[2021]JMSC Civ. 62

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV00830

BETWEEN	**LUCILLE MOORE**	**CLAIMANT**
AND	**STEPHEN POWELL**	**1ST DEFENDANT**
AND	**RESTAURANTS OF JAMAICA LIMITED**	**2ND DEFENDANT**

IN OPEN COURT

Mr. Everal McLeod instructed by Kinghorn and Kinghorn for the Claimant

Ms. Katherina D Watson instructed by Nunes, Scholefield, DeLeon and Co for the 2nd Defendant

Heard: January 21st, 2021 and March 26th, 2021

Assessment of damages – negligence – res ipsa loquitur – contributory negligence – duty of care – pain and suffering – loss of amenities – motor vehicle collision – personal injuries proved – expert's report

HUTCHINSON J

INTRODUCTION

[1] On the 22nd of October 2014, the Claimant, Ms Lucille Moore travelled to Old Harbour, St Catherine in order to meet a relative. While walking along East Street, she was involved in a collision with a motor vehicle which was owned by the 2nd

Defendant and being operated by the 1st Defendant. As a result of the collision, Ms Moore reported sustaining injuries for which she later sought medical attention.

[2] This claim was subsequently filed on the 29th of February 2016 in which she seeks the following;

a. Damages for negligence
b. Interest pursuant to the Law Reform Miscellaneous Provision Act.
c. Costs

Claimant's Case

[3] Ms Moore provided a statement in this matter which was permitted to stand as her evidence in chief. Her account disclosed that she is 78 years old and on the 22nd of October 2014, she had travelled to Old Harbour by bus to meet with a relative. On arrival at her destination she exited same and sought to cross the road in order to get to the bus terminus on the other side.

[4] She said that while walking on the left side of the road she felt an impact to her back and fell to the ground. She then saw a van and was assisted off the ground by the driver who then gave her a ride to terminus in order to search for her relative but she did not locate him. She said that she was then left by the driver on a concrete bench at the terminus and had to be assisted back to her terminus by a passer-by, where she took a bus home.

[5] She stated that she began experiencing severe pain during the night and sought medical attention at the Kingston Public Hospital the following day. She was examined and treated but continued to experience pain which resulted in visits first to Dr Jones and then to Dr Thompson in May of 2015. She explained that her visit to the latter was as a result of ongoing pain in the back of her legs. She was examined by Dr. Thompson who made his diagnosis (this is dealt with in detail in the paragraphs 15 to 17 of the judgment). She was then referred by him for

sessions with a physiotherapist. She said she had a total of 3 sessions as she was not able to cope with the pain involved in the process.

[6] She was cross-examined and it was highlighted that in her Particulars of Claim she had indicated that she walked to the front of the bus from which she had disembarked before attempting to cross the road an account which Counsel suggested was different from her evidence in chief and she denied that she had said this. It was also suggested to her that she had walked into the path of the van and not the other way around and she denied that this was true.

[7] It was suggested to her that the van had made contact with her right side and not her back and that this was the reason the doctor at KPH had noted blunt trauma to her right side and she insisted that this was not correct. She was asked about the layout of the town and she drew a diagram which was admitted into evidence as Exhibit 6. She placed markers showing where the bus had stopped to let her off by the market, the location of the police station, the area on the roadway where she stated she had been hit and the lanes of traffic which traversed the area.

[8] It was suggested to her that after she had walked into the path of the van she had been assisted to her feet by the driver and she agreed he had helped her up. She denied that the driver had offered to take her to the doctor and she had refused to go. She also denied being asked by the driver if she had not seen that the filter light was green and she insisted that no such conversation took place. She also insisted that it was not true that after the driver took her to look for her relative that he drove her back to the terminus and offered her his telephone number. She was asked if she had seen any other doctor in between seeing Dr Jones and Dr Thompson and she indicated that she had but accepted that this was not correct after she reviewed her statement.

Defendant's Case

[9] In an amended defence it was acknowledged by the 2nd Defendant that the driver of the vehicle, Stephen Powell, had been acting as their servant and/or agent at

the relevant time. In his statement which stood as his evidence in chief, Mr Powell stated that on the day of the incident he had been travelling along East Street with a friend who was seated in the front passenger seat of his vehicle. He described the day as being fair with good visibility and the road surface was dry with a 'good amount' of traffic on the road which he described as congested. In cross-examination he clarified that the roadway was congested with both vehicular and pedestrian traffic.

[10] He explained that there were three (3) lanes on the roadway, two (2) of which carried vehicles travelling in the opposite direction and the third was a filter lane for vehicles turning right. He said that while waiting in the filter lane there were two vehicles ahead of his at which point the filter light changed to green. He stated that he began moving off at a speed of 15 kmph when a lady walked into the front fender of the Townace and fell to the ground. He went on to explain that the lady walked from in between two vehicles to his left. He stated that he did not see her until she walked into the left side of his vehicle but in cross-examination he stated that he felt the impact of the vehicle with the Claimant but did not see her.

[11] He said that he stopped the vehicle immediately and exited same whereupon he saw the Claimant on the ground with her body positioned at an angle to the front left section of the vehicle and 1 of her legs slightly under it but the vehicle itself was not on her. He said that he asked the Claimant if she did not see that the filter light was green and she said she hadn't. He stated that with the assistance of someone else he managed to raise her to her feet and observed that she had no cuts or bruises but she told him she had hit her knee. He outlined that he then sought to persuade the Claimant to allow him to take her to the doctor but was rebuffed by her. He said after transporting her to look for her family member he took her back to the bus stop where he gave her $1500 and his number before leaving

[12] He was cross-examined about his speed and disagreed that if he had been travelling at 15 kmph he could have stopped before the collision. He also denied

that he had not been keeping a proper lookout. He was asked if the Claimant had run into the vehicle and he stated that she had walked and when challenged on his earlier account where he had stated that he had not seen her he explained that based on her age he did not think she had run.

[13] He was asked if it was immediately as his vehicle had come into contact with the Claimant that he saw her and he replied that he saw her when he came from the vehicle, went around to the front and saw her on the ground. He was asked if when the collision occurred he had not realised that he had hit a pedestrian and he replied that it was the passenger beside him who spoke he just felt the impact and knew something happened. It was suggested to him that he had in fact been travelling faster than he had accepted and he denied that he was.

Medical Evidence

[14] The Claimant provided two medical reports in this matter, the first of which was produced from the Kingston Public Hospital. This document revealed that she was seen on the 23rd of October 2014 and the following were noted;

a. 70 year old female
b. History – Tenderness to right groin/thigh
c. Diagnosis – Blunt trauma to right thigh

[15] The second report was produced by Dr Ijah Thompson. He outlined his qualifications as a Bachelors in Medicine and Surgery. He first saw the Claimant on the 20th of May 2015 where he noted the following;

a. Pain to her back radiating to her legs,
b. Intermittent pain to her neck
c. Pain score of 6 /10

In a follow up visit 29th September 2015 the doctor found that while she still suffered persistent pain in the areas referred to at (a) and (b) her pain score was reduced to 5/10.

[16] His assessment of her disclosed;

a. Chronic back strain with radiculopathy associated with multilevel disc herniation and bulges
b. Chronic strain to her neck

[17] His prognosis in respect of her injuries stated that the Claimant's injuries are serious with permanent impairment related to her disc injuries. He also opined that the chronicity and nature of her symptoms are unlikely to resolve fully and he indicated that by way of future medical care the Claimant was referred for physiotherapy and orthopaedic care.

Damages

[18] The Claimant seeks special as well as general damages for her suffering and under special damages a number of receipts for medical expenses were agreed between the parties which amounted to the sum of JMD $98,000.

Claimant's Submissions

[19] It was submitted by Mr Mcleod that in this matter liability for the accident in question lies solely with the Defendant. He noted that on an examination of the cases, the following facts are not in dispute or are admitted:

(i) On the 22nd of October 2014 there was a collision between the Claimant and the Defendant's motor vehicle registration number 6890 GG.
(ii) The vehicle was being driven by the 1st Defendant, the servant and/or agent of the 2nd Defendant.
(iii) The Plaintiffs version and the Defendant's version are diametrically opposed.

[20] Counsel argued that the doctrine of Res Ipsa Loquitur is applicable in this case and that this is borne out by an analysis of the facts. He made reference to a number of authorities on negligence and stated that the starting point is the locus classicus of ***Boss v Litton*** *[1832] 5 C & P 407* where it was declared —

> *"All persons, paralytic as well as others, have a right to walk on the road and are entitled to the exercise of reasonable care on the part of persons driving carriages upon it"*

[21] He submitted that the House of Lords case of ***Baker v Willoughby*** *[1969] 3 All ER 1528* is also instructive on this area as the Law Lords held as follows;

> *There were two elements in an assessment of liability, causation and blameworthiness. A pedestrian had to look both sides as well as forwards. He was going at perhaps three miles an hour and was rarely a danger to anyone else. A motorist had not got to look sideways and if he was going at a considerable speed must not relax his observation otherwise the consequences might be disastrous. It was quite possible for a motorist to be very much more to blame than the pedestrian.*

[22] Mr McLeod commended to the Court the decision of Thompson James J in ***Jowayne Clarke and Anthony Clarke v Daniel Jenkins*** *C L 2001/C211* in which she adumbrated the relevant law in circumstances such as these as follows;

> *A driver of a vehicle on the road owes a duty 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……It is a question of fact in each case whether or not the driver had observed the above-stated standard of care required by him.*

[23] Counsel also made reference to the provisions of The Road Traffic Act, specifically Section 51(2) where it was provided as follows;

> *(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.*

[24] Mr McLeod also asked the Court to consider the decisions of Lennox Campbell J in the decision ***Pamella Thompson etal v*** **Devon Barrows etal** C L 2001/T 143 and McDonald Bishop J, as she then was in ***Cecil Brown v Judith Green and***

Ideal Car Rental *2006HCV02566*, where the Courts considered the meaning of Section 51(2). He highlighted that McDonald — Bishop J having been referred to the provisions of the Road Traffic Act as well as the common law declared :

> *It is clear that there is indeed a common law duty as well as a 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',*

Counsel submitted that this statement of law was affirmed by the Learned Judge in the later decision ***Jehoida Buchanan v Adrian Smith and Phyliss Hinds,*** *Claim No. 2010HCV04702*, which was delivered on the 16th September 2013.

[25] Mr McLeod submitted that the singular issue that falls for determination is whether on the evidence presented the Defendant is liable for the collision? In his submissions on this issue, Counsel asserted that the law is clear that a duty of care is owed to pedestrians as users of the road. He stated that these duties include, keeping a proper look out, travelling at a safe rate of speed in all the circumstances, and doing all that is possible to avoid a collision. He argued that even on the Defendants case there was a clear admission of liability.

[26] Mr McLeod submitted that the defendants account could be summarised as stating that while Mr Powell was traveling at a 'crawl' the Claimant managed to travel an entire 3-4 feet, without detection by him and thereafter walked into the left fender of his vehicle. He asked the Court to consider the speed of 15 kmph provided by the Defendant and asserted that this pace could be achieved by simply removing one's foot from the brake pedal when the vehicle is placed in drive and all other brakes are disengaged. He argued that if the Defendant was travelling at such slow a pace, it would have been easy for him to have observed a pedestrian who had been positioned in front of a vehicle to the left of him as his vehicle proceeded forward.

[27] Mr McLeod contended that the cumulative effect of the Defendant's account begs the question, how was the Defendant unable to see the Claimant in order to avoid the collision and why was he unable to stop to avoid same? He submitted that the

obvious and inescapable answer is that the 1st Defendant's account is untrue and that even on his account it is clear that he was negligent as he failed to keep a proper look out for pedestrians and was in fact travelling at a faster rate than he stated.

[28] He submitted that based on the evidence presented in this case, the doctrine of res ipsa loquiter is applicable and he relied on the decision of ***Bennett v Chemical Construction (G.B.) Ltd.*** *[1971] 1 W.L.R. 1571* in support of this position, where it was stated as follows:

> "*In order to rely on the doctrine of res ipsa loquitur, the Claimant must establish two things:-*
>
> i. *That the thing causing the damage was under the management and control of the Defendant or his servants; and*
> ii. *That the accident was of such a kind as would not, in the ordinary course of things, have happened without negligence on the Defendant'*

[29] Mr McLeod submitted it has been agreed that the thing which caused damage to the Claimant was in the control of the 1st Defendant, and on the facts of the Defendants own case, the accident could not have occurred without negligence on his part.

[30] Counsel acknowledged that when considering the plaintiff case, the question must be asked, based on her evidence how was she negligent and he asserted that the answer is she wasn't. He submitted that on an examination of the respective accounts, there is a preponderance of evidence which reveals that the 1st Defendant was negligent in the operation of the 2nd Defendant's motor vehicle and he asked that the Court finds in the Claimant's favour on the issue of liability.

Damages

[31] On the question of what damages if any are payable, Mr McLeod argued that Special Damages have been specifically proven in the sum of $98,300.On the issue of General Damages, he submitted that the evidence had made out a claim

for an award under the headings of Pain and Suffering and Loss of Amenities. Counsel argued that there was no challenge to the injuries sustained by the Claimant as stated in the medical report from Dr. Ijah Thompson and from Kingston Public Hospital. He made reference to the injuries outlined above and argued that an appropriate award would be the sum of $2,000,000.00.

[32] He asked the Court to take note of a number of authorities to which he made reference as providing a useful guide for the appropriate award of damages in the instant claim. The first decision is ***Kimesha Thomas v Sylvester Sydney Rose t/a Classic Food Wholesale,*** *Claim No. 2012 HCV 02716* decided on January 24, 2014 (CPI 81.1). Mr McLeod stated that in this case the Claimant suffered severe swelling and tenderness to her lower back as well as lower back strain but was not left with any permanent injuries. He noted that the sum awarded by the Court was 1,200,000.00 which updates to 1,612,823.67 using the December 2020 CPI (109).

[33] He then made reference to ***Kavin Pryce v. Raphael Binns and Michael Jackson*** *[2015] JMSC Civ. 96* in which Mr. Pryce's dominant injuries were cervical strain, lower back strain, soft tissue injury to his left thigh and left knee sprain. He stated that in that claim, the Claimant was awarded $1,500,000.00 in May 2015 (85.9). which updates to $1,903,000 using the same CPI.

[34] Mr McLeod concluded his submission by asking the Court to consider the dicta of Campbell J.A in the decision of ***Beverly Dryden v Winston Layne*** *SCCA 44/87 (unreported) delivered June 12 1989,* where he stated:

> "…*personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards."*

[35] He noted that the Claimant was also seeking interest on the general and special damages at the rate of 3% from the date of service and incident respectively to the date of judgement as well as costs in the amount of $200,000.00.

Defendant's Submissions

[36] In submissions made on behalf of the 2nd Defendant, Ms Watson agreed that it was not in dispute that;

a. The Claimant was a pedestrian;.
b. The 1st Defendant was at all material times the driver of motor vehicle registration number 6890 GG;
c. The 1st Defendant was the servant and or the agent of the 2nd Defendant;
d. The 2nd Defendant was the owner of motor vehicle registered 6890.
e. The incident occurred in the vicinity of the traffic light in Old Harbour in the parish of Saint Catherine.

[37] She submitted however that the following factors remained in dispute;

a. Whether the incident occurred in the manner as alleged by the Claimant;
b. Whether the incident was caused by and/or contributed to by the negligence of the Claimant; or
c. Whether it was caused and/or contributed to by the negligence of the 2nd 's Defendant driver;
d. Whether the Claimant suffered injuries and loss as a result of the incident;
e. Whether the injuries and loss suffered, if any, were caused or materially contributed to by the Claimant's and/or the 2 nd Defendant's driver's actions; and;
f. The Quantum of damages, if any, recoverable by the Claimant.

[38] She identified the issues to be determined as being broken down into three limbs;

i. the credibility of the parties;
ii. the probability of the respective accounts; and
iii. the physical or extrinsic evidence if any.

[39] On the issue of credibility, Ms. Watson submitted that there are two versions of the Claimant's case. She stated that the first version was found in the Particulars of Claim, where the Claimant had alleged that she had disembarked from a bus along

East Street with the intention to cross the street. That she walked to the front of the bus which was stationed at the stoplight that was on red and then positioned herself to cross. As she proceeded to cross East Street, the driver of the 2nd Defendant's vehicle that was travelling along the said street via the filter lane, failed to keep a proper look-out and caused the motor vehicle to collide with her.

[40] Counsel submitted that in her examination in chief, however, the Claimant stated that she was walking along East Street to the bus terminus when she met in an accident. She alleged that she was walking on the left-hand side heading to the bus terminus when she felt an impact to her back and fell to the ground.

[41] Ms Watson submitted that in comparison, the 2nd Defendant provided one version from the inception of the claim to this point. She asserted that it was the 2nd Defendant's case that it's driver was travelling along East Street and had come to a stop in the right turning lane at the stoplight with the intention of turning right on the green arrow at which point there were about two (2) vehicles ahead of him. On the appearance of the green filter arrow, the driver proceeded and sought to complete his manoeuvre when the Claimant suddenly and without warning stepped out from behind two vehicles on the left into the path of the motor vehicle.

[42] She asked the Court to accept the 2nd Defendant's version of events which she described as clear and consistent when compared to the Claimant whose account she asserted was variable and incoherent. She submitted that on an examination of the evidence; the 2nd Defendant's version should be accepted on a balance of probabilities as being more credible and more probable. She also argued that the extrinsic evidence is more consistent with the 2nd Defendant's version than the Claimant's account.

[43] In respect of the issue of credibility she made reference to the decision of ***Alvan Hutchinson v Imperial Optical Limited and Hugh Foreman*** *C L H035/1999* in which McDonald-Bishop J stated as follows;

> "*It is the Claimant who must satisfy the Court on a balance of probabilities that he has proven the allegation of negligence against the Defendant. It has to determine which of the accounts put forward by the Claimant and the Defendant is more believable. Credibility plays a pivotal role in this exercise, and the Court in assessing credibility will have due regard to the demeanour of the witnesses."*

[44] She also cited the decision of ***Cranmer King v Jamaica Public Service Limited & Leslie Bryan*** *C L K 013/1984* (June 23, October 20, 1988, June 5, 1989 and April 3, 1990) in which Bingham J highlighted the importance of the credibility of the witnesses in finding that the Plaintiff's inconsistency had undermined his reliability as a witness.

[45] She submitted that the major question to be decided by the Court is how the incident occurred and whether the Claimant stepped into the path of the 2nd Defendant's vehicle without due care for her own safety at a time when it was unsafe so to do. She argued that the Claimant's version on examination in chief was materially different from the version put forward in her Particulars of Claim and submitted that the 'new version' is either a recent fabrication or the result of a memory lapse and asserted that in either case her account is to be rejected,

[46] In relation to Exhibit 6, Ms Watson submitted that it failed to provide any real assistance to the Court as it was incoherent and unhelpful and all that could be gleaned from it, is that the Claimant was not on the left side of the road as she sought to suggest in her Witness Statement at the time of the incident.

[47] In respect of what she sought to highlight as the witness's conflicting evidence on the presence of a filter light on the scene, Counsel submitted that the Claimant sought to muddy the waters by asserting that she did not understand what was meant by "filter lane" even though it was evident from her previous responses that she did. She also asked the Court to note that there was no evidence from the Claimant that she had looked in both directions before attempting to cross the road.

[48] Ms Watson commended the evidence of Mr. Powell to the Court and argued that his evidence as to the speed at which he had been travelling was unchallenged. She also submitted that on an examination of the accounts given by the Claimant as well as the account of Mr Powell, it is more probable than not that the incident occurred in the filter land on East Street as he asserted.

[49] Under the heading of extrinsic evidence, Ms Watson submitted that based on the location of the injuries on the Claimant's body, the point of impact to the Claimant would be more consistent with the 2nd Defendant's version than with her own as advanced in her Witness Statement. She argued that the nature of the Claimant's injuries were more consistent with her crossing the road when she made contact with the vehicle than from being hit from behind.

[50] She made reference to the medical report from Kingston Public Hospital which noted that the Claimant attended for treatment a day after the incident. She highlighted the doctor's diagnosis of blunt trauma to the right thigh as well as the history reflected that she was hit by a van to her right thigh the night before her presentation at the hospital.

[51] Ms Watson submitted that if the Claimant had been hit from behind as she alleged the doctor would have found other injuries on examination to align with this contention and based on the mechanism of such an accident the Claimant would have sustained head injuries as a result of the force of a vehicle pushing her to the ground while caught off-guard. She argued that in this case, the Claimant had no such injuries.

[52] She made reference to the decision of ***Medine Forrest v Kevin Anthony Walker and Jhanelle Pitt*** *[2019] JMSC Civ. 24,* in which Rattray J. outlined the importance of the duty to put one's case and argued that the case as outlined in the Claimants witness statement was not pleaded and the Defendant was ambushed as his defence was in light of the pleadings.

[53] Counsel also sought to rely on a number of decisions on the issue of liability which include ***Roda Sam (previously Al-Sam) v Atkins*** *[20051 EWCA Civ. 1452* and ***Kayser v London Passenger Transport Board*** *[1950] 1 ALL ER 231*. She submitted that in the latter decision, although the Claimant was aware of a pedestrian crossing nearby, she took upon herself a higher standard of care in her use of the roadway by crossing in an intersection where at any time there would be vehicles turning or moving based on the traffic signal.

[54] Ms Watson contended that the facts of ***Roda Sam*** when examined most closely resemble the facts of the instant case, in that, the Claimant sought to cross a busy 3 lane roadway. She argued that the 2nd Defendant's driver being satisfied that persons lawfully entitled to cross the road were out of danger, was entitled to proceed and proceeded at such pace as would enable him to avoid being either dangerous or negligent.

Damages

[55] In respect of the claim for special damages, Ms Watson submitted that it had been agreed that these had been proved in the sum of $98,300.00. On the issue of general damages for the Claimant's pain and suffering and loss of amenities, she highlighted the report from KPH and asked the Court to note that the injury reported was blunt trauma to the right thigh for which tablets were prescribed.

[56] In respect of the report of Dr. Ijah Thompson she observed that the Claimant first saw Dr. Thompson seven (7) months post incident in May 2015 and highlighted that this visit was the first time the Claimant made any complaint of pain to her neck and pain to her back radiating to her legs. She submitted that although the doctor diagnosed the Claimant with chronic back strain with radiculopathy he did not indicate whether the radiculopathy was an age-related phenomenon or trauma related though he made veiled references to her advanced years.

[57] She submitted that Dr Thompson gave no reason or evidence to substantiate his findings, neither was there any explanation of the disc herniation at the levels noted

or disc bulges. She also questioned the importance of those findings in circumstances where she submitted he had seen the Claimant four (4) months earlier and had not noted same;

[58] Counsel argued that while Dr Thompson made certain assertions, his expertise is not that of an Orthopaedic Surgeon and she questions his statement that "the patient's injuries are serious, with permanent impairment related to her disc injuries", given his lack of expertise in orthopaedics being a ‘mere’ General Practitioner. She also submitted that he made no reference to whether he had the benefit of reviewing previous medical reports in order to provide a comprehensive opinion.

[59] Ms Watson contended that the Claimant's complaints of back and neck pains were inflated, exaggerated and untrue and that there was no causal link between the incident and the injuries noted by Dr. Thompson seven (7) months later. She asked that in the circumstances only the blunt trauma to the thigh complained of by the Claimant should be accepted as the only contemporaneous injured suffered as a result of the incident.

[60] She commended a number of decisions for the Court’s consideration, the first was ***Reginald Stephens v James Bonefield and anor,*** *CL 1992/S230*, delivered September of 1996, reported at pg. 212 of Khan, Vol. 4 in which the Claimant suffered an abrasion of the left leg, bruise to the right foot and experienced pain for four weeks following a motor vehicle accident. He was awarded $40,000.00 which when updated amounts to $275,949.36. In ***Derrick Munroe v Gordon Robertson,*** *[2015] JMCA Cith 38*, Counsel noted that that Appellant suffered soft tissue injuries with findings confined to . anterior chest and lower back. An award of $300,000.00 was made at the first instance and confirmed on Appeal in June 2015 (CPI 86.3). She asserted that this award now updates to $378,910.78 using the December 2020 CPI of 109.0.

[61] The final authority cited was ***Eric Ward v Lester Barcoo,*** *Suit No. CL1989/W245,* delivered May 29, 1991, which is reported in Harrison and Harrison at page 206. In that situation, the claimant suffered blows to the right foot and right side of the chest resulting in tenderness and pain in the lower back and was awarded $16,000.00. That award updates to $581,333.33 using the December 2020 CPI of 109.0.

[62] Ms Watson submitted that the injury suffered by the Claimant in ***Reginald Stephens*** is the most comparable injury to that which she asserts was sustained by this Claimant. She also argued that the decisions of ***Derrick Munroe*** and ***Eric Ward*** are not useful to the Court in circumstances where her only credible injury was blunt trauma to the right thigh and tenderness to the groin and there was no evidence of assigned permanent partial disability or whole person disability rating assigned.

[63] She submitted that the sum of $300,000.00 would be reasonable for pain and suffering and loss of amenities and any costs awarded should be assessed using the Parish Court Tariff of Fees. She contended that in spite of this indication based on the state of the evidence Judgment ought to be entered in favour of the 2nd Defendant with costs payable by the Claimant.

Issues

[64] The issues which arise for determination in this claims are as follows;

(i) Did the Defendant owe a duty of care to the Claimant?

(ii) Did the Defendant breach his duty of care to the Claimant?

(iii) Was the collision caused by the Defendant's breach of his duty of care?

(iv) Did the claimants suffer injuries and damages as result of the Defendant's breach of his duty of care?

(v) Was the Defendant solely responsible for the injuries to the claimants or did she fail to take reasonable steps to avoid or minimize injuries to herself?

(vi) What is the quantum of damages, if any, which would be assessed?

Law

[65] The principles in relation to the law of negligence were laid down in the locus classicus of ***Donoghue v Stevenson*** *[1932] UKHL 100* where Lord Atkins in his judgment stated as follows:

> *"a reasonable care must be taken to avoid an act or omissions which a reasonable man can foresee may cause injury to a neighbour".*

This principle was judicially considered by our Court of Appeal in ***Glenford Anderson v. George Welch*** *[2012] JMCA Civ.43* in which Harris JA stated at paragraph 26 of the judgment as follows:

> *"It is well established by authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty ....."*

[66] In ***Donoghue v Stevenson*** (supra), the care that is to be taken is based on the foreseeability test and the standard is that of the ordinary reasonable man placed in the same circumstances as the defendant. As such in cases involving persons who are road users the standard of care is that of the ordinary and reasonable road user.

[67] Section 32 (1) of the Road Traffic Act imposes a general duty on all motorist to drive with due care and attention for all other road users. It states:

> "*if any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence"*

[68] Section 51 of the Act imposes specific duties on motorists and section 51(2) cautions every driver that they have a duty to take necessary action to avoid an accident. It states;

> "*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."*

[69] In ***Roda Sam***, a decision cited by Counsel for the 2nd Defendant, the relevant principles in respect of negligence by a motorist were also considered. The facts in that case were that on the day of the incident, the Defendant was driving her Landrover in a westerly direction. When the accident happened she was in the offside/outside of the two lanes going in her direction, having pulled into that lane from the nearside lane.

[70] Just short of the accident there were road markings which reduced the lanes travelling west to a single lane to enable traffic travelling in the opposite direction to turn right. In the nearside lane was a row of stationary vehicles. The Defendant was overtaking at up to 20 miles per hour. At the front of the row of stationary vehicles, in the nearside lane, was a large box transit van which had apparently stopped to allow the Appellant and perhaps one or two other pedestrians, to cross the road in front of it. The Defendant could not see through the transit van as she was overtaking it as she had changed lanes from the nearside to the offside in order to overtake the van and other stationary traffic.

[71] As the Defendant's Landrover came level with the front of the transit van, the Appellant stepped out from the front of the van into the path of the Defendant's Landrover and she collided, it appeared, with its protruding left-side wing mirror, was knocked to the ground and suffered severe head and other injuries. In

considering the relevant principles for the Court hearing the matter on appeal, Lord May LJ stated as follows;

> ***'***……..*A negligence claim is habitually analysed compartmentally by asking whether there was (a) a duty of care; (b) breach of that duty and (c) damage caused by the breach of duty. But damage is the essence of a cause of action in negligence and the critical question in a particular case is the composite one, that is whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have suffered. As Lord Bridge of Harwich said in the Caparo case [1990] AC 605, 627:* ***'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.'*** *Lord Oliver of Aylmerton emphasised the same point in Murphy v Brentwood District Council [1991] 1 AC 398, 486 when he said:*
>
> ***'The essential question which has to be asked in every case, given that that damage which is the essential ingredient of the action has occurred, is whether the relationship between the plaintiff and the Defendant is such... that it imposes upon the latter a duty to take care to avoid or to prevent that loss which has in fact been sustained.'***
>
> ***"This question necessarily subsumes the question whether the acts or omissions of the Defendant caused the damage relied on."***(emphasis supplied)

[72] The issue of Res Ipsa Loquitur has also been raised on the part of the Claimant on the basis that she was struck from behind by a motor vehicle which was being driven by the 1st defendant at the relevant time. While she was unable to speak to the manner of the Defendants driving, apart from asserting that he failed to keep a proper lookout, it is her position that he would not have collided with her if he wasn't negligent in the operation of the vehicle. This position had been rebutted by Ms Watson who contends that the Claimant has in fact given evidence as to how the accident occurred and this principle of law should not apply.

[73] The application of this legal principle was examined by our Court of Appeal in the decision of ***Coke v Rhooms etal*** *[2014] JMCA Civ 54* where Brooks JA stated as follows;

> *In Shtern v Villa Mora Cottages Ltd and Another [2012] JMCA Civ 20, Morrison JA, in his characteristically thorough style, assessed the application of the doctrine of res ipsa loquitur. In his judgment, with which the other members of the court agreed, he cited the leading cases on the doctrine and, at paragraph [57], summarised the relevant principles: "[57] Res ipsa loquitur therefore applies where (i**) the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Lindsell, [19th Ed], para. 8-152 provide an illustrative short-list from the decided cases: 'bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns'); (ii) the thing that inflicted the damage was under the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place. As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on Henderson v Jenkins & Sons [[1970] RTR 70, 81 – 82], that 'Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine'.**" (Emphasis supplied)*

[74] Having outlined the relevant considerations, His Lordship then went on to find as follows;

> *It is fair to say, based on the highlighted portion of that extract, that the present case is not one where there is "no evidence as to why or how the [collision] took place". Constable Coke both pleaded in his particulars of claim and testified as to what occurred. Res ipsa loquitur, therefore, does not apply in this case.*

Discussion/Analysis

[75] It is not in dispute that the accounts provided by the parties, while agreed on some factors are diametrically opposed on the issue of liability. An issue which has been raised by the defence is the question of the Claimant's credibility which they have argued impacts her reliability as a whole as well as the strength of her claim. Upon examination of the case for this Claimant, it is evident that there is a discrepancy between her evidence in chief and the particulars of claim.

[76] While the Particulars provide details that the Claimant disembarked from the bus and walked towards the front of same before crossing the road, her witness statement did not as it merely outlined that she exited the bus after which she walked on the left side of the road and sought to make her way across. It was noted that when questioned about this difference the Claimant denied that she had ever stated what was outlined in the Particulars.

[77] Counsel has submitted that this raises questions as to whether any of the Claimant's evidence can be believed. I note that while the absence of this detail was a clear difference between the two documents, the later in time was in fact more favourable to the Defendant than it was to the Claimant as it could be argued that in the first account she may have been more visible to motorists. It was argued by Ms Watson that the effect of this difference is that the Defendant was ambushed as they would have prepared their case in anticipation of what the Claimant had pleaded. I have considered this submission and I was not able to agree with Counsel that this 'omission' was in fact prejudicial to the Defendant.

[78] I also considered whether the failure to provide this detail and her denial of same had the effect of undermining the Claimant's reliability as a whole. In order to determine this issue, I considered it prudent to review the totality of her evidence as well as her demeanour as she faced cross-examination. In conducting this exercise, I found that in spite of this 'omission/denial', the Claimant's account as a whole was not markedly different in terms of the sequence of events which led up to and after the collision with the motor vehicle which was being driven by the servant/agent of the 2nd defendant. I was impressed with her demeanour as she faced cross-examination and found that this difference did not in my opinion have the effect of calling her credibility as a whole into question.

[79] It was noted, that although Ms Watson highlighted this difference between the two accounts, the Claimant had also stated in her Particulars of Claim that the light had been on red at the time she positioned herself to cross but had failed to mention this in her witness statement. With the colour of the light being such an important

aspect of her claim, by failing to mention that the lights were on red in the later document the Claimant could have been accused of deliberately effecting another material change to her account if Counsel's submission as to the reason for the other omission was to be accepted. The challenge that this argument faces however is that these 'deliberate efforts' to 'ambush the Defendant' would have been to the Claimant's detriment. Upon a careful consideration of the level of the witness's intelligence as well as her candid responses in cross-examination, I was not persuaded that there was any such intent behind these 'omissions.'

[80] On the issue of the lights, which the Claimant confirmed were red in cross-examination, I found it noteworthy that Mr Powell agreed that the lights were on red while he was stationary in the filter lane. The point of departure was his insistence that it had changed to green at the point he moved off. From the account which was given by Mr Powell, it was evident that the area in which the collision occurred was heavily congested by both vehicular as well as pedestrian traffic. In those circumstances he would have been fully aware of pedestrians moving around on and along the roadway as he manoeuvred his vehicle. In these circumstances, there would be no question that he would have owed a high duty of care to the Claimant as well as other road users while he sought to traverse this area.

[81] The evidence of the Claimant is that the vehicle being driven by Mr Powell came into contact with her from behind while she was in the process of crossing the street. While she did not provide any additional details, it was clear from her account that she was knocked down and saw this van behind her as she lay on the ground. The inference which could be drawn and which she has drawn in that it was this vehicle's contact with her which resulted in her being struck down.

[82] Her account has been called into question by the Defendant who gave evidence that she came from between two vehicles and walked into the front fender of his van which then made contact with her. In the circumstances outlined, it is clear based on the reasoning of the Court in ***Coke v Rhooms,*** that there is in fact

evidence as to how the accident occurred, whether by inference or directly depending on the version of events accepted. As such the Court would have to make a determination as to whether there was negligence and on whose behalf as Res Ipsa Loquitur would not apply.

[83] It was submitted by Ms. Watson that the account of the Defendant should be accepted in determining where liability lies as in crossing the road, her right side would have been positioned in the direction from which the Defendant had been travelling and the evidence that she had been hit to this side was supported by the findings of the doctor at KPH in respect of the injuries noted in that area. It was the evidence of the 1st Defendant that the Claimant was fully on the ground and told him after that she had hit her knee. The Claimant on the other hand said she was hit to her left side when hit from behind and fell to the ground.

[84] Having carefully considered the evidence of the Claimant, I accept that she had already been engaged in the process of crossing the road at the time of the collision, having commenced doing so while the light was on red. The marking on the diagram produced by her shows that although she stated that she had been walking on the left side to the terminus, she was actually positioned closer to the middle of the road at the time when she was hit.

[85] It was accepted by her as well as the 1st Defendant that when she fell it was in front of the vehicle which did not run over her. While the Defendant suggested that she walked into the front of his vehicle, it is clear that this portion of Mr Powell's evidence is not informed by what he actually saw but what he assumed or speculated must have occurred. This is seen in the fact that although he stated that the Claimant walked from between two vehicles to his left into the front of his vehicle he subsequently stated that he did not see her until she walked into his vehicle.

[86] The reliability of his account was further undermined by two additional portions of his evidence, the first was when he stated that he first saw the Claimant when he

exited the vehicle after the collision and went around to the front and the second when he replied in cross-examination that he felt the impact and knew something had happened but became aware that the collision had occurred when the passenger beside him spoke. These remarks by the 1st Defendant made it clear that he was never aware of the Claimant until he collided with her, was told something, got out of his car and saw her on the ground. In circumstances where he owed a duty of care to her and other road users to keep a proper lookout in this high traffic area, I was satisfied that Mr Powell had breached this duty and I accept that the evidence clearly showed a failure to proceed with due care and attention.

[87] I have considered whether the extrinsic evidence as Ms Watson described it provided independent support which could rehabilitate Mr Powell's account and I found that although the medical states that the Claimant reported pain to her right thigh and the diagnosis stated that she had sustained blunt force trauma to the right thigh, I could not rule out the possibility that this could have occurred as a result of the collision with the ground and not with the vehicle.

[88] In her cross-examination of the Claimant as well as submissions in this matter, Ms Watson raised the issue of contributory negligence on the part of the Claimant. The Law on contributory negligence is found at Section 3(1) of the Law Reform (Contributory Negligence) Act (Jamaica.), which reads:

> *"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damages".*

[89] In ***Jones v Livox Quarries Ltd*** *[1992] 2 Q.B. 608,615,* it was noted by Denning L.J. that a Claimant will be found guilty of contributory negligence if there is evidence that he did not act as a reasonable and prudent man in circumstances where he ought reasonably to have foreseen that by failing to act as a reasonable and prudent man, he might hurt himself, taking into account the possibility of others

being careless. Where the Defendant raises contributory negligence the burden of proof on a balance of probability rests on him (see ***Caswell v Powell Duffryn Associated Collieries Ltd.*** *[1940] A.C. 1).*

[90] In order to establish contributory negligence, the Defendant must prove on a balance of probability that the Claimant is partially to be blamed for her own injuries. That is, that she failed to take actions that she could reasonably have taken, acting as a wise and prudent road user to avoid injury to herself. Once the Claimant is found to be contributory negligent, the award in damages should be reduced based on her percentage of contribution as determined by the court.

[91] In support of the Defendant's contention that the Claimant was at the very least guilty of contributory negligence Ms Watson submitted that the Court should take careful note of what she argues is compelling evidence in this regard;

a. The defence's contention that even if the light had initially been on red, the Claimant stepped into the path of the 2nd Defendant's vehicle after it had begun moving on a green filter light.

b. The absence of any evidence from the Claimant that she had first looked to her left and right before she began to cross.

[92] In respect of these submissions, while the Claimant was never asked and never stated that she had looked in both directions before attempting to cross the road, she gave clear evidence that the light was on red, the vehicles in the area would have been stationary and it was while she was already engaged in the act of crossing that she was knocked to the ground by the defendant. In those circumstances I do not believe that the Claimant would have been acting in a negligent manner in her attempt to cross.

[93] The authority of ***Kayser v London Passenger Transport*** Board provides that 'where the driver of a vehicle is satisfied that persons who are lawfully entitled to

cross the road, whether they are on a pedestrian crossing or not, are out of any danger from him if he goes on in the normal course, he is entitled to do so, but only at such a pace as will enable him to stop almost immediately should the persons who are crossing do anything dangerous or negligent'. The challenge for the 2nd Defendant is that the evidence is clear that his driver failed to satisfy himself that this was in fact the case before seeking to continue on his way. The collision which resulted was due entirely to his own failing as he was aware of the high pedestrian traffic on the roadway and the need to proceed with caution.

Damages

[94] The agreed documents which were placed before the Court at the outset of this trial disclosed that Special Damages incurred by the Claimant had been agreed and proved in the amount of $98,000. The question which remained for the Court under this heading was what was the appropriate award which should be made as general damages for her pain and suffering and loss of amenities.

[95] On the issue of the appropriate award to be made to the Claimant, Ms Watson has argued that the findings outlined in the report of Dr Thompson should be wholly rejected and an award made based on the finding at KPH. The basis for this submission lies in her assertion that Dr Thompson has largely given evidence which she contends is outside of his area of expertise and having seen the Claimant 7 months after the incident provided no true nexus between the accident and the injuries seen. While the report disclosed that Dr. Thompson was a general practitioner, it would be speculative for the Court to conclude that his findings and observations were outside his area of expertise especially in circumstances where there was no evidence provided on behalf of the 2nd Defendant to the contrary.

[96] The report of Dr. Thompson was accepted as an expert's report and permitted to stand without the need for him to be called for cross-examination. It would have been open to the 2nd Defendant, to pose questions to the doctor in respect of the concerns about the nexus between the injuries seen and the collision as well as

the ‘sweeping statements’ which he was alleged to have made. There being no evidence to undermine the reliability of his report, in so far as it represented his true findings on examination of the Claimant, I am prepared to accept the contents of both medical reports and consider my award bearing same in mind.

[97] The authorities cited on behalf of the 2nd Defendant were reviewed but failed to provide any useful assistance as the injuries of this Claimant and her prognosis was far more serious than obtained in those circumstances. I then considered the authorities provided by Mr. McLeod and I found that the injuries of the Claimant in ***Kavin Pryce v Raphael Binns etal*** were more akin to those suffered by this Claimant but, taking her prognosis into account, her injuries were somewhat more serious in my opinion. Having arrived at this conclusion, I determined that an appropriate award for her pain and suffering and loss of amenities would be $2.2 million.

[98] As such, my ruling in this matter is as follows,

a. Judgment is entered in favour of the Claimant as follows

b. General Damages are awarded to the Claimant in the sum of $2.2 million. Interest is to apply at a rate of 3% from the 10th of March 2016 to today’s date.

c. Special Damages are awarded in the sum of $98,000 with interest at the rate of 3% from the 22nd of October 2014 to today’s date.

d. Costs are awarded to the Claimant to be taxed if not agreed.

e. Claimant’s Attorney to prepare, file and serve order herein.