



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV05741

BETWEEN	DAVE SCOTT	CLAIMANT
AND	PARAMOUNT TRADING JAMAICA LIMITED	1ST DEFENDANT
AND	ANTHONY WALLACE	2ND DEFENDANT

TRIAL IN OPEN COURT

Martina Edwards-Shelton and Matthew Ricketts instructed by Shelards for the Claimant

Kerry- Ann D. Sewell for the First Defendant

Heard: 24th October 2016, 2nd February 2017 & 11th July 2018 and 12th June 2020

Negligence - Motor Vehicle Collision - Liability of parties – Contributory Negligence- Assessment of Damage

CRESENCIA BROWN BECKFORD, J

INTRODUCTION

[1] This claim is brought by Mr Dave Scott against Paramount Trading Jamaica Limited, (Paramount) the 1st Defendant, and Mr Anthony Wallace, the 2nd

Defendant. The claim arises from a collision between a motor bike owned and being driven by the Mr Scott and a motor truck being driven by the Mr Wallace and owned by Paramount.

- [2] Mr Scott was travelling in a westerly direction along the Waltham Park Road which is a main road. Mr Wallace was travelling in the opposite direction along the same road and turned to enter the premises of Paramount which was on the opposite side of the road when the collision occurred. This was about 12.30 in the afternoon. Mr Scott asserts that the collision was due solely to the negligence of Mr Wallace, who was an employee of the Paramount and for whose negligence Paramount was vicariously liable. As a consequence of the collision the Claimant claims to have suffered personal injury, loss and damage.
- [3] Paramount accepts that Mr Wallace was its employee and that it is vicariously liable for his negligent acts done in the course of his employment. Both Defendants however deny liability for the accident and contend that the collision was caused by the Claimant who, due to his failure to keep a proper lookout collided with the left rear of the motor truck which was stationary at the material time.
- [4] Mr Wallace was served in these proceedings but failed to file an acknowledgement of service. Default Judgment was accordingly entered against him in favour of Mr Scott and which has not been set aside.

ISSUES

- (a) Whether the collision was caused solely by the negligence of the 2nd Defendant or did both the Claimant and 2nd Defendant materially contribute to such collision; and if so in what proportions?
- (b) What is the measure and quantum of damages if any due to the Claimant?

THE LAW - NEGLIGENCE

[5] There is general agreement between the parties as to the applicable law of which a summary is given below.

[6] The definition of negligence is now trite law. The classic statement of the law on negligence and the duty of care was made by Alderson B. in **Blythe v. The Birmingham Waterworks Company** 11 Exch. 781 where he said:

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.”

In **Blyth** the defendants had installed water mains along the street with hydrants located at various points. One of the hydrants across from plaintiff's house developed a leak as a result of exceedingly cold temperatures and caused water damage to the house. The plaintiff sued for negligence. The issue was whether the company had used proper care to prevent the accident. The court found that the defendants had 'provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence'.

[7] In **Glenford Anderson v. George Welch** [2012] JMCA Civ.43 Harris JA highlighted the nature of the evidence required in a claim for negligence stating 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 ...”

As to the burden and standard of proof she went on to say:

“It is also well settled that where a Claimant alleges that he or she has suffered damages resulting from an object or thing under the Defendant’s care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities”

[8] In Bingham & Berrymans’ Motor Claims Cases 11th Edition it is stated at paragraph 4.1 that:

“There is a duty on the driver of a motor [vehicle] to observe ordinary care or skill towards persons using the highway whom he could reasonably foresee as likely to be affected.”

[9] In addition to the common law duty of care, there is also a statutory duty of care placed on users of the roadway. The Road Traffic Act (RTA) under the caption ‘Driving Rules’ outlines what is the duty of care owed by drivers to other users of the road. It provides that a vehicle shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic and shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead. A further duty is placed on a driver of a motor vehicle to take such action as may be necessary to avoid an accident, regardless of whether the driver of any other motor vehicle has avoided a similar the duty imposed on him by the RTA.

The RTA also defines obstruction as follows:

A motor vehicle obstructs other traffic if it causes risk of accidents thereto;

[10] A motor vehicle is defined in the RTA as “any mechanically propelled vehicle intended or adapted for use on roads” and is further categorized in the Act to include motorcycles.

[11] The duty of care is neatly summarised in the case of **Cecil Brown v. Judith Green and Ideal Car Rental** Claim No. 2006 HCV 02566 delivered October 11,

2011 in the judgment of McDonald Bishop J (as she then was) who stated as follows:

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

[12] The position of a driver is also correctly stated in the case of **Jowayne Clarke (bnf Anthony Clarke) and Anthony Clarke v Daniel Jankine**, Claim 2001/C211 delivered October 15, 2010 by Thompson-James J who stated as follows:

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

[13] The duty of a driver making a right hand turn across the path of oncoming traffic was dealt with in **Coca-Cola of Jamaica Ltd. & Errol Francis v Daniel Hurd et al** (1985) 22 JLR 120. It was held that the driver had a duty and primary obligation to ensure that before he made a right hand turn across the path of oncoming traffic to ensure it was safe to do so. In that case the driver gave the appropriate signals and had the greater part of the vehicle had left the highway but a collision occurred before he completed the turn.

[14] The Claimant is alleging negligence and the 1st Defendant is denying same. The burden of proof is on each party to prove his case on a balance of probabilities.

EVIDENCE

[15] The Defendants' negligence was particularised by the Claimant as follows:

- a) Failed to notice the presence of the Motor Cycle, which the Claimant was riding in time or at all;

- b) Failed to notice the Motor Cycle, which the Claimant was riding and which was proceeding along Waltham Park Road, St. Andrew;
- c) Failed to travel at a speed which was reasonable under the circumstances;
- d) Failed to show consideration for the safety for the Claimant;
- e) Failed to keep any or any proper look out;
- f) Failed to accord precedence to the established presence of the Motor Cycle, which was occupying the left lane along Waltham Park Road, St. Andrew;
- g) Collided into the Claimant who was riding his Motor Cycle, in the left lane along Waltham Park Road, St. Andrew;
- h) Turning right from Waltham Park Road, onto the 1st Defendant property, when it was not safe to do so;
- i) Turned off from Waltham Park Road, St. Andrew on the 1st Defendant Property too quickly;
- j) Drove into the path of the Claimant's Motor Cycle,
- k) Failed to brake, slow down, swerve or otherwise control the vehicle so as to avoid colliding into the line of traffic occupying the left lane of the Waltham Park Road.

[16] The Claimant's account is that he was travelling along Waltham Park Road, which he describes as a very straight road. His evidence is that it was a sunny day and visibility was good. There was nothing obstructing his view of the roadway, nor was there a lot of traffic on the road given the time of day. In cross-examination he said, in contradiction to this, that there was a lot of oncoming traffic. He was unable to describe the dimensions of the road in terms of length and width, but admitted that the road was fairly wide enough, in that it could accommodate two lanes of traffic with ease and two trucks could pass each other. He could see quite some distance up the road he was travelling on.

[17] The Claimant's evidence further is that he was travelling at approximately 35 kilometres per hour. He states that while he was travelling along the roadway, the 2nd Defendant, attempting to enter the premises of Paramount Trading which was on the Claimant's side of the road, turned the truck suddenly and without warning right across the roadway into the lane in which he was travelling, and directly into his path. As a result, he collided into the left rear side of the truck and was injured. The Claimant's evidence is that the 2nd Defendant both failed to use his indicator to signal that he was about to turn right, and misjudged how far away the motorcycle was when he attempted to make the turn.

[18] The 1st Defendant particularised the Claimant's negligence as follows:

- a) Operating the motorcycle bearing registration number 7126 H at an excessive and/or improper speed;
- b) Failing to keep any or any proper look out;
- c) Driving and/or operating the motorcycle without any or any sufficient consideration for other users of the roadway;
- d) Failing to maintain any control or any sufficient control over the motorcycle bearing registration number 7126 H;
- e) Failing to apply his brakes within sufficient time or at all so as to prevent a collision;
- f) Failing to stop, slow down, swerve, turn aside or otherwise operate the motor vehicle so as to avoid a collision;
- g) Colliding into the left rear of the 1st Defendant's stationary motor truck;
- h) Failing to observe the presence of the 1st Defendant's motor truck bearing registration number CJ0008 on the roadway.

[19] The evidence for the 1st Defendant comes from the 2nd Defendant and from Miss Blossom Nairn, security guard working at Paramount's premises. The evidence of Mr Wallace is that on reaching the vicinity of Paramount he stopped on the opposite side of the road to wait for his co-worker who was purchasing food.

Sometime later, after debating whether to drop off goods elsewhere or return to Paramount, having decided to return to Paramount he turned on his right indicator. He looked down the road and in his rear-view mirror, and saw that the road was clear. He then slowly proceeded to cut across his lane and the opposite lane to turn into Paramount Trading.

[20] Mr Wallace said that he was stationary at the gate of Paramount Trading, waiting on the security guard to open the gate. While stationary at the gate, he heard the sound of a bike revving at high speed. He said he looked to his left where the sound was coming from. However his view was obstructed by a utility pole on the sidewalk and by his co-worker who was seated in the left passenger side of the truck.

[21] Mr Wallace then heard a sound and felt an impact to the left side of the truck and the truck started to shake. He looked into the left rear-view mirror and saw a person on a bike, on the left side of the truck. He said that after he exited the truck, he observed that a bike had run into the left side of the truck behind the left rear wheel and close to the tip of the rear section. Mr Wallace being unable to see the bike stated that he was unable to say the speed at which the motor bike was driving.

[22] In Mr Wallace's cross-examination, he stated that he was waiting on the security guard for about 15-20 seconds to open the gate. He admitted in that part of the truck was protruding on the road while he waited for the gate to be opened. He said that the truck would have been in the way of traffic coming up on the left side. Mr Wallace estimated that the truck length was just under 20 feet.

[23] Miss Blossom Nairn was the next witness for the 1st Defendant. She said that while she was talking to someone she saw that Mr Wallace had come to a stop on the opposite side of the road. She inquired of him if he was coming into the premises and he said no. Sometime later, she saw that he began to drive and she went to open the gate. Her evidence as given in her witness statement is that:

“As the vehicle came across the road from the left, I started to open the gate. By this time the vehicle driven by Mr. Wallace has stopped at the gateway and I had almost completed opening the second half of the gate when I heard the loud sound of a motorcycle coming from the right. As I completed the opening of the gate, I heard a crashing sound...”

[24] She was not able to give any evidence as to how the collision occurred.

SUBMISSIONS ON LIABILITY

Claimant

[25] Counsel for the Claimant acknowledges that the burden of proof is on the Claimant to satisfy the court on a balance of probabilities. Since there are two divergent accounts, in considering the probabilities of the case, an assessment of the credibility and reliability of the evidence is an essential undertaking. Counsel relies on the cases of **Prinsloo v Road Accident Fund [2013] ZAGP JHC 285** and **McDonald, Errol v Zoukie Trucking Services and Wallace, Ainsley [2009] HCV 1374**.

[26] In the first place Counsel contends that liability against the 2nd Defendant Mr. Wallace is settled by judgment in default being entered against him and the Claimant is entitled to have damages assessed against him

[27] Counsel submits that the evidence given by the witnesses for Paramount all support the Claimant's case in that they agree that Mr Wallace drove across a main road from where he was parked. In so doing, it is further submitted, he drove directly across the lane in which the Claimant was travelling. Further even if the court were to accept Mr Wallace that he drove cautiously carefully and slowly across the main road, such manoeuvring would be negligent as he would run the risk of oncoming traffic catching up with him and thereby causing an

accident. Counsel relies on the provisions of the RTA Driving Rules to support this submission.

[28] Counsel for the Claimant also asked the court to reject Mr Wallace's account that he was stationary at the time and reflect also. Also that the Claimant was speeding and thus unable to take evasive action when he came upon the truck. The Court was asked to accept the Claimant's account. Counsel contends the Claimant's account is corroborated by the evidence of Sergeant Marcus Graham.

1st Defendant

[29] Counsel for the 1st Defendant submits that the proximate cause of the collision was the negligence of the Claimant. Firstly, that in circumstances where it was a clear and sunny day with good visibility and nothing obstructing the Claimant's view of the roadway for about 200 metres, failure to see the white truck which was about 20 feet long meant the Claimant could not have been keeping a proper lookout.

[30] Counsel also submits that the motor bike being stuck under the truck, that the Claimant's helmet left an impression on the side of the truck that Mr Wallace heard the revving of a motor bike and that the Claimant became unconscious upon impact despite wearing a helmet is evidence from which the court should find on a preponderance of probabilities that the Claimant was travelling at a fast rate of speed and not the 35 kmph as given in his evidence.

[31] Counsel also challenges the credibility of the Claimant and points to inconsistencies in his evidence as it relates to his state of consciousness after the collision and his observations. He was also inconsistent on whether he took evasive action to avoid the accident saying in examination-in-chief that he tried to brake and swerve to avoid the accident and saying in cross-examination that he did nothing. Sergeant Graham's evidence, it was contended, was also unreliable having regard to the dearth of his independent investigations.

[32] It was finally contended by Counsel that the Claimant may not rely on obstruction of traffic as same was not pleaded.

DISCUSSION AND ANALYSIS

[33] Lord Denning LJ (as he then was) in **Davies v Swan Motor Co [1949] 2 K.B. 291** said generally, there are two questions to be answered in road traffic accidents. Firstly, what faults were there which caused the damage? Secondly, what are the proportions in which damages should be apportioned having regard to the respective responsibilities of those at fault?

[34] It is proposed to analyse the evidence and to answer these questions taking into account four broad heads:

1. Point of impact
2. The distance of the motor bike from the truck when the Claimant first saw the truck
3. The distance of the Truck from the entrance of Paramount/position of the truck on the Roadway
4. Credibility

[35] All the evidence in this case seems to be agreed on the point of impact on the truck. It is firstly agreed by all that the collision occurred in the left lane in which Mr Scott was travelling. In cross-examination he agreed it was on his side of the road close to the white line in the middle of the road. In his evidence in chief, contained in his witness statement, Mr Scott states that the driver of the 1st Defendant's truck turned suddenly into his path, causing the front of his motor cycle to collide onto the **rear left side of the truck**. In cross-examination he agreed that the point of impact with the truck was **behind the ear left wheel**.

[36] Sergeant Graham observed that the motor cycle had collided with the **left side of the truck** and was stuck **behind the left rear wheel**

- [37] Mr Wallace in his examination-in-chief given in his witness statement said that following the collision he observed that a bike had run into the **left side of the truck behind the rear wheel and close to the top of the rear section**. He also went on to state that he observed **two indentations on the in the body of the truck behind the rear left wheel** where the bike had impacted the truck and where the rider's helmet came in contact with the truck.
- [38] Ms Nairn observed that the front section of the motor cycle was **under the left hand side behind the left rear wheel** of the company's vehicle.
- [39] The point of impact on the truck is helpful to the determination of liability. Impact closer to the front of the truck would suggest that the truck had just entered the lane in which Mr Scott was travelling when the collision occurred. Impact closer to the back of the truck would suggest the majority of the truck was in or past the lane in which Mr Scott was travelling. This would also not be inconsistent with the truck being stationary at the entrance to Paramount given that Mr. Wallace agreed that in so doing the rear of the truck would protrude onto the roadway.
- [40] Mr Wallace did not see the motorbike though his evidence is that he heard the sound of bike revving at high speed. Mr Scott agrees that his bike could be heard from a good distance away and could be heard even when not going fast. Under cross-examination Mr Scott agreed that he had sight lines of approximately 200 meters which is approximately 650 feet or 218 yards or ½ of a running track along a 'very straight' road. In his words he could see 'way up the road' as nothing obstructed his view. He said in cross-examination and confirmed in re-examination that when he first saw the truck was when it turned instantly in front of him and that was about 14 feet away.
- [41] Mr Scott has not disputed that the truck was stopped on the opposite side of the road virtually across from Paramount (there was communication between Mr Wallace and Miss Nairn from their respective positions) and moved off from that position. He clearly did not notice it then. In examination-in-chief he said the truck was travelling in the opposite direction in the right lane. Given the clear visibility

which Mr Scott had of the road ahead, and his evidence that there was not a lot of traffic on the road, (though in cross-examination he said there was) it is implausible that keeping a proper lookout and travelling at 35 kmph he did not see the truck parked or move off some 636 feet ahead. Notably on his evidence he would not have seen if Mr Wallace had put on his indicator. The only reasonable inference is that he was not keeping a proper lookout for his own safety. If he did see the truck move off, then he must have expected the truck to have completed turning into Paramount before he would reach it. On the evidence he would not have been able to see the gates and therefore could not know if they were opened or in the process of being opened.

[42] When the credibility of the Claimant is weighed in the balance, including the inconsistencies in his evidence, I find that from his demeanour he did not inspire confidence in his veracity and in fact was misleading in his account of the cause of the collision.

[43] It means that I reject the account of the Claimant as to how the accident occurred as it is improbable.

[44] The contentions are that the truck turned across the road suddenly in front of the Claimant, which I have rejected, and that the truck was stationary at the gates of Paramount. It is not disputed that the gates are set back from the roadway and open inwards. There is no independent evidence as contended for on behalf of the Claimant, as to the relative positions of the truck and the motor bike. Sergeant Graham in his sketch of the scene positions the truck mostly in the lane in which Mr Scott was travelling but also partly in the opposite lane. This he said was based on information contained in the statements collected as well as from his own observations of the scene. In cross-examination he said it was a general sketch and not a 'dead on artist sketch'. He was also not aware that the truck had been moved as is the uncontradicted evidence of Mr Wallace.

[45] Mr Wallace's evidence is that he was stopped for about 15-20 seconds at the gate waiting for the security guard to complete opening the gate. There is no

indication that he indicated to her his intention to turn into the premises though he observed the appropriate driving rules for turning. On the account of Miss Nairn who was the security guard in question she started to open the gate as the truck came across the road. On her account too, there was no request to open the gate from Mr Wallace. Her evidence too is that Mr Wallace had stopped at the gate and she had almost completed opening the second half of the gate when she heard the sound of the collision. Both are agreed therefore that the vehicle was stationary for a while at the gate. In the range of probabilities this seems to be the more likely scenario and I find on a balance of probabilities that the truck was stopped at the gate of Paramount awaiting the completion of the opening of its gates.

[46] However, Mr Wallace was aware that the roadway was a busy one. He had communicated with the guard when he was stopped. There was no urgency to enter the premises. He was able to alert the guard to his intentions and to have the gate fully opened before he moved off. In this way he would have been able to complete the manoeuvre safely. He therefore commenced turning when it was unsafe to do so and knew he would be obstructing the lane. He therefore would be in breach of his common law duty of care to other road users and of his statutory duty of care not to obstruct traffic in making such a manoeuvre.

[47] I find that Mr Wallace failed to observe his duty of care and was therefore negligent when he crossed the road before ensuring he could drive into the premises of Paramount without stopping and stopped in a manner to obstruct traffic.

CONTRIBUTORY NEGLIGENCE

[48] The Road Traffic Act provides in Section 51(2) that:

...it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident...

[49] In **Berrill v. Road Haulage Executive [1952] 2 Lloyds Rep 490** digested in Bingham & Berrymans' paragraph 4.7, it was held that:

“A driver is not bound to foresee every extremity of folly which occurs on the road. Equally he is certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of a road user teaches that people do albeit negligently.”

[50] Contributory negligence does not mean breach of a duty to take care, but simply means careless conduct on the part of the person, usually the plaintiff, in failing to prevent or avoid the carelessness of the other person's breach of duty to take care (Charlesworth and Percy on Negligence, 9th Ed. Para 1-10). Contributory Negligence therefore is one's carelessness in looking after his own safety. In **Jones v Livox Quarries Ltd [1952] 2 QB 608**, per Denning LJ (as he then was) on the nature of contributory negligence said:

“A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.”

[51] In keeping with his duty of care as a driver and his statutory duties, the Claimant ought to have taken such action as may be necessary to avoid an accident. In that regard in his examination-in-chief, Mr Scott said that he tried to brake and swerve in an effort to get away from the truck, but this was from 14 feet away. He also said he had no time to take any action. It was clear from his cross-examination that he took no evasive action saying then “it happen so quick I can't say how much I moved”.

[52] In **Prinsloo**, relied on by the Claimant, it is noted that the duty to keep a proper look out includes not only the physical act of looking, but also a 'reasonably

prudent reaction to whatever might be seen'. A reasonable and responsible driver would have slowed or stopped when the truck moved off

[53] The only plausible account as I have found is that the Claimant failed to see the motor truck in time and consequently was unable to take evasive action to avoid the collision or that he saw the truck but not knowing the gate was not fully opened, believed the truck would have completed the turn instead of stopping. Therefore, he failed to take care for his own safety in that he failed to maintain a proper lookout. While the negligence of Mr. Wallace caused the accident. Mr. Scott was also to blame.

[54] I find therefore that both drivers are responsible for the collision. To determine the apportionment, I must consider whose actions contributed the most to the incident. I find that the truck stopping across the road is the main cause of the accident in that Mr Wallace created the conditions in which the collision occurred. Had the roadway been clear, even without the Claimant paying due care and attention, no collision would have occurred. In the circumstances where in my view, the action of one driver is not significantly more egregious than the other I consider a fair apportionment of liability is 40% to the Claimant and 60% to the Defendants for which the 1st and 2nd Defendants are jointly and severally liable.

ASSESSMENT OF DAMAGES

GENERAL DAMAGES

[55] Mr Scott said immediately after the accident he became dazed and was in and out of consciousness. He felt excruciating pains to his left wrist and had cuts over his hand and body. He was attended at the Kingston Public Hospital where he was admitted for one day. He travelled to the United Kingdom where he resided and was admitted to the King's College Hospital in London. He underwent a surgical procedure and was discharged the following day. This was followed by multiple visits to the outpatient and physiotherapy departments of the hospital. He produced medical reports from the treating physicians at both hospitals.

- [56] According to the medical reports given in evidence, he sustained multiple bruises and abrasions to his body and pain and deformity to left distal forearm. X-rays revealed a Galeazzi fracture of his left forearm. He was operated at King's College Hospital for open reduction and internal fixation of fracture of his left radius. When he was seen some 6 weeks later his arm was out of plaster and he was able to move it reasonably well. X-rays showed the fracture to be healing but not fully healed. He was allowed to start using his arm for light activities. He should not lift anything heavy, force it into any activities or push and pull things with it. Complete healing of the fracture was expected in 2 to 3 months or longer. Until then he would not be able to move his arm normally in a job.
- [57] On November 5, 2014 Mr Scott was again examined at Kings College Hospital. There was a well healed surgical scar on his left forearm. There was tenderness but no wasting of the surrounding muscles. Range of movements of the left shoulder was full and pain free. The range of movement of the left wrist was restricted compared to the right and there was minimal weakness in the left wrist compared to the right. There was no abnormality in terms of tenderness, range of movements or sensations to the left hand.
- [58] The findings were that he had not regained full function in his left arm. He had minimal weakness and significant restriction of movements in his left wrist and forearm and was unlikely to recover any further or regain the preinjury function of his left arm. There is no indication of any further treatment being given or recommended at that time.
- [59] Mr Scott also saw Dr Andrew Ameeraly on November 7, 2016 reportedly for evaluation of his injuries. Based on his physical examination, he assessed him as having a combined upper extremity impairment of the wrist based on pain and decreased range of motion of 11%, and a 7% whole person impairment in accordance with the Guides to evaluation of Permanent Impairment, Sixth Edition published by the American Medical Association.

[60] Counsel for the 1st Defendant has submitted that the court should treat this report as unnecessary having been obtained for the sole purpose of putting it into evidence. This is supported by the fact that Dr Ameerally has not indicated that he treated Mr Scott. However, while it was indicated that there would be some disability in the report of Dr Arya from King's College Hospital, it was not quantified in relation to the whole person impairment. To that extent the evaluation by Dr Ameerally was not superfluous or unnecessary.

[61] Mr Scott's evidence is that he still feels pain and had been unable to resume his regular occupation as a carpenter.

[62] The Claimant has relied on the following authorities

- (i) **Lora Hinds v Robert Edwards et al [1990] Suit no C.L. H025**
- (ii) **Annette Christie v Nutrition Products Ltd &The Attorney General Suit no. C.L. [1990/C429]**
- (iii) **Hubert Watson v Guy Fraser Suit No. C.L. 1990 W 083**

[63] The 1st Defendant relies on the following authorities

- (i) **Byron Bailey v A.J. Webb and Moses Morris** Harrison's Assessment of Damages for Personal Injuries page 258
- (ii) **Janet Barclay v Metropolitan MTH** Khan Volume 6 page 86

[64] On examination of these authorities the closest in the nature of injuries is **Lora Hinds**. That claimant's injuries were noted as pain in right elbow and injury to right hand. There was no indication of the exact nature of the injury. She was assessed with a 6% whole person disability. Regardless of how her injury was caused and the exact nature of her injury, the effect was similar to the Claimant's and so comparable. This authority is however 30 years old. I am mindful that it is preferable that the comparison be made with more recent cases (**Seepersad v Persad and another [2004]** 64 WIR 378 and **Derrick Munroe v Gordon**

Robertson 2015 JMCA Civ 38). The claimant in the more recent authority of **Janet Barclay** is also comparable. She was diagnosed with strain of left acromioclavicular joint of shoulder and lumbosacral strain. This caused pain and weakness of the shoulder muscles. Her ability to do strenuous or light work was reduced partially. She was required to continue therapy. She also had injury to the back. She had a disability rating of 7% overall (5% for the relevant rating) and was awarded \$1,500,000.00 in 2007 which updated to \$, 3,230,769.23 using the CPI for 268.8 of 2020. Where the effect of the disabilities are similar to the relevant case.

[65] In the circumstances I believe utilizing the full disability rating of 7 % is reasonable. Taking into account the loss of amenities including his inability to carry out his usual occupation I consider a reasonable award to the Claimant is \$5,000,000.00

SPECIAL DAMAGES

[66] The following items claimed as special damages are not being contested

(i) Police Report	\$1000.00
(ii) Cost of Medical Report KPH	\$1000.00
(iii) Cost of medical report Dr. ARYA	\$43,637.50
(iv) Wrecker fees Century Wrecking	\$6990.00
(v) Receipt for Damage Assessment Report	\$10,500.00
(vi) Loss of motor vehicle	\$720,000.00

[67] The cost for Dr Ameerally's report is allowed. The medical reports of Dr Aryan admitted into evidence indicate that the Claimant paid for both. Both are pleaded

on the Amended Schedule of Special Damages though with what appears to be a typographical error and are both allowed.

[68] The receipt for the estimate, which is exhibit 8, is in respect of 2008 Honda CBR 600 and is dated August 24, 2013. It logically relates to the damage to the Claimant's motor bike and is allowed.

[69] The cost for medication is not unreasonable. The Claimant's explanation that he is unable to locate the receipts is reasonable and accepted. This is allowed.

[70] The Claimant has claimed loss of earnings. The medical reports support the Claimant's inability to carry out his occupation as a Carpenter. The only supporting document in relation to the Claimant's employment is a letter from his employer Richwell Construction Ltd. The Claimant is described as being contracted to the company. No further detail is given.

[71] In cross-examination the Claimant says he would receive payslips and he was paid by bank transfers. He had been contracted to this company from 2007 (or 2001 my note is unclear). He said he was not on the company's books and he would go in and do the job when called. The jobs would be of varying duration. With respect to the actual scope of the job he said he would make cabinets on site and each would take him roughly 2 days to build the cabinets for one kitchen. Cabinets for 200 kitchens would therefore take him 400 days, well over a year! In his evidence he said he had 8 months to do them. He later clarified he was not making the cabinets from scratch but assembled pre made ones. It does stretch credulity that on a new construction it would require up to 8 months or worse 1 year plus to install cabinets. There is also a contradiction in his evidence of 200 kitchens with the letter from his employer which indicated he had a job for 150 kitchens.

[72] According to the evidence given under cross-examination that he would take 8 months to complete the kitchens, he would earn from this job alone approximately & £15,937.00 per month, a far cry from the & £3500.00 per month

he said in his witness statement that he earned as a carpenter. As indicated before the Claimant's veracity is in issue and the contradictions in his evidence are weighed against his credibility.

[73] There is no indication who provided the premade kitchens. Was the contract to supply and install kitchens? In which case what is the cost to acquire the kitchen? Were the kitchens otherwise provided and he to install them only?

[74] The courts have time and time again held that special damages must be strictly proved. Exceptions have been made in cases where it was not realistic to expect the Claimant to keep records or sufficient records to substantiate his claim (See **Walters v Mitchell** (1992) 92 JLR 173).

[75] This is not a case where the exception applies. The Claimant is in a position to supply documents to support his claim and file the only document produced, the letter from his employer was woefully inadequate such that little or no weight can be given to it. There are contradictions with the evidence given by Mr. Scott. The maker was not made available for cross-examination. It was not bolstered by the claimant's lack of credibility.

[76] The Claimant said he got pay slips and paid taxes. He gives no reason why documents of some sort were not produced. This is a significant part of the claim amounting to some \$22,000,000.00. The Claimant is obliged to place cogent evidence of this loss before the court. I find he has not done so and the claim is disallowed. I have however made some allowance for this in general damages as it is clear that he must have suffered some loss of income.

[77] Though the Claimant was unable to carry out his usual employment as a carpenter, his own evidence showed he was not a full time employment and looked based on the availability of jobs. He was obliged in the circumstances to prove one balance of probabilities not only the fact of his employment but also the income lost as a result of the 2nd Defendant's negligence. I find that he has not proved to the required standard, this specific loss.

[78] The additional special damages allowed are

(vii)	Cost for medical report Dr. Ameerally	80,000.00
(viii)	Cost for Medical Report Dr. Arya	\$27,928.00
(ix)	Cost of estimate Motor Consultants Ltd.	\$7,200.00
(x)	Medication	\$2779.00
(xi)	X-ray	\$3500.00

DISPOSAL

[79] It is hereby ordered

- (1) Judgment for the Claimant with contributory negligence assessed at 40 % on the part of the Claimant and 60% on the part of the 1st and 2nd Defendants jointly and or severally.
- (2) Damages for the Claimant assessed as follows

Special Damages in the amount of \$904,534.50 with interest thereon at 3% from the 12th April 2013 to the date of judgment

General damages for pain and suffering and loss of amenities in the amount of \$5,000,000 with interest thereon at 3% from 18th October, 2013 to the date of judgment
- (3) The Claimant is to have 60% of his costs to be taxed if not agreed.