of the bus colliding with the other students.

[21] She asked the Court to find that the Claimant was the author of her own misfortune and to find that Mr. Beersingh was not negligent as he did all that was possible to avoid the accident so he is neither wholly or partly liable for the collision.

ISSUES

[22] I have considered all the pleadings, evidence led and the submissions advanced and have found that the issues to be considered touch and concern the credibility of the witnesses. The main issue to be determined is whether or not the agent and/or servant of the Defendant was negligent in his operation and management of the bus he was driving. In determining the main issue several collateral issues arise for consideration. They are as follows:

1. Whether Mr. Beersingh was overtaking the vehicles that had stopped to allow the Claimant to cross the road.

2. Whether the Claimant walked, stepped or darted across the road.

3. Whether Mr. Beersingh failed to take steps to avoid the accident.

4. Whether the actions of the Claimant caused the accident.

5. If the Defendant is liable, whether there was contributory negligence on the part of the Claimant.

LAW

[23] In order to establish negligence on the part of the Defendant the Claimant must establish that the Defendant's agent or servant owed her a duty of care and that he breached that duty and further that the Claimant suffered damage as a result of the breach. The cases relied on by the Claimant suggest that a greater duty of care is owed to the Claimant who was a child, than that would be owed to an adult Claimant.

[24] The case of **Moore v Poyner**, which was relied on by counsel for the Defendant, sets out the test to be applied in determining whether a Defendant is negligent in a case involving an infant plaintiff. This case was applied in a decision of this Court in **Duncan McKoy v Sonia Watson and Anor.** where P.A. Williams J approved the test set out in the **Moore v Poyner** case. From an examination of these cases, there does appear to be a distinction between the duty owed to a Claimant of tender years and that owed to a teenager or an adult who would be expected to be more aware of the dangers of not paying attention to the road.

[25] The nature of the distinction was discussed by McDonald-Bishop J in the unreported decision of **Craig Martin (B.N.F. Carmen Brown) v John Archer** Claim no. 2008 HCV 05180 delivered December 19, 2011. McDonald-Bishop J conducted an analysis into the standard of care required of a defendant in the exercise of his duty of care owed to users of the road. After an examination of the law enunciated in several authorities she arrived at a conclusion, which is reflected at paragraph 49 of the judgment, in these terms:

> *"The fact is that he owes a duty of care to children pedestrians to exercise reasonable care for their safety while using the road. The degree of care required to discharge this duty may be greater than the norm depending on the circumstances of the case, which includes the age and understanding of the child."*

She went on to examine contributory negligence and pointed out that there is no rule of law of general application that a child can never be held blameworthy or

that a defendant must be liable. She also referred to the case **Gough v Thorne** in which Lord Denning pointed out that a judge should only find a child guilty of contributory negligence if he is of such an age as reasonably to be expected to take precautions for her own safety and then she should only be found guilty if blame should be attached to her.

[26] It is clear that the fact that the Claimant is a child does not prevent a finding of contributory negligence and so I will have to address my mind to whether in the circumstances of this case the Claimant was contributorily negligent.

DISCUSSION

[27] The fact that the Defendant and the driver of the Defendant's vehicle owed the Claimant, a pedestrian, a duty of care is not in dispute. That the Claimant sustained injuries consequent upon a collision with the Defendant's bus is also not in dispute. The issue in dispute is whether this collision resulted from the Defendant's breach of that duty. It is only if there is such a breach that the Defendant would be liable in negligence. In determining the question of whether or not the Defendant was negligent, credibility is a live issue. If demeanour alone were to be utilized it would be an insurmountable task as the demeanour of both the sole witness for the Claimant and that of the sole witness for the Defendant was equally satisfactory. I will therefore have to examine carefully the nature of the evidence given. In dealing with the main issue I will attempt the resolve the subsidiary issues mentioned earlier.

[28] Among the issues in contention are the mode and pace at which the Claimant and her school mates made their way across the road. According to the Defendant in the Defence they stepped out into the road however, in the witness statement she is said to have darted across the road and in the evidence in court she was said to have launched herself across the road. I have examined all of these words used to describe how she made her way across the road. Despite the contention of counsel for the Claimant that these words are inconsistent, I did

not find the essence of these words to be so divergent as to connote totally different meanings. It stands to reason that the Claimant and her companions must have been moving swiftly in order to catch the bus from which the driver had beckoned to them, whether it was a dart, a step or launch does not affect the main issue in contention.

[29] If I were to accept the Claimant's account, I would have to find that this JUTC bus was in fact overtaking at a time when both lines of vehicles had stopped to allow the Claimant and her companions to cross the road and that it was while overtaking he swerved the vehicle, presumably to the left, and in so doing collided with the Claimant. The bus would also have had to overtake the vehicles that had stopped to allow her to cross the road. It seems to me that the bus would have had to swerve to avoid not only her and her friends but also the Coaster bus from which the driver had beckoned to the Claimant to cross the road.

[30] If the Defendant's version were to be accepted I would have to accept that the bus was travelling at some 15-20 kilometres per hour when not one or two but three girls stepped out or darted out or launched out into the road immediately after the last car had passed them, without being aware of this large bus which was a mere 4 -5 feet away from them. The Defendant's contention is that they did not notice the bus because they were in a haste to catch the bus from which the driver had beckoned. Although this is not impossible, it seems rather unlikely as 4 to 5 feet is in fact a short distance and one would have expected that if a bus of this size was so close to them they would have not only seen it but also heard it and appreciated its presence.

[31] On both accounts, the Claimant was still in the left lane heading down Constant Spring Road when she was hit. Initially, it seemed to have been the Defendant's case that he only swerved once, in fact it had been suggested to the Claimant that the only swerve the Defendant made was to the right. However, during cross-examination Mr. Beersingh admitted that after making this first swerve he

had to swerve back into his correct lane. It is Mr. Beersingh's evidence that his vehicle came to a stop a little before reaching Charlton Road. On the Defendant's version, Mr. Beersingh would have first swerved in the direction in which the girls were moving presumably to avoid them. In order for him to end up just above Charlton Road, he would have had to make a second swerve back to his correct side of the road, which would be to his left and this would have been done whilst the Claimant was on the ground in the road. This seems somewhat incredible.

[32] One thing that is clear is that the injuries sustained by the Claimant were by no means severe. I find it difficult to accept that the Claimant, having darted out into the road at a time when the bus was basically upon her, only sustained relatively minor injuries, in fact some of the injuries sustained were caused when she fell as opposed to when the bus collided with her person. On the Defendant's account I would have expected there to be more serious injuries. I find the Claimant's account to be more consistent with the nature of the injures and with the truth. On a balance of probabilities, I find the Claimant's version to be more credible. I therefore reject the Defendant's contention that the Claimant stepped or darted across the road when the bus was just 4 to 5 feet away from her. I find it more probable than not that the driver was overtaking the vehicles that had stopped to allow the Claimant to cross the road and it was whilst overtaking that he saw the danger and swerved and this is when his vehicle came into contact with the Claimant.

[33] I still have to consider whether in those circumstances the Defendant would have been negligent. There was no indication given in evidence on either side as to the speed limit in that area. The Claimant gave no evidence as to the estimated speed at which the Defendant's bus was travelling which was not altogether unexpected as she was below the age that one would expect a person to appreciate driving speed and also because she said she did not see the bus before it collided with her. The only evidence on that issue emanates from Mr. Beersingh who testified that he had been travelling at some 15 to 20 kilometres per hour, agreeing that he was barely moving. At such a speed I could not help

but wonder why then did Mr. Beersingh not stop immediately when he apprehended the dangers ahead. Could it have been that he was not paying sufficient attention to the road so as to appreciate the dangers ahead. He said that prior to the collision he had noticed the girls in their school uniform from a distance of some twenty feet away. If he was keeping a proper look out he ought to have noticed that the driver of the Coaster bus that had stopped was signalling to the girls to cross and that vehicles had already stopped to facilitate the crossing of these girls. I am therefore of the view that he was not keeping a proper lookout and therefore failed to take sufficient steps to avoid the accident. I therefore find as a fact that Mr. Beersingh, in his capacity as servant of the Defendant was negligent.

[34] In accepting the Claimant's version, I have found that a line of vehicles did in fact stop in front of the Defendant's bus in order to allow the Claimant to cross over. Hence, she must have commenced crossing the road around the time that Mr. Beersingh commenced the process of overtaking. The question therefore is whether she had a duty as a user of the road to pay attention to this. The Road Traffic Act also places a duty on pedestrians to be cautious in their use of the road. In the case of a child the law does expect and accept a lower standard of care and an act which would constitute contributory negligence on the part of an adult may fail to do so in the case of a child or a young person.

[35] In the 10th edition of Charlesworth and Percy on Negligence at page 182 paragraph 3-28 the authors explained with respect to the degree of care to be expected in the case of a child, the following:

> *"Accordingly, while the fact that the claimant is a child does not prevent a finding of contributory negligence, the crucial points are the child's age and understanding. Infancy, as such, is not a "status conferring right", so that the test of what is contributory negligence is the same in the case of a child as of an adult. That test is modified only to the extent that the degree of care to be expected must be apportioned to the age of the child. The degree of care it is appropriate to expect of a child is a matter of fact for decision on the evidence in the particular case."*

[36] I find the case relied on by the Claimant, **Gough v Thorne**, to be particularly instructive. This Claimant at the time was the same age as the Claimant in that case and had been crossing a road also at the beckoning of a driver for her and her siblings to cross. Lord Denning disagreed with the decision of the judge who found that the plaintiff was guilty of contributory negligence and went on to indicate the circumstances under which a judge should find a child contributorily negligent which are as follows:

> *"A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. Judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her safety: and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense of the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.*
>
> *In this particular case I have no doubt that there was no blameworthiness to be attributed to the plaintiff at all. Here she was with her elder brother crossing a road. They had been beckoned on by the lorry driver. What more could you expect the child to do than to cross in pursuance of this beckoning? It is said by the judge that she ought to have leant forward and looked to see whether anything was coming. That indeed might be reasonably expected of a grown-up person with a fully developed road sense, but not of a child of 131/2."*

[37] In the instant case I have accepted that both lanes of traffic had stopped to allow the Claimant to cross. I have also accepted that this was at the instance of a beckoning adult. If the Claimant were an adult she would have been expected to at least look beyond the cars that had stopped but in the case of a 13 year-old youth, I think that would be an onerous expectation. I do not find her negligent in failing to appreciate the presence of the bus which would have been behind the line of vehicles at the time she was attempting to cross. The Defendant is wholly liable for the accident. Judgment is for the Claimant.

ASSESSMENT OF DAMAGES

[38] The Claimant has pleaded that she sustained the following injuries:

I. Capsulitis to the metacarpo-phalangeal joints (MCPJ's) of the right foot;
II. Non-united undisplaced, avulsion fracture of the medial collateral ligament of the head of the proximal phalanx of the fourth toe;
III. Healed avulsion fracture of the medial collateral ligament of the head of the proximal phalanx of the third toe;
IV. Subjective anterior knee pains;
V. Memory lapses with behavioural changes;
VI. Mild clinical depression; and
VII. Mild post-traumatic stress disorder.

[39] The Claimant relied on a medical report from Dr. Phillip Waite who has set out all the injuries referred to above save for the mild clinical depression and mild post-traumatic stress disorder. The Claimant has also relied on a report from psychologist Dr. Sidney McGill who assessed the Claimant on November 9, 2008 as experiencing increased recurring fear of dying and the repulsive prospect of going into Kingston and of showing signs of mild clinical depression. This Doctor also spoke of her having signs of mild post-traumatic stress disorder and recommended that she receive ongoing counselling. However, Dr. Terrence Bernard, a consultant psychiatrist also examined the Claimant and although he did so several years post the accident on September 10, 2015 he concluded that during the three-year period following the accident she experienced symptoms of anxiety that fell short of a diagnosis of post-traumatic stress disorder by one criteria and that she continues to have anxiety symptoms to this day. He diagnosed her as suffering from anxiety disorder not otherwise specified.

[40] There is a conflict between the psychologist and the psychiatrist in respect of whether she suffered from post-traumatic stress disorder. I am of the view that this type of assessment is more in keeping with the expertise of the psychiatrist

and so I prefer the findings of Dr. Bernard to that of Dr. McGill and find that the Claimant's condition fell short of post-traumatic stress disorder.

[41] Counsel for the Defendant has submitted that the Claimant has not relied on a competent medical expert as the complaints fall within the ambit of psychiatric injuries which can only be diagnosed by a psychiatrist and Dr. Waite, being an orthopaedic surgeon is not competent to speak to psychiatric injuries. On this point she relied on the case **Williams v Bhoorasingh** reported in the 1st Edition of Harrison's Assessment of Damages at page 117 where the court was of the view that it had not received the necessary assistance where only the evidence of medical experts was provided when the conclusion was that of an emotional disorder. Counsel also pointed out that an anxiety disorder is to be distinguished from behavioural changes and memory loss and that the Claimant having failed to plead that she suffered from "anxiety disorder", should not be awarded a sum for "anxiety disorder".

[42] There is some merit in these arguments in the sense that Dr. Waite, being an orthopaedic surgeon is not qualified to speak on an issue of behavioural changes and memory lapses. This is an issue dealing with emotional disorder and so ought to be determined by a psychiatric expert. I therefore place no weight on the opinion of Dr Waite in that regard. It is clear that the specific nature of what Dr. Bernard assessed the Claimant as having suffered was not specifically pleaded. The question therefore is whether the Claimant's failure to plead this should result in no award being made for that injury.

[43] This is an area touching and concerning General Damages. It has always been the law that Special Damages must be specifically pleaded and in fact rule 8.3(5) of the Civil Procedure Rules, 2002 (the CPR) mandates a Claimant to include or attach to the Claim Form or Particulars of Claim, a schedule of any special damages claimed. In respect of General Damages there is no such principle of law nor is there any similar provision in the CPR. General Damages are presumed to flow from the wrong inflicted and so need not be specifically

pleaded. This, however does not mean that a party should not set out their case so that the other side is aware of what they have to meet. The case **McPhilemy v Times Newspapers Ltd. and others** [1999] 3 All ER 775 has been cited in many Jamaican cases dealing with how pleadings ought to be drafted in accordance with the CPR and provides a useful guide as to how to approach such pleadings which I have set out below:

> *"The need for extensive pleadings include particulars should be reduced by requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witlessness statement will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleading are still required to marl out the parameters of the case that is being advances by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. However, a party is required to mark out the parameters of their case."*

[44] Although the Claimant has not pleaded that she suffered "anxiety disorder", she had pleaded that she suffered "mild clinical depression" and "mild post-traumatic stress disorder". This would have made the Defendant aware that the injuries alleged extended beyond physical injuries. The Claimant's pleadings, taken with the witness statement and the documents attached to the Notices of Intention to Tender Hearsay Evidence Contained in a Statement would have given the Defendant sufficient notice as to the full extent of what the Claimant was alleging by way of emotional disorder. I am therefore prepared to accept the finding of Dr. Terrence Bernard and find that the Claimant suffered from anxiety disorder and in arriving at an appropriate award, this will be taken into account.

[45] Counsel for the Claimant relied on the case **Hope Brown v Glen Gooden et al** Suit No. C.L. 1996 J 181 found at page 282 of Volume five of Khan's Collection of Personal Injury Cases. In that case the plaintiff suffered abrasions above the right eyebrow, pains over lower abdomen, undisplaced fracture of the right acetabulum, an

undisplaced fracture of the left superior and inferior public rami and fracture of bone of second and third metatarsals of right foot. She was assessed as having a permanent partial disability of five percent. He also found that she was likely to develop early osteoarthritis in her right hip because of the fracture of the acetabulum. In that case the plaintiff was awarded $680,000.00, a sum which now converts to $2,800,397.43.

[46] Counsel for the Defendant relied primarily on two authorities:

Errol Finn v Herbert Nagimesi and Anor. reported at page 66 of Volume four of Khan's Collection of Personal Injury Cases where the plaintiff suffered from a compound fracture of 5th metatarsal of left foot and a wound at fracture site requiring stitches. A sum of $64,365.00 was awarded in May 1994 which now amounts to $617,040.44.

Lincoln Swaby v The Attorney General for Jamaica reported at page 56 of Volume three of Khan's Collection of Personal Injury Cases, where the plaintiff sustained multiple injuries to her left lower limb including fractures of the 3rd and 4th metacarpals and was left with a final disability of 5% of the function of the affected limb. He was awarded a sum of $20,000 in July 1990 which converts to $788,832.48.

[47] There are similarities with respect to all the cases relied on in the sense of injury to the toe and areas surrounding the toes. All the cases relied on provided some guidance. The case relied on by the Claimant seems similar in some respects however is to be distinguished based on the fact that that Claimant was diagnosed as having a five percent permanent disability and was one hundred percent temporarily disabled for a period. It is noted that the Claimant in that case was admitted to the hospital and she remained in traction for three months before being discharged. Moreover, she was also diagnosed with a possibility of developing early osteoarthritis. This case appears to be about twice as severe as

the instant case whereas the **Errol Finn** case appears to be far less severe. Although in the **Lincoln Swaby** case the Claimant was left with a 5% permanent disability, this is the oldest case and I am somewhat hesitant to rely on it because older cases do not always reflect current trends. In the Privy Council decision of **Seepersad v Theophilus & Capital Ins. Ltd.** UKPC 86 of 2002), Lord Carswell pointed out the caution that ought to be exercised in following awards which are old.

> *"Their Lordships entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms."*

[48] I do find however that all the cases relied on in respect of the physical injuries, although not directly applicable provide a range for my consideration and taking into account the nature of the injuries sustained by the Claimant herein I am of the view that the sum of $1,400,000.00 is an appropriate figure for the physical injuries suffered. In relation to the anxiety disorder no case was presented for my consideration. However, I have considered the case **Angeleta Brown v Petroleum Company Limited and Juici Beef Limited** 2004 HCV 1061 (unreported) in which the Claimant was found to be suffering from major depressive disorder and PTSD. An award was made which now updates to $775,821.19. The instant case appears to be less than half as severe. I find an additional figure of $300,000.00 is an appropriate award.

[49] Special Damages must be specifically proven. The Claimant has tendered into evidence receipts to substantiate the sum of $25,000.00 as the cost of the medical report so this has been proved by way of the receipt. Receipts amounting to $21,600.00 have also been provided as the cost for further medical

expenses. A sum of $70,000.00 was claimed for the psychological report however, no receipt tendered in support thereof.

[50] In respect of transportation, although she indicated that she spent $31,000.00 for transportation and that she intends to rely on receipts demonstrating these payments, only two receipts were produced amounting to the sum of $6000.00. It has been expressed time and time again that in Jamaica expenses incurred for transportation do not have to be proven by receipts because in many instances no receipt is provided. It is however different in the instant case as the Claimant has indicated that she has receipts but has failed to provide them. Hence only the figure of $6000.00 has been proven.

[51] The Claimant has also sought a figure for future medical care based on the recommendation of the psychiatrist. That recommendation was made in 2015 and there is no evidence that the Claimant has been subject to any other medical care. This is now three years later. It would have been prudent to have a more recent opinion as to whether that is still necessary at this stage. I make no award for future medical expenses.

[52] In respect of Special Damages, the sums proven are as follows:

Medical Expenses	-	$21,600.00
Cost of Medical Report	-	$25,000.00
Transportation	-	$6000.00
Total	-	$52,600.00

My orders are as follows:

1. Judgment for the Claimant
2. Special Damages assessed at $52,600.00 with interest at a rate of 3% from January 22, 2008 to February 19, 2018.
3. General Damages assessed at $1,700,000.00.00 with interest at a rate of 3% from October 20, 2011 to February 19, 2018.
4. Cost to the Claimant to be agreed or taxed.