[2021] JMSC Civ. 52

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV03719

BETWEEN	**TRUDY-ANN SILENT-HYATT**	**CLAIMANT**
AND	**ROHAN MARLEY**	**1ST DEFENDANT**
AND	**JASON WALTERS**	**2ND DEFENDANT**

IN OPEN COURT

Ms Yualande Christopher instructed by Yualande Christopher & Associates for the Claimant

Mr Stephen Jackson instructed by Samuda & Johnson for the Defendants

Negligence – Motor vehicle accident – 1st Defendant's Motor truck colliding in back of Claimant's car – Vicarious liability - Contributory Negligence

Damages – Assessment – Pain and suffering and loss of amenities – Pre-existing medical condition – Post Traumatic Stress Disorder – Special damages

Heard: September 21, (Submissions filed October 15, November 12 and December 2, 2020) and February 19, 2021

LINDO, J.

[1] On April 15, 2016 at about 2:10 p.m., there was an accident along Half Way Tree Road in the parish of Saint Andrew. It involved motor car registered 9115 EH driven by Trudy-Anne Silent-Hyatt, a Marketing and Public Relations Consultant, and motor truck, registered CE 9933, owned by Rohan Anthony Marley and driven by Jason Davion Walters, an Electrician/Repairs and Maintenance Consultant. They were both travelling in the same direction with Mrs Silent-Hyatt driving in front of Mr Walters when Mr Walters collided in the rear of her car.

[2] On September 1, 2016, Mrs Silent-Hyatt filed a Claim and Particulars of Claim alleging that she sustained personal injuries, property damage and loss and expenses "on account of the 2nd Defendant's negligent operation of the 1st Defendant's motor vehicle". She is seeking to recover damages.

[3] In the Particulars of Negligence of the 2nd Defendant, she lists the following:

> a. *Failing to keep a proper lookout along the roadway;*
>
> b. *Failure to take heed of the position and distance of the claimant's motor vehicle in the lane ahead and on the roadway;*
>
> c. *Failure to apply his brake or manoeuvre his vehicle in a timely manner to avoid a collision;*
>
> d. *Driving at an excessive speed;*
>
> e. *Failing to take any other effective measure to avoid a collision;*
>
> f. *In the circumstances, drove his said vehicle in a reckless and unreasonable manner without reasonable concern for the safety of other road users, and in particular the Claimant;*
>
> g. *Driving away from the scene of the accident in an attempt to avoid liability.*

[4] The 1st Defendant filed a Defence on November 4, 2016, while the 2nd Defendant filed his Defence on January 6, 2017. Both Defences are identical in content. They admit that they are owner and driver, respectively, of the motor vehicle bearing registration number CE 9933, and deny that the 2nd Defendant *"slammed into the rear of the motor vehicle being driven by the Claimant approximately 5-6 seconds after the Claimant had come to a complete stop"*. They state that the Claimant came to a sudden and abrupt stop when a taxi ahead of her was stopped by a policeman, and that the 2nd Defendant received no prior warning of her intention to stop and he attempted to avoid colliding with her but was unable to do so, "*despite his best efforts*".

[5] The Defendants state further that after the collision the 2nd Defendant had to *"move from the scene to location off the road so as not to create a traffic jam..."* They deny that the collision was caused by their negligence, deny the

particulars of negligence pleaded by the Claimant and state that the collision was caused and/or contributed to by the negligence of the Claimant. They allege that the Claimant was negligent in that she:

a. *Failed to keep any or any proper lookout or to have any or any sufficient regard for traffic along the said road;*

b. *Failed to give any or any adequate warning of her intention to stop;*

c. *Failed to exercise or to maintain any or any sufficient control of the said motor vehicle which she was driving at the material time;*

d. *Stopped suddenly and abruptly ahead of the 2nd Defendant and in his path thereby causing the said collision;*

e. *Failed to take any or any other step or in any other way so to manage or control the said motor vehicle as to avoid the said collision.*

The Issues

[6] The court has to determine whether the 2nd Defendant caused injury and damage to the Claimant by reason of negligence and whether the Claimant was contributorily negligent. Additionally, the court has to address the issue of vicarious liability as the 1st Defendant is the owner, and the 2nd Defendant was the driver of the motor truck, and their Defence is silent on whether the driver was the servant or agent of the 1st Defendant.

[7] The court also has to determine the nature and extent of the personal injury and property damage sustained by the Claimant, and the quantum of damages, if any, to which she is entitled, if the Defendants are found to be negligent.

The Trial

[8] The matter came on for trial on September 21, 2020. The Claimant gave evidence on her own behalf, while the 2nd Defendant gave evidence on behalf of the Defendants. Their witness statements were admitted as their evidence in chief and they were cross examined. There was no independent eyewitness to the accident.

[9] Documents numbered 1 – 42, and including reports from six persons who were called as expert witnesses, were agreed and admitted in evidence.

[10] The expert witnesses were Dr Stuart Murray, Anaesthetist and Pain Consultant; Dr Neville Ballin, Consultant in Anaesthetics, Critical Care and Pain Management; Dr Kai A.D. Morgan, Consultant Clinical Psychologist; Dr Shaun Corbett, Board Certified in Physical Medicine & Rehabilitation & Pain Medicine; Dr Randolph Cheeks, Consultant Neurosurgeon; and Dr Mark Minott, Consultant Orthopaedic Surgeon and Sports Medicine Physician.

The Claimant's Case

[11] The Claimant's evidence as contained in her witness statement filed on December 20, 2019, is that she had just driven off from a stop light which had turned green, was driving at 5-8 mph in the second lane of a four lane road and a car in the lane to her left began drifting into the second lane. She says she came to a complete stop to allow the vehicle to complete the transition into her lane and while waiting for 5-6 seconds she felt the impact of a vehicle in the back of her car and her body was jerked.

[12] She adds that she sat for a few seconds and then was in the motion of opening her car door when she saw the same vehicle "*reversing somewhat*". She states that "*he rubbed the right back light and scraped the side of the vehicle as he hurriedly drove away...".* She says she pursued him for a few chains, he drove into First Caribbean Bank car park and she parked on the outside, exited her car, began feeling pains and having intense muscle spasms and after about 5-6 minutes, the truck driver handed her his documents, she held onto them and they went to the Half Way Tree Police station.

[13] Her evidence also is that she has a pre-existing condition, fibromyalgia, and in recent times her pains had decreased and she was not relying on opioid/narcotic pain medication, could do light exercises and housework and was not depressed and could pursue other activities and hobbies. She says when the 2nd Defendant rear ended her she "*did not feel all the physical effects on the spot...was trying all the relaxation techniques learnt...was getting worse*

and that is when [she] scheduled a visit to see Dr Stuart Murray... on April 24, 2016 – for the first time in 3 years".

[14] Mrs Silent-Hyatt also states that since the accident her "*base line pains have been exacerbated to the point that [she] had to return to opioids/narcotic medications to cope...[she] would ...scream or have panic and anxiety attacks if vehicles get too close to the vehicle that [she] is in..."*

[15] She indicates that she visited and received treatment from medical experts and none of them have been successful in restoring her "pre-accident condition" and she was again referred to Rosomoff. She says the cost of the initial assessment which took place over three days was US$3,689.00 and she had to borrow all the funds to pay for the evaluation, accommodation and air fare. She also states that the five-week treatment plan proposed by Rosomoff as at 2017 was at a cost of US$101,197.93, inclusive of airfare and accommodation for an assistant, "*as [she] is unable to travel without one*".

[16] When cross examined, Mrs Silent-Hyatt said she was proceeding very slowly, there was no car in front of her, she applied her brake and gently came to a "*full stop*" and then felt *"a big jerk*". She said the impact felt like a major one because she did a "*whiplash motion*" and the damage to her vehicle was significant enough for her to have to replace the bumper and right rear light, and there was a scrape on the right side.

[17] When asked if she checked her rear view mirror to see if any vehicle was behind her, Mrs Silent Hyatt said "*I don't remember doing that*" but admitted that she considered it important to do so. She also said on impact, her vehicle did not move and that she started feeling pain when she went to the police station.

[18] Mrs Silent-Hyatt agreed that she had a prior accident and indicated that she declared that she had fibromyalgia. She also agreed that the injuries, subject of her claim, are identical to symptoms she would have due to fibromyalgia but said they are of a greater magnitude. She explained that she suffered new injuries, her "*baseline pain was heightened*" and that the whiplash motion was that her body went "*back and forth*". She said she went to the police station about 10 to 15 minutes after the accident.

The Defendants' Case

[19] Mr Walters' evidence in chief is contained in his witness statement filed on August 11, 2020. He states that he was travelling behind the Claimant and was about 1½ car lengths from her car and the traffic was heavy. He says he saw a policeman stop a taxi operator who was driving in front of the Claimant, she stopped suddenly as the taxi operator had stopped and was then pulled over to the left by the police.

[20] He adds that he tried to pull away from the Claimant and the front bumper of his vehicle collided with the right rear bumper of her vehicle and that he had "a very short window of opportunity to avoid fully hitting her vehicle". He says further that the Claimant did not signal her intention to stop and he "*did not see any break (sic) lights on her vehicle prior to the collision".*

[21] Mr Walters also states that he pulled over to the side of the road so as not to cause a pile up of traffic and when he exited his car he observed the metal bar at the front of his vehicle had a small dent while the Claimant's vehicle had a scratch to the lights and a small dent to bumper. He indicates that the Claimant was wearing a back strap at the time and that in a telephone conversation he had with her, she said the accident only aggravated her injury.

[22] In amplifying his evidence, Mr Walters said he got the brake light signal that the Claimant was going to make a sudden stop, and he was a bit close, so he applied his brake and tried to swerve away.

[23] When cross examined, he said Mr Rohan Marley gave him permission to drive the vehicle and at the time of the accident he was on the job. He said the vehicle he was driving was a van, an open back, land rover. When pressed, he admitted that it was a motor truck and that his driver's licence does not permit him to drive a motor truck. He indicated that when he stopped suddenly, no one collided into his vehicle. He denied driving away from the scene of the accident and said he could not exit the vehicle as he was in traffic, so he "*turned left to get a private park"* and got a park about six feet away.

[24] He admitted that they went to the police station and said he had no opportunity to report the matter to the police before that as there was no police on the scene at the time. He then added that the police he had said was there, drove away about twenty seconds after. He denied speeding, denied attempting to flee from the scene and admitted that although he was 1½ car length away from the Claimant's car and saw it, he still collided in it.

The Experts' Evidence

Dr Stuart Murray

[25] Dr Stuart Murray was the first medical professional who is noted to have attended to the Claimant after she was seen at the Andrews Hospital on the day of the accident and given injections for pain and muscle relaxation. He states that he saw her on April 20, 2016, she was unable to sit for more than a few minutes before the pains became unbearable and he prescribed oral morphine and referred her for physiotherapy and aqua-therapy, and on May 13, 2016, he also referred her to Dr Kai Morgan, a Clinical Psychologist.

[26] Dr Murray indicates that Mrs Silent Hyatt:

> *"... had seen definite improvement since being treated at the Rosomoff ... in April – May 2013. ... she had been coping reasonably well. ... A measure of her improvement was evidenced by her being off morphine tablets for over two years ... with the worsening of her state to pre2013 levels, I think the best option for her is to yet again seek treatment at the Rosomoff Center as soon as possible."*

[27] In a further report dated July 11, 2016, Dr Murray states as follows:

> *"... was allegedly rear-ended ... this has resulted in a significant re-exacerbation of her fibromyalgia pains in her upper back, right shoulder neck and arms ...her pain level has risen ... Trudy is now suffering from exhaustion, chronic fatigue and insomnia...She has regressed to the point where she has had to restart oral morphine daily in an attempt to control her pain ..."*

[28] His evidence further, is that she was reviewed on September 1, 2016, and she continued to be in severe pain, had developed pain and tenderness in the right elbow radiating down the forearm and hand and that she had a steroid injection *"... to address this new manifestation of her fibromyalgia"*

[29] Dr Murray requested Dr Neville Ballin to evaluate and provide a medical report for the Claimant, and referred her to Dr Mark Minott, for treatment as he diagnosed her with '*De Quervains Tenosynovitis'.* On September 23, 2019, he referred her to Dr Mark Morgan, a neurosurgeon, indicating that *"... it would be prudent for Trudy to have a neuro-evaluation at this time".* He sets out her current medications and states that *"she is also hypertensive and diabetic and on medication for these".*

[30] Dr Murray states that *"Mrs Silent-Hyatt had already been suffering from severe fibromyalgia for several years which also causes chronic muscular pain. This recent accident has unfortunately served to multiple (sic?) the muscle pains..."* He explained that fibromyalgia is characterised by chronic widespread pain and a heightened pain response to pressure.

Dr Kai Morgan

[31] Dr Kai Morgan, in her expert report dated November 4, 2016, states that she had treated the Claimant before, "*for several courses of depression based on a chronic pain condition, and fibromyalgia resulting from an accident she sustained in February 2007 and a more recent accident in April 2016 which appears to have caused a serious flare-up"*

[32] She states further that she has only been able to see her once following the accident and *"... she appears to be regressing into a state of severe depression... Based on her current emotional state, it is my professional opinion that Trudy-Anne will need an additional 8 sessions in order to help manage her declining mental health"*

[33] In a letter to Dr Murray dated June 1, 2016, Dr Morgan states that her most recent session with the Claimant was May 17, 2016, and, *"... there has been an increase in her depressive symptoms as well as her pain symptoms"*. She adds that "*Trudy-Anne reported some post-traumatic stress symptoms (hypervigilance and avoidance in particular) ... will need approximately 4 sessions of therapeutic intervention..."*

Dr Shaun Corbett

[34] The evidence of Dr Corbett is that he first saw the Claimant on April 24, 2017, when her presenting complaints were neck pain, right upper extremity pain, total body pain. He indicates that she was previously treated at the Rosomoff Center. Dr Corbett reviewed notes from Dr Stuart Murray and indicates that the Claimant underwent evaluation by Dr Cheeks and points out that both doctors have recommended a return to the Rosomoff Center for multidisciplinary treatment for fibromyalgia.

[35] He states that he assessed her with the following diagnosis:

1. Fibromyalgia
2. Exacerbation of pain following motor vehicle accident in April of 2016
3. Cervical, thoracic and lumbar myofascial pain syndrome
4. Chronic pain syndrome
5. Deconditioning
6. Anxiety/depression
7. Hypertension
8. Diabetes mellitus
9. Asthma

[36] He recommends *"at minimum, four weeks of intensive treatment which would begin on an inpatient basis".*

[37] In response to questions put to him, Dr Corbett explained, *inter alia*, the significance of 'pain scales' and indicated that although he did not evaluate the Claimant in 2013, he reviewed the 'discharge summary' which reports pain of 9-10/10, and that the Claimant "reports similar pain currently". He states that fibromyalgia symptoms most commonly focus on widespread pain complaints although depression, sleep disturbance, and decreased cognitive ability, making it difficult to complete tasks, often accompany the diagnosis.

[38] Dr Corbett states further that fibromyalgia typically has longstanding effects on a patient's daily life and says it is difficult to determine if there is a causative relationship between fibromyalgia and the psychological state. He adds that an accident need not be severe to cause a relapse of fibromyalgia symptoms and that the natural course of the disease process is characterised by flares and relapse of symptoms in the chronic state.

[39] He stated that worsening of fibromyalgia symptoms after a car accident *"can reasonably be expected to last from one week to a couple of months ... while it could conceivably last longer, I am unaware of any studies that indicate a flare of fibromyalgia lasting an extended period after an additional traumatic event. That being said, the natural course of fibromyalgia can commonly lead to extended flare-ups and exacerbation of symptoms. Ms Silent is likely suffering from an exacerbation of her baseline pain..."*

Dr Neville Ballin

[40] Dr Ballin examined Mrs Silent-Hyatt on May 25, 2017 and June 27, 2018. In his initial report dated July 25, 2017, he discusses the characteristics of fibromyalgia and with reference to the impact of the accident, states as follows:

> *"The recent traumatic episode has caused an exacerbation in her pain and deterioration in her condition. This is consistent with the pathophysiology of her condition...She will require increased multidisciplinary input in her management until her pain is reduced."*

[41] In the "Addendum to Medical Report dated 25th July 2017...", which is dated July 20, 2018, he indicates the presenting complaint as "*Generalized Pain, Exacerbation of Fibromyalgia Syndrome".* He states his impression as follows:

> *"Exacerbation of fibromyalgia with generalized musculoskeletal pain and multiple active trigger points, stimulation of which causes radiation of pain to other areas. Clinical depression and sleep disorder. This is secondary to the motor vehicle accident sustained in April 2016".*

Dr Mark Minott

[42] Dr Minott examined the Claimant on February 13, 2018, at the request of Dr Murray who asked him to review her left wrist. He states, *inter alia*, that she had:

"... a left DeQuervain's tenosynovitis. At surgery, the tendons were flattened under the retinaculum. Post-operatively, the pain is relieved..."

Dr Randolph Cheeks

[43] Dr Cheeks examined the Claimant on February 16, 2017 at the request of the Defendants. The purpose of his consultation was to assess *"the status of injuries allegedly sustained in motor vehicle accident in April of 2016".* He was provided with reports prepared by Dr Murray; letters from Dr Murray to Dr Morgan and to GK General Insurance Company; copy of the medical records and addendum medical report from the Rosomoff Comprehensive Rehabilitation Center; medical report from the Rehabilitation Institute of the Caribbean dated November 30, 2012; medical reports prepared by Drs Ballin, Ali, Mark Morgan and Gayle; letter from psychologist Dr K. Morgan to Dr Murray, and a report dated May 27, 2016 prepared by therapist J. Pinto.

[44] Dr Cheeks states that "*a complete general and neurological examination was carried out ...".* His diagnosis was "*exacerbation of the pre-existing condition of fibromyalgia".* He also states as follows:

> *" ... I think that basically she suffered minor muscular sprain type injuries in the accident of 2016, but her pre-existing condition of fibromyalgia for which she had been receiving treatment for several years ...and which had established a pattern of intermittent flare ups ...has continued unabated as is usual in this condition. ... The minor sprains sustained ... have resolved and her medical condition of fibromyalgia has reverted to its pre-accident status.*
>
> *Consequently, I do not think that she has suffered from any permanent new injuries after the accident ... since her current condition corresponds with her medical condition as described by the Rosomoff ... in 2013 and her condition when assessed ... by pain specialist Dr Ballin in April 2012 ...her current disabilities are derived from the injuries sustained in the previous motor vehicle accident in which she was involved in 2007*
>
> *I concur with Dr Ballin and hold the view that the fluctuations in the pains which she has been experiencing since 2007 is reflecting the normal ebb and flow of the condition and cannot be ascribed specifically to the accident of 2016."*

[45] With regard to 'consistency with mechanism of injury', Dr Cheeks states:

> *"I do not think that the accident of 15 April 2016 is responsible for any part of her current pain syndrome which is continuing to manifest the*

profile of the symptoms which it has been manifesting in the preceding years".

[46] His prognosis was stated as follows:

> *" ..., this pain syndrome which commenced after the accident of February 3, 2007 and has continued since that time is likely to persist indefinitely and she will need to continue proceed with the multi-disciplinary approach to its management".*

The Submissions

[47] At the end of the trial, the parties were ordered to file written submissions in relation to liability and quantum of damages. The Claimant's submissions were filed on October 15, 2020 while the submissions on behalf of the Defendants were filed on November 12, 2020. The Claimant's response was filed on December 3, 2020.

[48] Counsel for the Claimant reviewed the evidence and addressed the law in relation to negligence and breach of statutory duty. She urged the court to consider liability in light of the evidence that the 2nd Defendant did not have the requisite licence, although she correctly pointed out that not having the requisite licence does not '*ipso facto'* mean that the 2nd Defendant is liable in negligence. She urged the court to find that the more plausible evidence is that the Claimant did not stop her vehicle abruptly, but that the accident was caused by the 2nd Defendant's failure to keep a safe distance, failure to apply his brakes in a timely manner to avoid the collision, driving at an excessive speed and driving in a reckless manner.

[49] With respect to the extent of the liability of the Defendants, Counsel submitted that based on the 'egg shell skull' principle, as explained in the case of **Smith v Leech Brain & Co**. [1962] 2 QB 405, a defendant must take his victim as he finds him and is responsible for the full consequences of his actions regardless of the nature of the damage.

[50] She said the 2nd Defendant's action caused the collision which resulted in personal injury to the Claimant and damage to her motor vehicle and question whether the Defendant's actions exacerbated the Claimant's condition can be proved by the medical evidence.

[51] Counsel for the Defendants, with respect to the issue of contributory negligence, pointed to the general definition of negligence as provided in the case of **Blyth v Birmingham Water Works Company** (1856) 11 Ex Ch 781**,** and cited the cases of **Esso Standard Oil SA Ltd & Anor v Ian Tulloch** (1991) JLR 553 and **Bourhill v Young** [1943] AC 92.

[52] Mr Jackson indicated that the "the point of damage would be helpful in determining whose negligence caused the accident" and expressed the view that there was no evidence led to suggest that the Defendant was a reckless or careless driver. He submitted that the Claimant was not a witness of truth and that she "has attempted to mislead the court on the issue of liability, and has exaggerated the true nature of her injuries..."

[53] Counsel said, *inter alia*, that the Claimant admitted that she did not use her rear view mirrors to check if it was safe for her to stop and he urged the court to reject her evidence that she applied her brake gently, and that there were "two hits" to her vehicle. He asked the court to find that the damage to the Claimant's car was minor, and that the 2nd Defendant was not travelling too closely to the Claimant.

The Law

[54] It is well established that in a claim grounded in the tort of negligence evidence must be produced to show that the defendant owed a duty of care to the claimant, that the defendant breached that duty and damage sustained by the claimant was caused by the breach of duty by the defendant (See **Anderson (Glenford) v Welch (George)** [2012] JMCA Civ 43).

[55] All users of the road owe a duty of care to other road users and drivers of motor vehicles have a duty by statute and at common law to exercise reasonable care while operating their vehicles on the roadway. The standard of care expected is that level of care which an ordinary skilful driver would have exercised in all the circumstances.

[56] As motorists, the Claimant and the 2nd Defendant had an obligation to observe the provisions of the Road Traffic Act and the Road Code. The duty involves

avoiding excessive speed, keeping a proper lookout, observing traffic rules and signals, avoiding an accident and exercising reasonable care to avoid causing injury to persons or damage to property. (See: **Esso Standard Oil SA Ltd. & Anor. v Ian Tulloch** [1991] 28 JLR 553) **Bourhill v Young**, *supra.* See also **Section 51 (2) of the Road Traffic Act**).

[57] In this case, both the Claimant and the 2nd Defendant owed a duty of care to each other as they were traversing the roadway, both travelling in the same direction and driving motor vehicles. (**Nance v British Columbia Electric Railway Co. Ltd.** [1951] AC 601). They also owed each other a duty of care to so operate their vehicles as not to cause any foreseeable harm to each other or to other road users.

[58] Although the parties agreed that the 2nd Defendant collided in the rear of the Claimant's car, the manner in which the collision occurred is in dispute as well as who is at fault. These will therefore have to be resolved by assessing the credibility of the parties and the plausibility of their accounts of the factual circumstances surrounding the accident.

Findings

[59] The Claimant's version of what took place was not shaken in cross examination and I have no reason to doubt that the accident took place in the manner described by her. I also believe that the 2nd Defendant caused further, albeit minor damage to the side of her vehicle, as he drove away from the scene. I found the Claimant to be honest and straightforward and her evidence to be more credible than that of the 2nd Defendant. I note that there was no question put to her in cross examination in relation to that part of her evidence that the 2nd Defendant drove away from the scene and went into the car park which was some chains away.

[60] On the other hand, I found that the 2nd Defendant lacked credibility. He was also quite inconsistent and his evidence was self- contradictory. I do not believe his evidence that he saw a police officer pull over a taxi in front of the Claimant's car or that he pulled over to the side of the road, a distance of 6 feet, after the impact. This bit of evidence is inconsistent with his defence in which he stated

that he "*had to move from the scene to location off the road so as not to create a traffic jam*" and with his evidence in cross examination in which he said he "*turned left to get a private park*".

[61] I note also that in seeking to amplify the evidence contained in his witness statement, he said he was able to observe the brake light signal that the Claimant was going to stop although in his defence he said *"[he] received no prior warning from the Claimant of her intensions (sic) to stop..."*

[62] Even if the 2nd Defendant was able to see the brake lights of the Claimant's car, as he testified, it is clear that he could not have been driving with due care since he failed to manoeuvre his vehicle in a manner to avoid colliding in her vehicle. It is also highly improbable that a police officer, in the immediate vicinity, could have stopped a motorist in front of the Claimant's car just before the impact occurred, and leave the scene "about twenty seconds after..."

[63] I reject his evidence that the traffic was heavy and all vehicles were travelling close to each other and I also reject his evidence that he was driving at 35kmph. I find that he was travelling too closely to the Claimant's vehicle, was not keeping a proper lookout and failed to take heed of the position of the Claimant's vehicle and the distance between them, and neither did he manoeuvre his vehicle in a manner, or take any or any sufficient measure, to avoid colliding into the rear of her vehicle.

[64] Additionally, I find that he drove in a reckless manner so that even after colliding in the back section of the Claimant's car, he caused further damage to the side of her vehicle. This I find, took place in his bid to drive away from the scene and I also believe that he drove away from the scene and entered a private parking lot some chains away, as the Claimant testified.

[65] The material discrepancies which exist between the evidence in chief and his evidence on cross examination, against the background of the defence put forward, lead me to a finding that the 2nd Defendant is not being truthful.

[66] I find that he would have had sufficient time to come to a complete stop without causing any damage to the Claimant's vehicle, had he not been driving so

closely behind the Claimant and at the rate of speed at which he was going. It therefore means that the 2nd Defendant must be at fault for not proceeding with due care.

[67] Evidence in respect of the repairs done to the Claimant's car show that the right rear bumper and the side of the car were damaged. It is conclusive and wholly supportive of a finding that it is the back section of the Claimant's car, including rear right bumper, bumper lamp, back door and back glass, that were damaged, and that there was also minor damage or "scrape" to the side of the car.

[68] No questions were put to the Claimant about the repairs she testifies were carried out on her vehicle, and I find as a fact that repairs, including removal of dents and scratches, removal and replacement of rear bumper and removal and installation of the "right hand tail lamp", as identified by her, were in fact done, as evidenced by the receipts for the purchase of parts and for payment for the repairs.

[69] It is my view that the fact of the damage to the right section of the bumper and the back section of the right side of the car, provide cogent evidence supporting her contention that the 2nd Defendant failed to keep a proper lookout, failed to take heed of the distance of her car, failed to take any or any effective measure to avoid the collision and drove in a reckless manner thereby causing the accident and causing her to suffer personal injury and damage to her motor car.

[70] I therefore find that the 2nd Defendant was negligent.

Vicarious Liability

[71] The Defences filed by the Defendants were identical in content and the issue of agency was not addressed. There was however no issue raised that the 2nd Defendant was not the servant or agent of the 1st Defendant, the owner of the motor truck. The 1st Defendant has not provided any evidence to rebut the presumption of agency and from the evidence presented, I find as a fact, that the 2nd Defendant was driving the 1st Defendant's vehicle in the course of his employment to the 1st Defendant, and that he was driving it with the 1st Defendant's permission.

[72] It is therefore clear that the 1st Defendant is vicariously liable for the negligence of the 2nd Defendant, who, at the material time, was acting as his servant or agent.

Contributory negligence

[73] The Defendants having pleaded contributory negligence on the part of the Claimant, have a duty to provide evidence from which this court can find on a balance of probabilities that the injury and loss of which she complains, resulted from the particular risk to which she exposed herself by virtue of her own negligence. To establish this defence, they must prove that she did not, in her own interest, take reasonable care and contributed, by her want of care to her own injury.

[74] The evidence presented by the Defendants is that the Claimant stopped abruptly. I find however, that the Claimant generally complied with her duty of care to other road users by applying her brake and slowly coming to a stop to allow another vehicle to enter the lane in which she was driving. I bear in mind that the Claimant, although admitting that it is important to check the rear view mirror, stated that she did not remember doing so. While it is likely that she did not look in the mirror before stopping, that of itself, is not sufficient for me to find that she is at fault to any degree. I find that she slowed down and applied her brake and came to a stop and that the brake lights would have been obvious to a motorist travelling at a safe and reasonable distance behind her. As such I do not find that she could be held to have contributed in any way to the accident.

Conclusion/Liability

[75] It is the considered view of this court that the evidence of the Claimant is to be preferred to that of the 2nd Defendant. Mrs Silent-Hyatt was a very honest and compelling witness while Mr Walters was inconsistent and I did not believe his version of how the accident happened. I find on a balance of probabilities that the collision occurred as a result of the 2nd Defendant not keeping a proper lookout, driving too closely to the Claimant's car and failing to take reasonable steps to avoid colliding in the rear of the said car. The only conclusion to be

arrived at, therefore, is that the accident was wholly caused by the negligence of the 2nd Defendant, the driver of the 1st Defendant's motor vehicle.

[76] It is my view that the Defendants cannot escape liability in the circumstances as I have also found that the 2nd Defendant was acting as the servant or agent of the 1st Defendant and as a result of the collision the Claimant sustained injuries and incurred loss and there was an exacerbation of her pre-existing condition of fibromyalgia, as indicated by the medical evidence presented.

[77] In view of all the foregoing, there will be judgment for the Claimant against the Defendants.

[78] I will now proceed to assess the damages to which the Claimant is entitled.

Damages - Assessment

Special damages

[79] It is an established principle that special damages, which are generally capable of exact calculation, must be specially pleaded and proved and therefore in any action in which a claimant seeks to recover special damages, he has a duty to prove his loss strictly. (See **Lawford Murphy v Luther Mills** (1976) 14 JLR 119). The authorities however show that the court has some discretion in relaxing the rule in the interest of fairness and justice, based on the particular circumstances of the case. (See **Julius Roy v Audrey Jolly** [2012] JMCA Civ. 63.

[80] The Claimant has pleaded and particularized special damages, being medical expenses totalling $56,690.00 and motor vehicle expenses, inclusive of loss of use of the vehicle, totalling $161,404.36. The total special damages pleaded is $218,094.36.

Medical Expenses

[81] In respect of her medical expenses, Mrs Silent-Hyatt has given evidence that she did two Magnetic Resonance Imaging, visited and received treatment from a number of medical experts, and incurred expenses, which include payments to Andrews Memorial Hospital, Dr Murray and Swimmaz Aquatic Swim Club to

a total of $56,690.00. She states also that she was referred to Rosomoff Center, and an initial assessment which cost US$3,689.00, was done and that she had to borrow all the funds from her friend to pay for the evaluation, accommodation and airfare.

[82] She has provided receipts which show that she incurred medical expenses, and receipts showing a total of $1,278,628.39 have been referred to at paragraphs 43 to 46 of the closing submissions of Counsel.

[83] There is unchallenged evidence, supported by the medical evidence, that Mrs Silent Hyatt was assessed at the Rosomoff Center and was seen by Dr Kai Morgan, a Psychologist as well as by a number of other medical practitioners. She would therefore be entitled to recover the sums paid.

[84] In her Particulars of Claim, Mrs Silent-Hyatt indicated that "as treatment is continuing the claim will be amended in the future to include the further medical reports". She had a duty to apply to amend her particulars of claim to reflect additional medical expenses but has not done so.

[85] In **Lyndel Laing & Anor. v Lucille Rodney & Anor** [2013] JMCA Civ 27, the Court of Appeal emphasised that a judgment could not properly be entered for a sum in excess of the amount claimed. The learned Judge of Appeal, Harris JA said, in part, at paragraph [25]:

> *"...as a matter of law, a claimant cannot recover by a judgment, more than that which has been pleaded..."*

[86] On the authority of the case of **Lyndel Laing & Anor.**, *supra*, this court cannot enter judgment for a sum which is more than the amount pleaded. The Claimant cannot therefore recover those amounts that have not been pleaded.

[87] The sum of $56,690.00 for medical expenses, inclusive of costs of water therapy apparatus, as pleaded, has been proved.

Motor Vehicle Expenses and Loss of use

[88] The Claimant has pleaded a total of $161,404.36 in respect of expenses incurred for the motor vehicle. This includes a sum for the loss of use of the motor car for ten days, at the rate of $3,000.00 per day.

[89] Counsel for the Defendants took no issue with the loss of use claimed, nor the costs of repairs to the vehicle, and the sum pleaded, was not challenged. I find the period of loss to be reasonable as parts had to be purchased, and will therefore make an award for $30,000.00 for loss of use at the rate of $3,000.00 per day. The Claimant has also provided proof of payment by way of receipts, totalling $131,404.36 in respect of the repairs to her car.

[90] I therefore find the sum of $131,404.36 for the cost of repairs to the motor car and the sum of $30,000.00 for loss of use of the motor vehicle, pleaded and proved

Loss of Earnings

[91] As a general principle, a claimant is entitled to compensation for any loss of earnings resulting from the negligence of a defendant. A claim for loss of earnings is a claim for special damages which must be specifically pleaded and strictly proved.

[92] The Claimant gave evidence that she did not work for 30 months. There was however no evidence adduced to provide the court with an indication of how much she earned when she worked, so that the court could determine what income, if any, she lost, and neither did she give any explanation for the absence of proof.

[93] In her closing submissions, Counsel for the Claimant referred to the case of **British Transport Commission v Gourley** [1956] AC 185 at 206, and indicated that Lord Goddard opined that “special damages are out of pocket expenses and loss of earnings up to the date of trial and loss of earning power in the future”. At paragraph 92 of the submissions, Counsel states as follows:

> *"...the Claimant is a self-employed marketing consultant...Before the accident she was earning ... she currently earns... which reflects a decrease...The Claimant has historically, been a part of the informal economy...It is difficult to provide evidence of her earnings...we submit that a modest award would be fair under this head."*

[94] In the absence of tangible proof, the court maintains a discretion to allow an amount for loss which has been occasioned as a result of injury sustained, especially in a case where the Claimant has been found to be a witness of truth. In view of this, and in an effort to arrive at a reasonable conclusion, the court examined the particular circumstances of this case to ensure that justice is done and also sought to determine whether strict proof was absolutely necessary in making an award.

[95] The court also considered the principle that notwithstanding the fact that a claimant cannot prove loss of earnings he may still be awarded a nominal sum. (See **Greer v Alstons Engineering Sales & Services Ltd**. [2003] UKPC 46) However, I find that it is only when evidence is placed before the court that the court can look into the particular circumstances and whether the evidence is reasonable and sufficient to prove the claim, and this I find also would be when the claim has been specifically pleaded.

[96] A claim under this head was neither pleaded nor proved. There will therefore be no award made for loss of earnings.

[97] The award made for special damages as pleaded and proved is $188,094.36 in respect of medical expenses and costs of repairs to her motor car and the sum of $30,000.00 for loss of use of the motor vehicle.

General Damages

[98] It is well settled that in assessing the amount for compensation for pain and suffering and loss of amenities, the court must bear in mind that the claimant is to be placed in the position she would have been in had the accident not occurred. The court also has to consider that awards should be comparable, reasonable and moderate. (See **Beverley Dryden v Winston Layne** SCCA No. 44/87 delivered 12 June 1989)

[99] From the evidence presented there can be no doubt that the accident resulted in a painful experience for the Claimant who was already vulnerable due to her pre-existing condition. She has testified of the pains she felt after the accident and with regard to her loss of amenities, she says as a result of the accident she has suffered loss to her personal and social life, as prior to the accident, she was able to pursue activities and hobbies including going to the movies and watch plays which required sitting for longer periods of time than she had been able to before being treated at the Rosomoff Center, but now she can no longer engage in those activities.

[100] It is trite law under the "egg shell skull" principle that a tortfeasor takes his victim as he finds him and this is so even if the harm suffered was greater than would have been suffered by the normal person. The Defendants therefore ought not to benefit from the Claimant's "unusually thin skull" and are responsible for the pain and suffering she endured, and for the loss of amenities suffered as a result of the accident.

[101] Determining the amount to represent her loss is a difficult exercise as her pre-existing condition manifests the same symptoms as those she experienced after the accident and as such I find that consideration of her pre-existing condition has a direct bearing on this assessment. The level of pain and loss of amenities suffered by her before the accident as compared to after the accident is also of significance.

[102] For the quantification of the award for general damages for pain and suffering and loss of amenities, Counsel for the Claimant relied on the following cases for comparison:

1. **Olive Henry v Robert Evans & Greg Evans** Khan Vol 5, page 156;
2. **Marie Jackson v Glenroy Charlton & George Harriot** Khan Vol 5, page 167;
3. **Wesley Glandville v Delroy Campbell & Gwendolyn Brown** Khan Vol 5, page 174;
4. **Candy Naggie v The Ritz Hotel Co. of Jamaica** Khan Vol 6, page 198; and

5. **Stephanie Burnett v MMTH Ltd & JUTC** Khan Vol 6, page 195.

[103] Counsel submitted that **Olive Henry** "suffered a 5.5% PPD and her injuries were far less severe" and suggested that an appropriate award "increased to reflect the injury to the Claimant at bar, is therefore $7m for pain and suffering", the pain and suffering of **Marie Jackson** do not rise to the threshold of chronic pain suffered by Mrs Silent Hyatt and she has more serious injuries than **Wesley Glandville** so it would be just and fair to award $8m.

[104] Ms Christopher did not elaborate on the comparable or distinguishing features of the cases of **Naggie** or **Burnett** apart from indicating the type of injuries sustained by them and the award made. She however proposed the sum of $7,992,000.00 and added that that sum should be reduced "since the Claimant suffers from a pre-existing condition". She asked the court to apportion the damages for her impairment caused by the 2016 accident.

[105] Counsel examined and analysed the "functionality score" of the Claimant when assessed by Dr Corbett, and submitted that her functionality score reflects a 44% decrease and therefore that is the percentage of the quantum of damages that represents the Claimant's pain and suffering and suggested that the award of $7,992,000.00 proposed be reduced to $4,475,520.00. She said however, that as the assessment took place in 2017 and the Claimant's evidence is that her pre-accident functionality has continued to deteriorate since then, the award should be 70% of the $7,992,000.00.

[106] Counsel pointed out that she 'rejected' the findings of Dr Cheeks "in disregarding the aggravation of the Claimant's fibromyalgia caused by the accident".

[107] On behalf of the Defendants, the following cases were submitted to be taken into account in determining the appropriate award to be made:

1. **Jahmiellah Gordon v Jevon Chevannes** [2016] JMSC Civ 79

2. **Dalton Barrett v Poincianna Brown & Leroy Barrett** 2003HCV01358, delivered November 3, 2006

[108] Mr Jackson submitted that the injuries referred to in the cases "are comparable and instructive" in examining the pain and suffering endured by the Claimant and formulating an award, and stated that an award of "not more than $1,700,000.00 is fair compensation".

[109] He urged the court to disregard the evidence presented in the reports from Dr Corbett, alleging that they were in breach of **the Civil Procedure Rules** and submitted that the findings made by Dr Randolph Cheeks indicated that his report ought to be preferred to that of Dr Corbett "in that his qualifications and experience place him in a more reliable position in terms of assessment of the Claimant". It was however, not seriously disputed that Dr Corbett was not well qualified and neither was there any issue with whether he had a good knowledge of fibromyalgia and I note also that Dr Corbett was called as an expert witness and that his report, dated April 24, 2017, specifically states that he is acting as an expert witness, and that he understands his duty to the Court and has complied with the duty.

[110] Although the medical evidence shows that the symptoms are much the same as that associated with fibromyalgia, there is no reason to doubt that the description of her pain since the accident is genuine and I believe the Claimant's evidence that there was little or no flare between 2013 and 2016.

[111] The issues relating to her injuries being symptoms identical to symptoms of fibromyalgia and whether they were a direct result of the accident or an aggravation of her pre-existing condition were not canvassed at any length with the Claimant in cross examination and neither were there any questions put to Dr Cheeks and therefore in my view, form no good reason for the court to find the Claimant to be unreliable. Additionally, the evidence that she had little or no flares after she was treated at Rosomoff in 2013, and up to the time of the accident, was not challenged and is corroborated by the evidence of Dr Murray.

[112] I bear in mind that all the medical evidence suggest that her condition was exacerbated by the accident although Dr Cheeks indicated that when he saw her ten months after the accident, the minor injuries she received had resolved and she had reverted to her pre-accident condition.

[113] I prefer and place reliance on the evidence of Dr Stuart Murray, who examined the Claimant on April 20, 2016 and September 2016, as he had treated her previously for the condition and had not seen her since 2013. Additionally, the evidence that prior to the accident she had stopped taking narcotic/opioid medication and after the accident she has had to resort to these and other medications as a result of the increase in pain, has been corroborated by Dr Murray who also states that part of her symptoms is 'a new manifestation of her fibromyalgia'. although he did not indicate that it specifically resulted from the accident in 2016.

[114] Dr Cheeks speaks to her pain being the result of muscular sprain and he says the vast majority of her complaints correspond to her pre-existing diagnosis of fibromyalgia. He has also expressed the view that *"...the fluctuation in the pains...is reflecting the normal ebb and flow of the condition... and cannot be ascribed specifically to the accident of April 2016..."*. He has therefore not stated with any degree of certainty or specificity that the present condition of the Claimant is not as a result of the accident.

[115] I do not however, find that the opinion of Dr Cheeks shows a disregard of any aggravation of the Claimant's fibromyalgia as a result of the accident, as Counsel for the Claimant has suggested. Dr Cheeks has stated that there was exacerbation and has stated further that the minor injuries have resolved, but he also expressed the view that her current disabilities were derived from the injuries sustained in the motor vehicle accident she had in 2007. He however, did not indicate or explain why he came to that conclusion and neither did he make any comment in relation to the information that between 2013 and the date of the accident, the Claimant did not have to rely on the opioid/narcotic drugs, but had to revert to them immediately after the accident.

[116] I bear in mind also that the report from Dr Ballin which was reviewed by Dr Cheeks would have been a report which is directly related to her condition as it was in 2012, prior to the accident, and Dr Ballin's addendum report speaks to the examination he did on June 27, 2018, after Dr Cheeks would have examined the Claimant.

[117] I find that after the Claimant had been discharged from the Rosomoff Center, she did not require the medication prescribed when she was suffering from flares associated with her pre-existing condition. I therefore hasten to add, that I find that notwithstanding the "ebb and flow" of fibromyalgia as described by Dr Cheeks, and the disordered physiological processes associated with the condition, as described by Dr Ballin, it is clear that she sustained injuries as a result of the accident and has suffered loss of amenities.

[118] As I understand the evidence in relation to fibromyalgia, there can be flares with or without any particular trigger and on the totality of the medical evidence presented, which all support the case of exacerbation following the accident, and in conjunction with the Claimant's evidence, I find that she suffered injury and pain as a direct result of the accident. I find on a balance of probabilities that injuries sustained by the Claimant in the accident caused a flare-up and as such she had to go back to the doctor who was treating her for fibromyalgia.

[119] In arriving at this finding, I have placed reliance on the evidence of Dr Murray, who had been treating the Claimant previously for her pre-existing condition and on that of Dr Corbett, whose report provides clear explanation of the nature of fibromyalgia. I have also placed reliance on the evidence of Dr Ballin, who, in stating his "impression", specifically indicates that *"This is secondary to the motor vehicle accident sustained in April 2016".*

[120] I am of the view that the Claimant's evidence that she sustained injuries as a result of the accident is credible. I find that she did not exaggerate and there is no evidence to show that she "played down" her prior pain from her pre-existing condition or that she exaggerated her pain level since the accident, as Counsel for the 2nd Defendant has suggested. In fact, I find it admirable that she declared from the outset that she had the pre-existing condition.

[121] Although the full impact of the accident on the Claimant is difficult to assess due to the nature of her pre-existing condition, I find that there is no conclusive medical evidence that her pain and suffering were not caused by the accident and I am of the view that it is more likely than not that had she not been involved

in the accident her condition would have continued with “the little or no flares” as she explained she had experienced.

[122] I have reviewed the cases referred to by both Counsel. I note that they were not fully canvassed and find that the cases referred to by Counsel for the Claimant were of some vintage. I note however, that the case of **Olive Henry,** cited by Counsel for the Claimant**,** deals with a pre-existing condition of cervical spondylosis at C5/6 discs. Henry was injured in January 1996, and in 1998 Dr Cheeks assessed that her whiplash injury had resolved. She was assessed at 11% PPD and the court found that her pre-existing condition accounted for 50%, and for the purposes of assessing damages, the judge attributed 50% of the PPD to the pre-existing condition and therefore treated the PPD as 5.5%. She was awarded $750,000.00 in February 1999. This updates to $4,280,585.11.

[123] In the case of **Dalton Barrett**, *supra*, referred to by Counsel for the Defendant, the Claimant was diagnosed with mechanical lower back pains and a very mild cervical strain and had no measurable PPD. He was awarded $750,000.00 in November 2006, for pain and suffering and loss of amenities which, when updated, amounts to $2,106,675.39.

[124] Having review the cases referred to above, the court found it necessary to refer to the more recent case of **Courtney Livermore v Ezekiel Alexander Russell** [2017] JMSC Civ 134, delivered September 29, 2017, in which my brother, Evan Brown J, considered, *inter alia*, the cases of **Candy Naggie** and **Olive Henry**, and the case of **Jhamiellah Gordon. Courtney Livermore** sustained injuries to his cervical and lumbar spine as a result of a motor vehicular accident. He had a pre-existing injury to his lumbar spine and there was a rating of 1% whole person impairment in respect of his cervical spine injuries. He was awarded the sum of $6,000,000.00 in January 2014 which updates to $7,938,347.71.

[125] In order to ascertain her pain and suffering as a result of the accident, I have considered the physical injury itself, examined her complaints and initial treatment after the accident and bear in mind that her evidence that between

2013 and the time of the accident, she was not attending on the medical practitioners in relation to symptoms relating to fibromyalgia, has not been challenged.

[126] An award for loss of amenities serves to compensate a claimant for the loss of quality or reduced enjoyment of life. The Claimant has shown on her evidence that as a result of the accident her quality of life has changed.

[127] Having considered the cases cited, against the background of the medical evidence presented, I find that the case of **Courtney Livermore** is a reasonable guide. In that case, as in the instant case, the medical professionals did not provide an independent diagnosis devoid of the pre-existing condition, save and except for Dr Cheeks in the instant case, who opined that the effects of the injuries sustained in the accident had resolved, and although the Claimant in the case at bar was not assessed with any whole person impairment as Livermore, I am of the opinion that in all the circumstances an award of $5,000,000.00 will suffice to compensate her for the pain and suffering and loss of amenities arising from the injuries sustained in the accident.

Post Traumatic Stress disorder (PTSD)

[128] It was submitted on behalf of the Claimant that her regression to pre- 2013 conditions has caused her to suffer depression and anxiety. Counsel indicated that in the report of Dr Kai Morgan dated June 1, 2016, she states that Mrs Silent Hyatt is susceptible to depression and that, *inter alia*, she "is now suffering from PTSD, namely hyper vigilance and avoidance on account of the April 2016 incident caused by the negligence of the 2nd Defendant".

[129] Counsel also pointed out that Dr Ballin's report indicates that she suffers from exhaustion, chronic fatigue and insomnia, while Dr Corbett's report "confirms that she has insomnia as a result of the exacerbation of her fibromyalgia". She also stated that Mrs Silent Hyatt developed a phobia for travelling in motor cars.

[130] I find on the evidence that the Claimant suffered psychological problems prior to the accident and that these problems have recurred since the accident. The medical evidence from Dr Ballin indicates that as a result of the accident her

psychological state was affected as he assessed her with clinical depression and sleep disorder which he indicated was secondary to the accident in 2016.

[131] I note also that Dr Kai Morgan, who indicated that she has only been able to see her once following the accident of 2016, indicated that she is susceptible to depression and had symptoms of PTSD, namely hyper-vigilance and avoidance. The Claimant has also testified of her fear when travelling and motor vehicles come close to her. I find on the totality of the evidence that she has made out a case for an award to be made for her psychological injuries. I bear in mind however that she was already pre-disposed to these symptoms as a result of her pre-condition.

[132] I have examined the cases referred to by Counsel and must indicate that I do not find that this is a case in which her fear of vehicles coming close to her should be addressed separately from her other psychological injuries as the medical evidence refers to hyper-vigilance and avoidance as symptoms of PTSD.

[133] In the case of **Angelita Brown v Petroleum Company of Jamaica Limited and Juici Beef Limited,** Khan, Volume 6, page 174, the claimant sustained severe burns and was assessed as suffering from "major depression-moderate and Post Traumatic Stress Disorder", and had a degree of disfigurement which was a source of emotional distress. She was awarded $340,000.00 for PTSD in April 2007 (CPI 39.4). This sum updates to $925,939.08 (CPI 107.3) Using this case as a guide, I will make an award of $900,000.00, bearing in mind that there was no evidence of sleep disorder in the case of Angelita Brown and that the Claimant in this case had no disfigurement.

[134] The sum awarded under this head is therefore $900,000.00.

Future medical care and future care

[135] Mrs Silent Hyatt has claimed for future medical care and future care. She indicates that she "*will require follow-up care including physiotherapy, orthopaedic and further assessment and commencing with treatment and care*

from Rosomoff Comprehensive Rehabilitation Center...". She states further, that *"... treatment is continuing ..."*

[136] In order to recover future medical expenses, the Claimant needs to show that it is reasonably probable that her injuries sustained in the accident will cause her to incur medical expenses in the future. She may recover such expenses if she shows the existence of an injury, that medical care was rendered for that injury and the cost of such medical care. She must show as well, that she is still injured. (See **The Attorney General v Tanya Clarke (nee Tyrell)** SCCA No 109/2002, delivered December 20, 2004.)

[137] The evidence presented by the Claimant with respect to this head of damage is unsatisfactory. Although the medical experts indicate that she needs further treatment and both Dr Murray and Dr Cheeks have recommended a return to Rosomoff Center, and Dr Corbett recommended a minimum of four weeks of intensive treatment, no sufficient evidence has been led to show that this is specifically as a result of the accident and not directly related to the general treatment for fibromyalgia.

[138] Mrs Silent-Hyatt has given evidence that the costs for the five-week treatment plan proposed by Rosomoff is US$101,197.93, inclusive of airfare and accommodation for an assistant, "as [she] is unable to travel without one". However, she has not provided any documentary evidence in the form of an invoice from the institution in relation to the costs and neither has she provided any evidence from which I can find, on a balance of probabilities that she is unable to travel without an assistant, as she has stated.

[139] Counsel for the Defendant submitted that the court ought not to make any award with respect to invoices presented and that no award should be made under this head as doing so would only facilitate the Claimant being treated for her symptoms relating to fibromyalgia.

[140] It is not possible on the material before the court to form an accurate or even verifiable estimate of the future costs of the medical treatment and medication the Claimant will require, or is likely to incur, because of the nature of the injuries and the fact of her pre-existing condition. I bear in mind that she would more

likely than not, have required same, as a result of her pre-existing condition, and there is no evidence led to show that as a result of the accident she would need more or any additional treatment than that which is common for the treatment of fibromyalgia.

[141] In my opinion, the most just and reasonable way to deal with this aspect of her claim would have been to allow for the cost of the assessment done at Rosomoff which she stated is in the amount of US$3,689.00, as she had been referred to that facility and also to allow for the cost of payment for her psychological injuries. However, she has not provided any documentary evidence from the institution or from the Psychologist to show that the sums set out in her witness statement are required to be paid because she is still injured or that a particular sum is required in respect of her psychological injuries. In a case where documents exist or can be provided, it is eminently prudent and in accordance with established principles for them to be disclosed. The court is therefore not in a position to make any award for future medical expenses.

[142] Ms Christopher has also submitted that the Claimant "has shown a need for domestic assistance as evidenced by her receipts for household help..." She suggested that an award of $15,000,000.00 be made for her future medical care and future household assistance.

[143] The court notes that the Claimant has given evidence that prior to the accident she could do light exercises and housework but she has not provided one scintilla of evidence to show that as a result of the injuries sustained in the accident she has had to employ anyone to do housework or to assist her in anyway.

[144] With respect to "future care", no evidence has been led by the Claimant which establishes that an award ought to be made and, in any event, there has been no amendment to the particulars of claim and neither has any application been made for any amendment to be made. This is an item of special damages which must be both pleaded and proved. In applying the principle that a claim for domestic assistance must be both pleaded and proved, there will be no award under that head.

Handicap on the labour market/loss of earning capacity

[145] Under this head of damages, the court is being asked to assess the Claimant's reduced eligibility for employment or the risk of future financial loss. The Claimant therefore needs to provide medical evidence to show that her reduced eligibility for employment is as a result of the injuries sustained in the accident.

[146] There was however no claim made in respect of this head of damages and neither did the Claimant adduce any evidence relating to her pre or post-accident income from which the court could make an award. There will therefore be no award made under this head.

Disposition

[147] Judgment for the Claimant against the Defendants with damages assessed and awarded as follows:

Special damages awarded in the sum of $218,094.36 with interest at 3% from April 15, 2016 to date of judgment

General damages for pain and suffering and loss of amenities awarded in the sum of $5,000,000.00 with interest at 3% from the date of service of the claim form to date of judgment

PTSD $900,000.00

Costs to the Claimant to be agreed or taxed.