



[2023] JMSC Civ.186

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2020CV04323**

<b>BETWEEN</b>	<b>DONOVAN RICHARDS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JUNIOR MULLINGS</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>SHANTAVIA MUSCHETT</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>ACKEEM HARRIS</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN OPEN COURT**

Miss Serena Byron instructed by Everton Dewar & Co. appeared for the Claimant

Mr. Ryan Carty appeared for the Defendants

Heard: July 10<sup>th</sup>, 2023 and October 4<sup>th</sup>, 2023

**Assessment of Damages — Motor Vehicle Accident — Personal Injury — General Damages — Pain and Suffering — Handicap on Labour Market — Special Damages — Spinal Cord Injury — Video Evidence**

**T. HUTCHINSON SHELLY, J**

**BACKGROUND**

[1] This matter which came before me for assessment of damages had its origins in a motor vehicle collision which occurred on the 29<sup>th</sup> of April 2020 along the Bernard Lodge Main Road in the parish of St Catherine. The collision occurred when a motor vehicle registered **0294 JL** which was being driven by the 1<sup>st</sup> Defendant, the servant and/or agent of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, who were the owners of said

vehicle, collided into the rear of motor car registered **PJ 2143** which was being driven by the Claimant.

- [2] The Claimant sustained numerous injuries and now seeks to recover damages by way of this claim which was filed on November 11<sup>th</sup>, 2020. An amended Claim Form and Particulars of Claim were filed on January 26<sup>th</sup>, 2021. In these pleadings, Mr Richards has asked the Court to award him Special Damages, General Damages, Damages for Handicap on the Labour Market, Loss of Future Household Help and Future Medical Care.
- [3] Judgment by Admission was entered against the Defendants on the 6<sup>th</sup> of December 2021 and the matter was scheduled for an assessment of the quantum of damages to be awarded. The Assessment Hearing was held on the 10<sup>th</sup> of July 2023. The Claimant gave evidence and a statement from Ms Shanika Dennis, a private investigator employed by the Defendants, was also admitted into evidence along with a compact disc of videos and photographs produced by her.

## **ISSUE**

- [4] Although the Parties agree that the collision was caused by the actions of the 1st Defendant, there are sharp disagreements between them as to the impact of same on the Claimant. As such, the following issues have arisen for determination by this Tribunal:
- (i) The nature and severity of the injury suffered by the Claimant;
  - (ii) Whether the video and photographic evidence undermines the medical evidence being relied on; and
  - (iii) The quantum of damages to be awarded to the Claimant in all the circumstances.

## **CLAIMANT'S EVIDENCE**

- [5] The Claimant's witness statement filed on the 28<sup>th</sup> of July 2022 was allowed to stand as his evidence-in-chief, amplification was permitted in respect of his work

history. Mr Richards stated that on the day of the accident, he was driving his Mazda AD Wagon from Naggo Head to Spanish Town in the parish of Saint Catherine. He was travelling along the Bernard Lodge Main Road with one passenger in the front seat of the vehicle. Upon reaching a section of the roadway, he observed a line of traffic ahead. He came to a halt and a few seconds later, he heard a loud bang and felt an impact to the back of his vehicle. His vehicle was propelled into the rear of the vehicle ahead of him.

- [6]** Mr Richards recalled that his body was jerked forward and backward by the impact and he hit his head even though he was wearing his seatbelt. He immediately felt dizzy and experienced pain to his head and lower back. He was assisted out of the vehicle by an unknown male and observed that his vehicle had been rear-ended by a Honda Stream motor vehicle, the end result of which was a four-vehicle collision.
- [7]** He drove to the Greater Portmore Police Station where he made a report. He then drove to a mechanic in Bridgeport, Portmore in Saint Catherine where the vehicle was left for assessment and repairs. A few days later, he began to feel pain in his neck, lower back and waist area. The pain became intolerable and he visited a doctor on Monday May 4<sup>th</sup>, 2020 for treatment.
- [8]** He was treated by Dr. Keishma Robinson at the People's Medical Complex in Spanish Town, St Catherine. Dr. Robinson prescribed medication for the pain and sent him to do an x-ray. Mr Richards complied with these instructions. He also used the medication prescribed but continued to feel pain which made it difficult for him to bend.
- [9]** He experienced constant numbness in both legs and observed that they did not have much strength or power to allow him to walk unaided. He was only able to move around by holding onto things or through the assistance of others. He also had challenges passing his faeces. His status was reviewed by Dr. Robinson on

May 15<sup>th</sup> and 19<sup>th</sup>, 2020 following which he was referred to engage in physiotherapy.

- [10]** Mr Richards engaged in eighteen (18) sessions of physiotherapy at Therapy Health Clinic located on 57 Wellington Street, Spanish Town in the parish of Saint Catherine. It was his view that the sessions did not assist as they increased his pain and affected his mobility. An MRI was recommended by Dr. Robinson and conducted on June 10<sup>th</sup>, 2020. It revealed that Mr Richards received injuries to his neck and thoracic spine to include disc bulging. Mr Richards was instructed to continue physiotherapy and did so but experienced no relief.
- [11]** He was subsequently referred to a neurologist and saw Dr. Roger Hunter, a Neurological Surgeon on September 10<sup>th</sup>, 2020. He was informed by Dr. Hunter that he had developed a traumatic T1 I/T12 herniated thoracic disc which has resulted in spinal compression, spinal cord damage and consequent severe paraparesis in his lower limbs as well as faecal incontinence. He was advised that he would need a microdecompression procedure to prevent permanent paralysis and restore normal walking and faecal function.
- [12]** On July 14<sup>th</sup>, 2021, he was examined by Dr. Grantel G Dundas, an Orthopaedic Surgeon, who confirmed that he would need surgery to improve his condition. The surgery has not been done due to his impecuniosity.
- [13]** Mr Richards complained of ongoing pain as a result of his injuries. He also stated that prior to the incident, he had been a taxi operator for fifteen (15) years. He postulated that he is the main breadwinner in his household with financial responsibility for three (3) children. His injuries had left him incapable of doing yard work or other domestic chores. He also experienced challenges in attending to his personal hygiene.
- [14]** He recounted that he had difficulty sleeping because of pain in his legs and found that he was unable to control his limbs whenever he stood up to walk. He was only able to dress himself with assistance from his partner. His intimate relations were

also adversely impacted as he was physically unable to engage in any sexual activity.

[15] He was unable to engage in social activities and his partner had to do so without him. The severity of his injuries also impacted his interaction with his three (3) months old daughter.

[16] Prior to the accident, he earned between **\$7000.00** and **\$12,000.00** per day or **\$188,000.00** per month and suffered loss of earnings for a period of over 117 weeks. Mr Richards stated that since the accident, the changes in his abilities have affected him mentally and he no longer feels like a man as he has lost his independence and the respect he had in his household.

[17] He incurred substantial medical expenses and produced the following documentation in proof of same:

- a. Medical report dated October 10<sup>th</sup>, 2020 from Dr. Robinson.
- b. Receipt dated October 14<sup>th</sup>, 2020 in the sum of Thirty-Two Thousand Dollars (**\$32,000.00**) as proof of payment for doctor's visits and medical report.
- c. Physiotherapy report from Mr. Patrick Brown dated June 24<sup>th</sup>, 2020.
- d. Receipt numbered **004529** dated June 25<sup>th</sup>, 2020 in the amount of Fifty-Four Thousand Dollars (**\$54,000.00**) at **\$3000.00** per session for physiotherapy sessions.
- e. MRI report from Elite Diagnostic Imaging Services dated June 10<sup>th</sup>, 2020.
- f. Receipt numbered 25141 dated June 10<sup>th</sup>, 2020 in the amount of One Hundred and Ten Thousand Dollars (**\$110,000.00**) as proof of payment for report.

- g. Receipt dated September 10<sup>th</sup>, 2020 for consultation with Dr. Roger Hunter.
- h. Medical report dated July 16<sup>th</sup>, 2021 prepared by Dr. Dundas.
- i. Receipt dated June 22<sup>th</sup>, 2010 as proof of payment for the said medical report.
- j. Invoice numbered **N004/2020** dated September 10<sup>th</sup>, 2020 prepared by Dr. Hunter providing a quote for the surgery in the sum of Six Million and Seventy-Seven Thousand Dollars **(\$6,077,000.00)**.

**[18]** Mr Richards also incurred transportation expenses as he had to charter taxis to take him to his doctor and physiotherapy appointments at a cost of Two Thousand Dollars **(\$2,000.00)** for a round trip between his home and Spanish Town and Four Thousand Dollars **(\$4,000.00)** for a round trip between his home and Kingston.

### **Viva Voce Evidence**

**[19]** Mr Richards was asked by his Attorney whether he had worked since the incident and indicated that he *'tried to go back to do the same work but couldn't as his foot was in pain and couldn't apply to the gas and brake which caused him to meet in a minor accident after which he realized that couldn't do it again'*. He gave no information as to when this was or if this attempt was on one occasion or more than one.

**[20]** Mr Richards was cross-examined and agreed that his statement did not contain any reference to his attempt to return to work. When questioned why this was not indicated to his attorney, Mr. Richards stated that he did not know he should have told them. He acknowledged that he provided his statement to his attorney earlier this year and agreed that he made no mention then of his attempts to work. It was suggested to him that this hearing was the first time that he was mentioning this information to his attorney and he strongly denied this. He insisted that he had

previously informed Ms Byron but could not recall the date. He asserted that this was shortly after his attempts and may have been sometime in 2020.

- [21] He was asked about the physiotherapy report, specifically the conclusion that he had shown improvement and regained his independence and denied that this was the case. He grudgingly accepted that he could move his legs '*a little*' after the treatment had ended. He was asked if he had operated a taxi in 2021 and he denied this.
- [22] A CD with recordings and photographs created by Shaneika Dennis which was placed into evidence as **Exhibit 11** was then played for the Claimant and his attention was drawn to four (4) photographs which showed him standing beside a vehicle which appeared to be a taxi. The photos showed him in various positions alongside the vehicle. He accepted that these were photos of him and stated that the car had been given to him by '*Errol*' to try to '*help himself*.'
- [23] A video bearing the date 16<sup>th</sup> July 2021 **13-38-29-2** which was 16 seconds in length was played for him. The video showed the side view of a male wearing a handkerchief around the lower section of his face and a cap on his head making change for currency handed to him. When questioned whether he recognized the individual, Mr Richards replied that he was unable to say as he could not see the face.
- [24] Another video dated 16<sup>th</sup> July 2021 **13-38-29**, 30 seconds in length was played and Mr Richards was asked if the individual shown driving the vehicle was him and he stated that he was unable to say. The individual was dressed as outlined above and the recording appears to have been made on the same day. On this occasion, the view was from inside the car and the individual making the recording appears to have been seated in the back seat. The driver was shown from behind and on his left hand in the middle of the arm, there was a tattoo displayed. Mr Richards was asked if he had a tattoo in the same area and indicated that he did. He showed the tattoo to the Court and stated that the tattoo on his arm read '*Talisha*' which is the name of his daughter.

- [25] He was shown a photograph extracted from this video with the tattoo enlarged and asked whether he would agree that the tattoo was the same one on his arm. He replied that he was not able to see the tattoo 'so wonderful' so he would not be able to say that it was him. He agreed however that both tattoos were on the left forearm. The enlarged photograph exhibited shows the left hand of the individual with a tattoo extending along the top of the forearm.
- [26] Another video recording dated July 17<sup>th</sup>, **2017-15-58-02** was played and Mr Richards was asked if the male driver shown was him and he acknowledged that it was. In this video, he is shown in profile speaking to prospective passengers with a mask resting on his chin.
- [27] A recording dated **20220919 – WA0024** was also played and the Claimant acknowledged that the individual shown driving the vehicle and soliciting passengers was him. Mr Carty also played a recording dated **2022-09-16-07-05-57-1** and Mr Richards agreed that it showed him walking around. The video shows him walking from the driver's door to the rear of the vehicle and he appears to be beckoning to someone. One hand is raised and the other is placed on the top and/or side of the vehicle as he moves around.
- [28] There were two other recordings played dated **2022-09-16-07-05-57 2** and **2022-09-16-07-05-57**, both of which showed an individual with a handkerchief covering the lower section of his face. Mr Richards was asked to identify the individual and indicated that he was unable to say if it was him as he could not see the person's face.
- [29] Mr Richards was then asked if having seen these videos and photographs, he would agree that the assertions in his statement in respect of his inability to walk unaided, work and engage in a personal care routine were not true and he strongly rejected same.



[30] Mr Richards told the Court that he had tried to work on more than three (3) times but on one of those occasions, he met in an accident. He reiterated that he had informed his lawyer of these efforts but he could not recall the year.

## **MEDICAL EVIDENCE**

[31] Mr Richards did not seek any medical attention immediately after the accident but subsequently consulted a number of medical professionals. He was provided with a number of reports which were exhibited as part of his case and the contents are summarized below:

### **Medical Report from Peoples Medical Complex per Dr. Keishma Robinson dated October 10<sup>th</sup>, 2020**

[32] Mr Richards was examined five (5) days after the accident. This examination revealed no abnormal swelling or obvious deformities to the c-spine and lumbro-sacral spine. There was tenderness on palpation of posterior neck and lower back but all examination of other systems and vital signs were normal. He was sent for X-rays and the diagnosis was lower back strain and whiplash injury. He was placed on anti-inflammatories, muscle relaxants, tablets and creams.

[33] The prognosis indicated that even with physiotherapy, it could take months/years for him to experience total relief of symptoms. The doctor also noted that he is at an increased risk of re-injury and scar tissue formation in the affected muscles and ligaments which increase the chances of nerve entrapment along the injured areas.

### **Physiotherapy Report from Therapy Health Clinic dated June 24<sup>th</sup>, 2020**

[34] Mr Richards engaged in eighteen (18) sessions of physiotherapy. On his first visit, the following observations were made:

- Pain constantly in lower back region
- Patient has swelling in lower back

- Patient has difficulty bending
- Patient has to walk with assistance (cannot walk)
- Patient's legs are without sufficient strength and power
- Patient complains of constant numbness in both legs
- Limited R.O.M (range of movement) in lower extreme

**[35]** The physiotherapist also recorded that Mr. Richard's independence was compromised by pain and lack of movement as he was unable to stand or walk without assistance and complained of constant numbness in his legs and toes. It was the opinion of the therapist that this might suggest a swelling in or around the spinal area. He was treated over several weeks. The therapist concluded that he had improved and regained his independence. Mr Richards was provided with tasks and objectives to continue at home to aid his recovery.

#### **MRI Report from Elite Diagnostic Imaging Services dated October 6<sup>th</sup>, 2020**

**[36]** The contents of this report revealed:

- Spine 3 Levels ligamentum flavum thickening resulting in canal stenosis. There is compression of the spinal cord at this level with associated oedema.

#### **Cervical spine MRI**

- Mild cervical disc desiccation, otherwise unremarkable study.

#### **Thoracic Spine MRI**

- There is normal vertebral alignment and bone structure.
- There is patchy loss of the **T11/T12** disc signal with mild to moderate posterior disc bulge.

- Disc bulge at the **T11/T12** level with associated canal stenosis resulting in spinal cord compression with oedema.

### **Lumbar Spine MRI**

- At **L4/5** and **L5/S1**, there is loss of the intervertebral disc signal seen.
- Mild posterior broad-based disc bulge is seen at both levels with thecal sac indentation.
- No evidence of canal stenosis is seen. There are mild exit foramina narrowing at both levels as a result of the degenerative changes.
- No evidence of exit nerve root compression is seen.
- There is degenerative disc disease to the lower lumbar spine.
- There is no evidence of canal stenosis.

### **Medical Report from Orthopaedic Associates per Dr. Grantel Dundas dated July 16, 2021**

**[37]** The Claimant was seen by Dr. Dundas on July 14<sup>th</sup>, 2021, with complaints of:

1. Weakness in both lower limbs
2. Pain in both lower limbs
3. Abnormal gait
4. Numbness in both lower limbs

**[38]** For this examination, Dr. Dundas had access to the physiotherapy report, report from Dr. Robinson, letter from Dr. R. Hunter and the MRI Report. Dr. Dundas observed the following:

a. the Claimant used both hands to assist himself in getting in and out of his chair.

b. his gait was slow and halting but his foot showed no signs of foot drop or a scissors pattern.

c. In the thoracolumbar spine, there was no deformity seen and the Claimant exhibited full flexion, extension, rotation and side bending.

d. There were no spasms or focal tenderness noted. The doctor noted that Mr Richards had a café noir adjacent the **T11/T12** vertebrae in the midline.

**[39]** Examination of the lower extremities disclosed several findings which included the fact that he had poor balance when standing on one leg. The diagnosis given was to query mixed upper and lower motor neuroma spinal lesions. Investigations using the MRI showed that Mr Richards had a segment of myelomalacia between **T11/T12** and other minor disc protrusions with ligamentum flavum hypertrophy.

**[40]** Under the heading '*Causation*', the doctor stated that in the absence of other physical pathologies such as vertebral fracture, it may be reasonably assumed that Mr Richard's delay in presenting with a spinal cord injury may have been due to bleeding or swelling of the spinal cord. In terms of any impairment, Dr. Dundas opined that Mr Richards had not yet reached maximum medical improvement and needs intervention from a neurological or spinal surgeon in order to make progress.

**Report and Invoice dated September 10<sup>th</sup>, 2020 from Winchester Surgical & Medical Institute prepared by Dr. Roger Hunter**

**[41]** Mr Richards was assessed by Dr. Roger Hunter who produced a brief report and invoice. Dr. Hunter diagnosed the Claimant as having suffered Post Traumatic **T11/T12** herniated discs and spinal cord compression, myelomalacia (spinal cord damage) paraparesis and faecal incontinence. He also indicated that urgent

surgery is required namely post **T11/T12** microdecompression and fluoroscopic guidance. The cost of the procedure was also stated.

## **DEFENDANT'S EVIDENCE**

- [42] Ms Dennis was the sole witness for the Defendants. In her account, she outlined that she has been a Private Investigator for more than five (5) years and primarily investigates matters for insurance companies and other corporate entities within Jamaica in personal injury and other matters.
- [43] She was tasked by the Defendants to investigate the matter with specific emphasis on the nature and extent of the injuries sustained by the Claimant. She was provided with documents and instructions and commenced her investigation. On or about July 14<sup>th</sup>, 2021, she observed the Claimant operating a grey Toyota motor vehicle registered **PL 2651** along the Spanish Town to Naggo Head, Portmore route in the parish of St. Catherine.
- [44] On diverse days, she observed the Claimant operating the said vehicle along the same route without any assistance and/or aid from other persons. She also observed him walking about within the respective taxi parks seeking passengers and making several trips to and from his route.
- [45] On or about July 26<sup>th</sup>, 2021, she boarded the Claimant's motor vehicle in Spanish Town. While on board, she used her smart phone to take photographs and recordings of him. She also photographed and recorded him walking, standing and loading the vehicle.
- [46] The photographs and recordings were subsequently transferred from her smartphone to a hard drive which belonged to the Defendants and their attorney and served as a part of a Notice of Intention to rely on hearsay evidence. The Disc and Photographs were earlier referred to as **Exhibit 11**.

## SUBMISSIONS ON BEHALF OF THE CLAIMANT

[47] Ms Byron commenced her submissions on behalf of the Claimant by identifying issues which she stated were not in dispute. These included the owners and drivers of the vehicle as well as the individual liable for the collision. Counsel argued that the medical reports produced and relied on by the Claimant establish that he suffered severe injuries as a direct result of the accident.

[48] Ms Byron submitted that the Claimant had established a proper basis for the award of special damages in the sum **\$2,739,000.00** which she particularized as follows:

<b>Medical expenses</b>	<b>\$226,000.00</b>
<b>Loss of income for 129 weeks &amp; continuing</b>	<b>\$2,451,000.00</b>
<b>Transportation</b>	<b><u>\$ 62,000.00</u></b>
<b>Total</b>	<b><u>\$ 2,739,000.00</u></b>

[49] Counsel highlighted the Claimant's evidence outlining the pain, suffering and loss of amenities suffered and asked the Court to note that the MRI report, indicated that the Claimant suffered injuries which were far greater than the initial diagnosis of Dr. Robinson.

[50] Ms Byron argued that while the conclusion in the physiotherapy report was at odds with the Claimant's evidence, the follow-up visits to Dr. Robinson and his MRI results confirmed his assertion that he had not improved. This was also borne out by the fact that he had to be referred to a Neurological Surgeon who later diagnosed him with "*Post traumatic **TI 1/T132** Herniated discs and Spinal cord compression Myelomalacia Paraparesis and Faecal Incontinence*" for which surgical intervention was urgently needed. Ms Byron posited that the current cost of this procedure was likely to be higher than that provided given the passage of time.

[51] Counsel commended to the Court the report of Dr. Dundas who confirmed that the Claimant had suffered a spinal cord injury and should see a spinal surgeon. Ms Byron asked the Court to note that as a result of the severity of his injuries, the

Claimant had suffered significant loss, in numerous aspects of his life for which he should be adequately compensated.

[52] She commended to the Court a number of authorities which she described as providing useful guidance in terms of the relevant award for general damages involving comparable injuries. These are summarized below:

- i. **Geoffrey Fagan v. Fiesta Jamaica Limited (Claim No. 2015HCV0203J).** The Claimant's age-related condition was discounted as being attributed to the accident. In February 2019, he was awarded **\$5,800,000.00** for age-related cervical multi-level degenerative disc disease, age-related multilevel degenerative lumbar disc disease and persisting right-sided traumatic cervical radiculopathy with 11% impairment. This sum updates to **\$7,788,911.07** using the CPI of 130.8 for July 2023.
- ii. **Brenda Gordon v. Juici Beef Limited (Claim No. HCV 2007/04212)** – In April 2010, the Claimant was awarded **\$4,600,000.00** for back pain from double level lumbar disc prolapse, injury to two lumbar discs, compression of the lumbar nerve roots, with numbness to both feet with permanent partial disability of 13%. This figure updates to **\$9,896,052.63** using the CPI of 130.8 for July 2023.
- iii. **Wellington Williams v. Black River Upper Morass Development Company Limited Suit No. C.L. 1987 W 252 (Khan 4 pg. 203)** – In April 1997, the Claimant was awarded **\$1,980,000.00** for prolapse intervertebral disc, and after undergoing decompression laminectomy at the L4/L5 was left with irreversible impotence, decreased sensation along L5/S1 dermatomes in the right leg, permanent damage to left L4/L5, left thigh 1cm smaller than right thigh, absence of reflexes bilaterally in both lower limbs, and

permanent partial disability of 10%. This updates to **\$15,791,707.31** using the CPI of 130.8 for July 2023.

**[53]** Ms Byron argued that applying the range and the guidance offered in the foregoing authorities, the devaluation of the local currency and rising inflation, an appropriate award for pain and suffering and loss of amenities would be **\$15,000,000.00**.

**[54]** Counsel concluded her submissions by asking that the Court make the following awards:

- a. **Special Damages - \$2,739,000.00**
- b. **General Damages - \$15,000,000.00**
- c. **Future Medical Care - \$6,077,000.00**

#### **SUBMISSIONS ON BEHALF OF THE DEFENDANT**

**[55]** Mr Carty acknowledged that the issue of liability has been settled. He asserted however that the question of quantum is hotly contested as there were lingering questions in respect of the Claimant's injuries.

**[56]** Mr Carty submitted that on careful review of the medical reports, the Claimant was seen by Dr. Dundas fourteen (14) months after the incident. He argued that the history provided to this doctor was different from previous statements as he denied feeling neck pains and stated that after two (2) days, he began to experience mild cramps in his lower limbs. Counsel also contended that the documentation produced by Dr. Hunter should be carefully scrutinized as he had provided no additional care or supervision of the Claimant.

**[57]** Mr Carty highlighted what he described as further contradictions in Dr. Dundas's report as the Claimant had reportedly informed him of 6-8 physiotherapy sessions, whereas the document in proof of sessions and payment stated that it had been 18. Learned Counsel also asked the Court to take careful note of the differences between the physiotherapist and Claimant, as to the outcome of those sessions.



Mr Carty also asked the Court to consider the failure of any of the attending physicians to provide/prescribe a walking aid if the Claimant was in fact unable to walk.

[58] Mr Carty raised questions as to the nexus between the motor vehicle accident and the severity of the injuries later noted by Doctors Dundas and Hunter and highlighted the fact that over fourteen (14) months had passed between the former's examination of the Claimant and that of Dr. Robinson.

[59] Learned Counsel contended that with the passage of time, it would be unreasonable and improbable for the Court to accept that these extensive injuries were suffered and in the circumstances should prefer the findings of Dr. Robinson. Mr Carty also raised questions as to the reliability of the Claimant's evidence, given the divergence between what he said in his Witness Statement and what he told the medical professionals. One such instance being the remark in his statement that he felt dizzy and was assisted from the vehicle by an unknown person after which he immediately began to feel pain to his head and lower back. Mr Carty submitted that this was never stated in any of his medical reports as he told Dr. Dundas that he left his vehicle unassisted. Concerns were also expressed as to whether it was after 2 or 5 days that medical attention was sought.

[60] Learned Counsel also asked the Court to give careful consideration to the impact of the video recordings and photographs on any damages to be awarded. He questioned whether the Claimant could be believed given the conflict between his assertion in his statement that he had been unable to work and his evidence in Court that he had tried.

[61] Mr Carty submitted that the Court should find that the Claimant's injuries were curtailed to those observed by Dr. Robinson and consider the appropriate award in comparable cases.

[62] Learned Counsel cited and relied on a number of authorities. The first is **Peter Marshall v Carlton Cole and Alvin Thorpe, Khan Vol. 6 page 109** in which

general damages of **\$350,000.00** was awarded in October 2006 using the CPI of 38.2. This updates to **\$1, 198,429.31** using the CPI of 130.8 as at July 2023. In that case, the Claimant suffered moderate whiplash, a sprained, swollen and tender wrist and left hand, as well as moderate lower back pain and spasm. He was given two (2) weeks sick leave, analgesics and cataflam injections and received sixteen (16) weeks medical care. Mr Carty argued that the injuries sustained by that Claimant were more serious than the whiplash injury suffered by the instant Claimant.

**[63]** In **Manley Nicholson v Ena Thomas and Glenmore Thomas, Khan Vol. 5 page 165**, general damages were assessed at **\$250,000.00** on 22<sup>nd</sup> November 2001 when the CPI 23.1 was and now updates to **\$1,415,584.41** using the CPI of 130.8 as at July 2023. In this case, the Claimant's injuries included:

- Unconsciousness;
- Whiplash to the neck with soft tissue injuries;
- Cerebral concussion;
- Tenderness over junction thoracic and lumbar spine;
- Mild limitation of movement of cervical spine, abrasion to the scalp in left parieto-temporal region, chest and back;

**[64]** He was admitted to the hospital for 24 hours after which he was discharged. Mr Carty submitted that his case is particularly instructive given its similarities to the injuries in the case at bar and the damages awarded was affirmed by the Court of Appeal.

**[65]** He commended the authority of **Matthew Wallace v Mark Anthony Kettle [2016] JMSC Civ. 28**, where general damages were assessed for sustained whiplash injury, lower back pain, left shoulder and left forearm and chest abrasions as well as soft tissue injury to right shoulder with no disability assigned. An award in the sum of **\$1,000,000.00** was made in March 2016 with CPI being 87.8. When the

award is updated using the CPI for July 2023, the Claimant received **\$1,489,749.43**.

- [66] Mr Carty submitted that an award of One Million Three Hundred Thousand Dollars (**\$1,300,000.00**) would be an adequate compensation to the Claimant in line with the Peter Marshall and Manley Nicholson awards. Learned Counsel argued that even if the Court found Mr Richard's account to be credible, he had failed to mitigate his loss per **Geest Plc. V Lansiquot (2002)** 61 WIR 212 and **Darbshire v Warran [1963]** All ER 310 at 315.

### **SPECIAL DAMAGES**

- [67] In respect of the Claimant's request for an award of Two Million Seven Hundred and Thirty-Nine Thousand Dollars (**\$2,739,000.00**) as Special Damages, Mr Carty relied on the decision in **Desmond Walters v Carlene Mitchell (1992)** 29 JLR 173, wherein it was noted that although strict proof of special damages is required, strict proof is determined by reference to the circumstances of each case.
- [68] Counsel submitted that it is trite law that special damages must be pleaded specifically and proven. He argued that the recommendation for "*emergency surgery*" should be rejected as although the Claimant purports to have consulted Dr. Hunter, there is no documentary proof of this, other than an invoice and a medical note which ought to be disregarded by the Court as being neither legally nor medically substantive.
- [69] Mr Carty relied on the case of **Able Edwards v Monique Campbell & Shirlette Hall [2020]** JMSC Civ. 220, where it was noted by K. Anderson, J that "*...in any event though, this court cannot and ought not to award damages, based on a mere possibility, of future medical care being required as distinct from evidence that there is a high likelihood of same. The claimant must prove his entitlement to aspects of damages that he seeks to claim for, on a balance of probabilities*".
- [70] Mr Carty also took issue with the claim for lost earnings. He submitted that the Claimant has asked the court to find this earning without any substantive proof of

same. Additionally, there is no medical evidence that shows he was unable to work.

## **ANALYSIS AND DISCUSSION**

[71] In order to properly address this vexed question, I have sought to address the relevant considerations under their respective heads.

### **The nature and severity of the injury suffered by the Claimant**

[72] Although the Claimant had produced a number of reports, it is the Defendants' position that only the report of Dr. Robinson should be accepted and relied on by the Court. In considering this submission, I have noted that Dr. Robinson examined the Claimant five (5) days after the accident. It is correct that this would have been approximately fourteen (14) months before he was seen by Dr. Dundas and three (3) months before he was assessed by Dr. Hunter. There can be no question then as to which of these medical professionals would have examined Mr Richards in closer proximity to the incident.

[73] While this position cannot be disputed, the report of Dr. Robinson also revealed that he saw the Claimant on other occasions as in spite of the medication prescribed and referral to physiotherapy, he continued to experience challenges. This was likely the foundation for the further investigation by way of the MRI which was done in June 2020 which was less than two (2) months after the accident had occurred.

[74] Although the Defendants raised questions in respect of the nexus between the collision and injuries observed by Doctors Dundas and Hunter, the MRI clearly shows that the Claimant sustained the injuries which were stated by each of these physicians. There has been no evidence presented to suggest "*novus actus interveniens*" and the initial observations and diagnosis had clearly included a reference to lower back issues. It would not be accurate then to suggest that these symptoms or injuries had not been present at the time that Mr Richards first sought medical attention.

- [75] While it is true that the initial examination of Mr Richards had not revealed mobility issues, Dr. Dundas has provided a medical explanation for same which has not been rebutted by any evidence presented by the Defendant. In his report, it was acknowledged by Dr. Dundas that based on the history of the matter there had been a delay of a few days between the collision and the presentation of symptoms. He explained that in the absence of other physical pathologies such as vertebral fracture, this delay may have been due to bleeding or swelling of the spinal cord.
- [76] This conclusion of the doctor cannot be dismissed as merely speculative as the physiotherapy report clearly states that observations made of Mr Richards in June 2020 revealed a swelling in his lower back, lack of power in his legs and limited range of movement. It was also noted that he was unable to walk without assistance.
- [77] The conclusion of the physiotherapist provides useful information in respect of the reason advanced by Dr. Dundas as it was noted as far back as June 2020 that the Claimant's inability to walk and numbness in the legs and toes might suggest a swelling in or around the spinal area.
- [78] In light of the foregoing factors, it is evident that the Claimant sustained a spinal injury as disclosed in the report on the Thoracic and Lumbar Spine in the MRI and confirmed by Doctors Hunter and Dundas. In the absence of any evidence which shows that this was caused by something other the collision, I am satisfied on a balance of probabilities that the injuries sustained were caused by the actions of the 3rd Defendant.

**Whether the video and photographic evidence undermines the medical evidence being relied on?**

- [79] The determination of this issue largely turns on the credibility of the Claimant. In this regard, the Defendants have submitted that his account has been wholly undermined as his assertions in respect of his inability to walk unaided were shown

to be untrue. In my analysis of this submission and the value of the video evidence, I accept that the recordings were at great odds with what was contained in Mr Richards's statement which had been provided by him this year. In what appeared to the Court to be a last ditch effort to address this glaring conflict, Mr Richards was asked by his attorney if he had made efforts to work after this accident to which he replied that he had.

**[80]** It is not in dispute that this did not appear in this statement, neither was a supplemental statement filed after Mr Richards had been served with these exhibits. This information made its appearance for the first time as he gave his evidence. When this was pointed out to him, Mr Richards then sought to place blame on his attorney. I carefully considered the demeanour of Mr Richards as he gave his evidence and was cross-examined on this point and I did not believe that he was being truthful about having previously mentioned this. I also formed the view that his explanation that he had worked after the accident was carefully contrived by him in response to his untruthfulness being exposed by the video surveillance. In fact, his evidence on this point disclosed an internal inconsistency as he had initially told Mr Carty that he did not know that he should have informed his lawyer about these efforts.

**[81]** Although it is evident that Mr Richards was able to move around unaided, I am mindful of the fact that sitting to drive is not the same as driving. It would however require the active use of his feet and this in and of itself would suggest that his actual situation was closer to what had been stated by the physiotherapist. The video and photographs of him walking around the vehicle while also quite instructive have to be viewed with the caveat that while moving, he maintained contact with the roof and/or side of the vehicle.

**[82]** In answering the question as to whether this evidence undermines the medical evidence, it would be appropriate to say that while it does not, it certainly makes it clear that the Claimant's assertions as to his incapacity have been exaggerated. The medical evidence which has been presented does not disclose a disability as

no assessment was done given the fact that Mr Richards had not reached Maximum Medical Improvement. In light of the foregoing discussion, it is my opinion that while Mr Richards suffered a serious and severe injury, it is not as severe as he has indicated.

### **The Quantum of damages to be awarded to the Claimant in all the circumstances**

- [83] The quantum of damages which would then be considered would be based on the full findings of all the medical professionals and not solely that of Dr. Robinson. The rationale for this is seen in the fact that while it was the earliest opinion, it was offered at a point when the matter had not yet been fully investigated and would not accurately reflect the complete scale of the Claimant's injury.

### **General Damages**

- [84] It is settled law that *"the sum of money that should be awarded as General Damages for personal injury suffered by a Claimant ought to be a sum which as 'nearly as possible' puts the Claimant in the same position she would have been in if she had not sustained the wrong"* (per Lord Blackburn in **Livingstone v Rawyards Coal Co. (1880)** 5 A.C. 25 at 39. This is the well-known principle of restitution in integrum. On an assessment of damages, it is never an easy task for a Court to determine the quantum of damages that should be awarded to a Claimant who has suffered some physical injury. In addressing this situation however, useful guidance is found in the types of awards made in comparable cases.
- [85] In order to appropriately address the award which should be made for general damages for pain and suffering and loss of amenities, I am mindful of the fact that although the Claimant has been accused of exaggeration and malingering, his confirmed injuries would have occasioned great suffering and deprived him of important amenities.
- [86] On a review of the cases, it was evident that the cases cited on behalf of the Defendants were not particularly useful as they were limited to injuries which were

far less serious than those of the instant Claimant. I carefully considered the authorities cited by Counsel for the Claimant and I found that this situation seemed to be more comparable to the circumstances outlined in the ***Brenda Gordon*** and ***Wellington Williams*** cases. Unlike those cases, however, there was no assessment of permanent partial disability or whole person impairment provided in order to usefully compare the levels of impairment suffered if any. Additionally, the injuries suffered by **Mr Williams** are greater in number and appear more severe than those of the instant Claimant. In these circumstances, an adjustment downward would have to be made to account for these differences. Adopting that approach, I am satisfied that an appropriate award would be in the sum of Four Million Five Hundred Thousand Dollars **(\$4,500,000.00)**.

### **Handicap on the Labour Market**

**[87]** Although this head of damages was pleaded in the amended claim, it appears to have been abandoned or overlooked by the Claimant as there was no evidence presented by him in respect of same. It is an established fact that a party cannot simply aver that a particular loss or disability has occurred but cogent evidence in proof of that fact must be provided. The Claimant having failed to comply with this requirement, no award can be made under this heading.

### **Future Medical Care**

**[88]** It is the Claimant's position that surgical intervention is required in order to do justice to his situation. This contention has been strongly disputed by the Defendants for reasons which have been outlined above. While I agree with the Defendants that the document produced by Dr. Hunter does not provide extensive details, a large part of it is comprised of the findings outlined in the MRI report. The additional detail is the Expert's opinion as to the type of surgical intervention which would be required. He also opined that given the nature of the injury, this intervention would be urgently required. It is noteworthy that when Dr. Dundas was consulted ten (10) months later, he was also of the opinion that surgery was needed.



[89] The description of the procedure as urgent to my mind only highlights the wisdom of treating with same as early as possible. As such, the passage of time since this report was issued, while of some relevance does not mean that the surgery is no longer required. Given that the medical opinion confirms that the Claimant would need this surgery to be '*put back*' in the position that he would have been in prior to the accident, I am of the view that he should be afforded the opportunity to have the surgery done. As such the Claimant is awarded the sum of Six Million and Seventy-Seven Thousand Dollars **(\$6,077,000.00)** as future medical care.

### **Special Damages**

[89] While Mr Carty took no issue with the claim for the medical expenses and transportation costs incurred, he raised questions in respect of an award for loss of earnings. On examination of the expenses particularized under this head of damages, I note that the Claimant placed into evidence a number of receipts in proof of the Two Hundred Twenty-Six Thousand Dollars **(\$226,000.00)** requested. I have reviewed these documents and I am satisfied that these sums have been expended and Mr Richards deserves to be compensated for same.

[90] In relation to the figure stated for transportation expenses, while Mr Richards had claimed the sum of Sixty-Two Thousand Dollars **(\$62,000.00)**, his evidence outlining the cost of the taxis chartered is at odds with this figure as the cost of the round trips for eighteen (18) visits to the physiotherapist, six (6) visits to Dr. Robinson and the three (3) trips into Kingston for the MRI and assessment by Drs. Hunter and Dundas by my calculation would amount to Sixty Thousand Dollars **(\$60,000.00)** and I award this sum.

[91] In respect of the claim for loss of earnings, it is evident that the Claimant would have suffered some loss as the evidence confirms that he would have been incapacitated for a period of time as a result of his injuries. The question which would then have to be determined by the Court is what is the relevant period taking into account the medical evidence and video recording? Careful consideration would also need to be given to the requirement for the Claimant to mitigate his

loss. Having considered the foregoing factors, I am persuaded that by July 2021, the Claimant was able to move around and '*help himself*' as he can be seen working in the recordings made during this period. As such, the relevant period of incapacity would not extend beyond June 2021 and would be twelve (12) months in length. In those circumstances, the appropriate award for this loss would be Two Million Two Thousand and Fifty-Six Thousand Dollars **(\$2,256,000.00)**.

## **Conclusion**

**[92]** For the foregoing reasons, my orders are as follows:

- a. Special Damages awarded to the Claimant in the sum of Two Million Five Hundred and Forty-Two Thousand Dollars **(\$2,542,000.00)**. Interest at 3% is awarded on the sum of Two Hundred and Eighty-Six Thousand Dollars **(\$286,000.00)** from the 29<sup>th</sup> of April 2020 to the 10<sup>th</sup> of July 2023.
- b. General Damages awarded to the Claimant in the sum of Four Million Five Hundred Thousand Dollars **(\$4,500,000.00)** with interest at 3% from the 14<sup>th</sup> of November 2020 to the 10<sup>th</sup> of July 2023.
- c. Damages awarded for Future Medical Care in the sum of Six Million and Seventy-Seven Thousand Dollars **(\$6,077,000.00)**.
- d. Costs awarded to the Claimant to be taxed if not agreed.
- e. Claimants Attorney to prepare, file and serve the Judgment herein.