



[2023] JMSC Civ 114

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2016HCV02243**

BETWEEN	KENISHA TAYLOR	CLAIMANT
AND	JERMAINE HOLDING	1ST DEFENDANT
AND	JAMAICA URBAN TRANSIT CO. LTD.	2ND DEFENDANT
AND	BERNARD BLUE	3RD DEFENDANT
BETWEEN	BERNARD BLUE	ANCILLARY CLAIMANT
AND	JERMAINE HOLDING	1ST ANCILLARY DEFENDANT
AND	JAMAICA URBAN TRANSIT CO. LTD.	2ND ANCILLARY DEFENDANT

CONSOLIDATED WITH:

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2015HCV04951**

BETWEEN	JAMELLA RODCLIFFE	CLAIMANT
AND	JAMAICA URBAN TRANSIT CO. LTD.	1ST DEFENDANT
AND	BERNARD BLUE	2ND DEFENDANT
BETWEEN	BERNARD BLUE	ANCILLARY CLAIMANT
AND	JERMAINE HOLDING	1ST ANCILLARY DEFENDANT
AND	JAMAICA URBAN TRANSIT CO. LTD.	2ND ANCILLARY DEFENDANT

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015HCV03079

BETWEEN	BERNARD BLUE	ANCILLARY CLAIMANT
AND	JERMAINE HOLDING	1ST ANCILLARY DEFENDANT
AND	JAMAICA URBAN TRANSIT CO. LTD.	2ND ANCILLARY DEFENDANT

Negligence – Motor vehicle collision – Liability of parties – Credibility of Witnesses – Assessment of Damages

Preliminary issue – application for relief from sanctions refused to allow witness statements to stand – application at trial for Court to exercise discretion under Rule 29.11 of the Civil Procedure Rules (CPR) to allow witnesses to give evidence – whether the Court has discretion to allow evidence where application for relief from sanctions is refused under Rule 29.11.

TRIAL IN OPEN COURT

Glenroy Mellish instructed by Mellish & Campbell for Bernard Blue

Lemar Neale and Natalie Casado Desulme instructed by Young Law for the Jamaica Urban Transit Company (JUTC)

Shanice Green instructed by Kinghorn and Kinghorn for Jamella Rodcliffe and Kenisha Taylor

On April 4, 5 and 6, 2022 and May 24, 2023.

PALMER, J

Preliminary issue at trial

[1] The trial arises from a motor vehicle collision that occurred on the morning of February 26, 2014 at the intersection of Ocean Boulevard and Church Street in Kingston. It involved a Toyota Corolla motor car driven by Bernard Blue, the Claimant in 2015HCV03079, and Jamaica Urban Transit Co. Ltd. (“JUTC”) bus driven by Jermaine

Holding, the 2nd Defendant. Mr. Blue, JUTC and Mr. Holding were also sued by Kenisha Taylor and Jamella Radcliffe in claim numbers 2015HCV04951 and 2016HCV02243, who were passengers in the JUTC bus. The claims were consolidated and came on for trial on April 4, 2022.

[2] At the start of trial, the Court heard an application to allow evidence from Kenisha Taylor and Jamella Rodcliffe. Ms. Taylor and Ms. Rodcliffe had failed to file and serve their witness statements within the time stipulated by the orders made at the Case Management Conference. There is some history behind the failure to file the respective witness statements, but it is sufficient to say that when relief from sanctions was sought from the Court to allow the Applicants to rely on them, the application was refused prior to trial. When the matter came on for trial, Counsel for the Claimants sought to invoke the powers of the Court under Rule 29.11. Rule 29.11 provides:

- (1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.*
- (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.*

[3] The submission of Counsel for the Applicants was that the Claimants' respective applications for relief from sanctions having been refused, it was open to the Court to allow for the witness statements to stand and for the witnesses to be called. The application was opposed by Counsel for the JUTC, relying on the ruling of the Court of Appeal in ***Oneil Carter and Ors v Trevor South and Ors [2020] JMCA Civ 54***. Counsel submitted that the Court had no discretion to grant the orders sought as the rule allows for the trial judge to permit a witness to be called where good reason was shown for a failure to apply for relief from sanctions. The submission is that an application for relief from sanctions having been heard and refused the Court had no discretion to grant the orders sought to either allow the witness statements to stand or allow the witnesses to give evidence.

[4] The position in ***Oneil Carter*** is essentially that where a party fails to file a witness statement, it is not sufficient for a Court, exercising its case management powers, to

simply extend time for filing the witness statement or allow it to stand as filed without relief from sanctions having been obtained. However, even if relief is not obtained, a party relying on such a witness statement has a small window of opportunity to rely on this witness if they can show good reason for not previously seeking relief from sanctions under Rule 26.8 of the CPR. The Claimants did apply and were refused relief. The Court's discretion to permit a litigant who has failed to file and serve a witness statement is only to the extent that it is satisfied that there is good reason for failing to apply for relief from sanctions. A party who fails to file a witness statement must make an application for relief from sanctions in order to rely on the statement or the evidence of that witness. If there is good reason for failing to apply for relief the Court may permit the statement to be relied upon. If relief is sought and refused, I found that the Court had no further discretion to permit the witnesses to be called and accordingly was constrained to rule against the Claimants in their application.

Claimant's case at trial

Bernard Blue

[5] The remaining claim is 2015HCV03079, brought by Bernard Blue against the JUTC and Jermaine Holding, driver of the JUTC bus involved in the collision. Mr. Blue was born on June 15, 1955, and co-owner of a Toyota Corolla registered 5017 GN and holder of a private driver's license with a thirty-two-year unblemished driving history. He said that on February 26, 2014, at about 8 am he was proceeding to work along Ocean Boulevard heading towards Duke Street. As part of his daily routine, he had taken his wife to work and proceeded along a route that he would usually take and on a road that was very familiar to him. The day was sunny, road surface was dry and there was a light traffic flow ahead of him.

[6] Ocean Boulevard is divided by a median and has dual carriageways leading in opposite directions. Mr. Blue's evidence is that he was travelling easterly towards Duke Street at about 50 KMH. There are other roads that feed on to Ocean Boulevard, with stop signs as they approach the intersection with Ocean Boulevard. Vehicles on Ocean

Boulevard, however, have the right of way. Mr. Blue stated that he knew that he had a right of way in that area, but insists that he traversed the roadway within the speed limit and with care.

[7] According to his evidence, when he got to the intersection of Ocean Boulevard and Church Street, he saw the subject JUTC bus as it proceeded on to Ocean Boulevard without stopping. By the time he realised that it was not stopping, he says that he was only half a car length from the bus, which left him with little or no time to react to stop his vehicle to avoid the collision. Notwithstanding same, he said he attempted to move his vehicle further right to avoid the collision, but it was inevitable as the bus covered both lanes as it turned on to Ocean Boulevard. The front of his vehicle collided with the mid to front right side of the bus.

[8] Immediately after the collision, Mr. Blue recounted that he felt pain in his chest and right shoulder from the seatbelt tightening and when the airbag deployed he was pushed backwards with a quick jerking effect, into the driver's seat and headrest. He also said he felt pain to the left side of his lower back. He alighted from the vehicle and sat on the side of the road and was approached by the driver of the JUTC bus, Mr. Holding. He said that at the time he was in significant pain and could not recall all that he said or that he had exchanged documents with him. Police were called to the scene and his wife arranged for him to be taken to the Kingston Public Hospital. He visited the Police Station but was unable to give a statement at that time, though he did eventually.

[9] On the way home from the police station, he visited the location to which his vehicle was towed to inspect it, and noticed that the windscreen of his car was smashed and the front of the vehicle; the bonnet, front fenders and radiator, were damaged. He arranged for the sum of Thirteen Thousand Five Hundred Dollars (\$13,500.00) to be paid as the towing fees and had the vehicle transported to his mechanic the following day for repairs and body work. He stated in his evidence that he was without the use of his vehicle for some one hundred and twenty (121) days after the collision which impeded the day-to-day activities for him and his wife. He said that he incurred a daily personal cost of Three

Thousand Five Hundred Dollars (\$3,500.00) to secure his and his wife's alternative transportation.

[10] Mr. Blue said that he suffered through excruciating pain for the next two nights and due to the unbearable pain arranged for a home visit from Dr. Orlando Thomas who advised him to have an X-Ray and CT scan done of his chest. On the evaluation of his doctors he was revealed to have a displaced fracture to his right clavicle and to his left 8th rib. He was recommended for an operative fixation of the right clavicle which he did on March 19, 2014, but continued to have discomfort to his chest for a few months. He applied for forty-two (42) days sick leave from his job, for the period of February 25, 2014 to May 11 2014, which was an accumulation of causal sick vacation and special leave approval.

[11] After the surgery, he received physiotherapy which provided some relief but he still suffered tightness to his right shoulder and was unable to lift heavy objects or undertake rigorous tasks without discomfort. Mr. Blue complained that his lifestyle was affected by the event as he could not help out at home as he used to. He also complained that his upper body strength had decreased, particularly his right arm and could not lift heavy objects or undertake rigorous tasks without feeling the tightness and discomfort in that area. The surgery and physiotherapy offered relief for the pain and discomfort he experienced but he continued on occasion to experience tightness in his right shoulder. Prior to the accident the only ailment he had was hypertension.

[12] Mr. Blue in his closing paragraph to his witness statement stated that he was not liable for the accident nor did he contribute to it. He had the right of way and was proceeding along the straight road in an area that had clear visibility. The presence of his vehicle and the direction in which it was going, he said, should have been clear to other users of the road. It was the driver of the JUTC bus that he said failed to keep any or any proper look out and drove on to Ocean Boulevard without stopping, which means that Mr. Holding was negligent and the sole cause of the collision.

[13] In cross-examination, Mr. Blue stated that he was about twenty (20) feet from the bus when he saw it and about a car length from it when it drove on to Ocean Boulevard. He acknowledged that his vehicle was in the right lane when it collided with the right side of the bus which by then was in both lanes as it was in the process of coming out of Church Street. He reiterated that his instinctive response when he saw the bus was to turn the vehicle to avoid the collision but could not recall if he had said that he had swerved to avoid the collision and that if he had not, he would have collided with the middle half of the bus.

[14] Mr. Blue admitted that the bus was not speeding when he saw it, but stated that the bus was in the process of turning and as it is a long bus it would take some time to turn on to the roadway. He gave the time between when he saw the bus and the collision occurred as being between 5 and 7 seconds but disagreed that he had sufficient time to stop when he saw the bus. He was later shown a document and stated that he could no longer maintain his earlier position that he saw the bus when it came out and insisted that he was paying attention to the road. He agreed that the bus is long and would take some time to turn on to Ocean Boulevard.

[15] He stated that he did not know the speed at which the bus was travelling but that it was not going fast just prior to the collision. Counsel confronted him with his Particulars of Claim in which he stated that Mr. Holding was travelling at an excessive speed. Mr. Blue however maintained that he did not know the speed that Mr. Holding was going but knows that he came out suddenly across Ocean Boulevard.

[16] He stated that he did not recall telling the driver that he did not see the bus and he was in so much pain that he wanted to go to the hospital. Counsel asked if he would agree that Dr. St. Juste made no reference to a complaint about his back. He stated that he did not recall that as he was feeling pain all over. Counsel asked if he remembered that he reported that he was feeling pain in his chest and right shoulder and he stated that he reported pain to his shoulder, chest and side joint to his back as one or two of his ribs were cracked.

[17] He did not recall how long after the collision that he went to the doctor but the effect of the injuries became so severe that he went on the recommendation of his family Doctor; Dr. Thomas. He stated that his family Doctor came to see him three times and was the one who referred him to see Dr. St. Juste. He could not recall the last time he saw Dr. St. Juste, but when shown his witness statement stated that it was in 2014.

[18] Counsel asked if he received a Medical Report and he agreed that he did and that he read it. He stated that his prognosis stated that he had 0% whole person impairment and was able to continue his life pain free. He disagreed with Counsel's suggestion to him that when he said that his life was significantly altered, he was exaggerating. He insisted that he is unable to carry out some activities at home such as heavy lifting and had to be careful when climbing trees as his arm strength is not like it was.

[19] In reference to the damage on his motor vehicle, Counsel suggested that the extent of damage to his car would show that he was going at a fast speed. Mr. Blue however maintained that he was travelling at about fifty (50) to fifty- five (55) kilometres as he is aware of the speed limit within the urban area.

Huan Morrison

[20] The witness statement of Mr. Morrison dated the February 24, 2023 stood as his evidence in chief. He is a colleague of Mr. Blue's wife and arrived at the scene to see her helping him and learned that he was Mr. Blue afterwards. Mr Blue appeared to him to be in a lot of pain. He observed significant damage to the bonnet, front bumper and front grill of Mr. Blue's Toyota Motor car, but only minimal damage to the JUTC bus, which had damage to the right driver's side and the body panel seemed to be pressed in. He took photographs of the vehicles and scene with his cell phone of the aftermath of the collision, but was not present when it occurred.

Dr. Steve St. Juste

[21] Dr. St. Juste is a Consultant Orthopaedic Surgeon and provided a Medical Report dated December 10, 2014. He detailed that when he first assessed Mr. Blue on March 12, 2014, he complained of persistent pain in the right shoulder and chest pain aggravated by coughing. On examination, he observed that he had a swelling of the right mid clavicular region and a spike of bone with thinning of the overlying skin as well as marked tenderness. His neurological exam was normal.

[22] He was then prepared for an operative fixation of the right clavicle which was performed on March 19, 2014. He was reviewed on April 3, 2014 and he reported experiencing chest pain with deep breathing. The surgical wound was healed and cleaned and physiotherapy was advised. He was seen again on May 1, 2014, when he reported tightness on his right shoulder. He then returned to work and reported compliance with physical therapy. His clavicle was clinically healed, and he had good shoulder motion. Aggressive therapy was then advised with a final assessment that he was able to perform his activities of daily living pain free and he has zero percent whole person impairment.

1st and 2nd Defendant's case

Jermaine Holding

[23] At the time of the accident, Mr. Holding had been employed to the JUTC for approximately two years where he was attached to the JUTC's Rockfort Depot. On February 26, 2014, he was on the 5:00 a.m. to 10:00 a.m. shift and was assigned and operating a yellow 2010 Volvo bus. The bus was assigned to the express route between Downtown, Kingston and Above Rock Via West Parade.

[24] His evidence is that about 7:30 that morning, he left the Half Way Tree Transport Center and travelled to West Parade Downtown with approximately twenty (20) passengers on board, majority of whom disembarked at the Kingston Parish Church and North Parade. Only two remained on the bus who asked to be let off on Duke Street.

[25] Mr. Holding said that the air conditioning in the bus had malfunctioned and he intended to take the bus to the Rockfort Depot and to withdraw monies from the Bank of Nova Scotia on Ocean Boulevard. He said he proceeded along Church Street towards Ocean Boulevard and when he reached the junction he came to a complete stop. He looked to his right and did not see any traffic approaching. He then began to make the left turn on to the Ocean Boulevard when he felt an impact to the right front side of the bus and came to a stop.

[26] He alighted from the bus and approached Mr. Blue who told him that he did not see the bus. Mr. Blue appeared to be injured and had identified himself to him giving him details, address and vehicular particulars. Mr. Holding said that he sustained a blow to the right side of his face and experienced pain to his lower back and the two other occupants of the bus also complained of being injured.

[27] He recounted that the bus had damage to its right-side access door in front of the right front tyre and the right light panel had shifted. There also appeared to be damage to the right front door as there is a delay when it is opened. He observed the damage to the motor car to include damage to the front section and the airbags were deployed.

[28] It is Mr. Holding's evidence that upon reaching the intersection of Church Street to go to Ocean Boulevard he made a complete stop at the stop sign for approximately five (5) seconds and looked down the road to his right down Ocean Boulevard. He testifies that he was able to see three bus lengths down the road and he did not see any vehicles. That, he described as being equivalent to one hundred and twenty feet (120 ft) as a bus is forty feet (40ft) long.

[29] After he made the turn on to Ocean Boulevard, he said that he ensured the road was clear and started to look in his left mirror to make sure that the back wheel of the bus had cleared the curb wall, he then felt an impact to the front of the bus. He said this occurred about twelve seconds after he stopped at the stop sign. He stated that it took him twelve seconds because he was not in a rush and he was looking in his left mirror to

make sure the left wheel had cleared as he did not want to ride the sidewalk. He maintained that he was not going fast.

[30] In cross-examination counsel suggested to Mr. Holding that he was in a rush because he was off his route, to which he disagreed insisting that the bus was defective. Counsel asked if he recalled being asked by two female passengers where he was going and he stated that he told them where he was going. Counsel asked if he recalled telling them that he was begging them for a minute and he stated that he did not have to because he already explained to them that he was going to stop at Scotia Bank and recalled telling them he was wanted to take the bus to Rockfort to the depot.

[31] Counsel suggested to him that he had other passengers who wanted to go in the opposite direction to Above Rocks and he stated that he told them he would drop them at Parade to get another bus because there was no air conditioning and the bus could not be driven without air conditioning. Counsel suggested to him that he was in a rush because of this and he stated that he was not in a rush and came to a complete stop.

[32] He stated after he was so frightened and did not know what direction of the bus it was coming from, he thought it had come from behind the bus. After the impact, he ran out and checked on the driver of the car and then learned Mr. Blue's name. He asked Mr. Blue if he was ok, and he responded saying that he did not see the bus. In cross-examination Counsel suggested to him that Mr. Blue did not say that he did not see the bus, to which he disagreed. In cross examination, Counsel suggested to him that he did not see the vehicle driven by Mr. Blue because he did not stop at the bottom of Church Street. He maintained that he came to a complete stop.

[33] Counsel asked him if he knew a Calvin Benjamin and he stated that he did not. He said that he did not recall having a discussion with the JUTC, he did not recall giving him a statement. When shown his statement given to JUTC, he agreed that in it, he had said he had not seen the car.

Peter Thomas

[34] Mr. Peter Thomas is a Certified Accident Reconstructionist, accident Investigator and Motor Vehicle Damage Appraiser, employed to Advanced Insurance Adjusters Ltd. He received training in accident reconstruction from the Institute of Police Technology and Management, a faculty of the University of North Florida, Jacksonville USA and became certified as an accident Reconstructionist and accredited with the respective certificates.

[35] He is trained in the use of classical and contemporary measuring devices and the use of accident reconstruction software. He has completed hundreds of accident reconstruction and investigation cases and has attended and documented many accident scenes that have been used as expert reports in the court in relation to motor vehicle accident.

[36] He deposed that Ocean Boulevard runs with two lanes easterly and two lanes westerly and is separated by a raised concrete curb and grassy median. Church Street is a one way that runs north to south and forms a T-junction intersection with Ocean Boulevard. There is a top bar on Church Street before entering Ocean Boulevard and the roads have not changed since the accident.

[37] The bus was forty feet (40ft) long with a wheelbase of twenty feet (20ft) and is easily visible to oncoming vehicles. According to Mr. Thomas, the fact that there was little or no signs of horizontal abrasions rips or scrapes confirms that the striking object rebounded after impact and the bus was fairly motionless thereafter.

[38] The Toyota received heavy left frontal damage. The damage was described as contact damage which means the Toyota and JUTC bus came into contact at an angle. The angled impact was due to the fact that the JUTC bus had already turned at an angle on Ocean Boulevard at the time of the accident. He reported that the speed of the Toyota could not be ascertained from the damage seen in the photograph, however, from the extent of the damage seen, the Toyota was travelling at a relatively high velocity.

[39] He observed that there were no skid marks on the road which means that the Toyota Corolla did not apply brakes prior to the collision. Skid marks are usually an indication that brakes were applied, however, the absence of same shows that the car continued at a constant speed into impact.

[40] He used a photograph of the position of the bus after the accident to make the conclusion that the bus had stopped 3.6 feet from the centre of the median curb and was turned at a one hundred and sixty-eight degree (168°) angle across the intersection, with the rear wheel on Church Street. He deduced that the distance travelled by the bus from Church Street was approximately fourteen meters (14m).

[41] Attached to Mr. Thomas's report were statements taken from Mr Blue, the passengers and Mr. Holding. He confirmed that he took into consideration information provided in the statements to arrive at his conclusion.

[42] He confirmed that it was his finding that Mr. Blue was about a cars length away when he saw the bus and at that distance he should have been able to see the driver of the JUTC bus. He stated that the distance of eighty – five meters (85m) as used in his report was based on the speed that Mr. Blue had outlined in his statement. He stated that what he showed in his report is a time distance calculation.

[43] Counsel suggested that if Mr. Blue could have seen Mr. Holding, then Mr. Holding should have been able to see him clearly, Counsel stated that if she is able to look and see him he should be able to see her as well. He stated that this was not the case in all instances.

[44] Counsel suggested that as the expert he should have been able to give his opinion as to why the reverse would not hold. He stated that what he showed in his report is that Mr. Blue gave an indication of a speed and his report showed that this speed would have given him sufficient time to stop and slow down. The factors that would cause Mr. Blue to see the bus may not be the same for the driver of the bus.

[45] Counsel asked if he had mentioned that there were impediments to Mr. Holding seeing Mr. Blue and he stated that he answered specific questions. Counsel asked if he saw that Mr. Holding said that he looked to his right and did not see any traffic approaching and he stated that he did, but only Mr. Blue had given a speed on which he could make a scientific calculation and that was 50kmph. He stated that that speed did not match the damage on both vehicles.

[46] Counsel suggested to him that for completeness he should have mentioned that at eighty-five meters Mr. Holding said he could not see the car. He stated that on looking on the statement given by Mr. Blue, the speed of 50kmph did not match the scenario. He agreed that a driver from a minor road has a duty to assess oncoming traffic and that both an underestimation and overestimation of traffic can cause an accident.

[47] Counsel asked if failure to stop at an intersection can affect a driver's ability to see oncoming traffic. He stated that the fact that someone does not stop cannot completely stop them from seeing but it is possible. He did factor in the statement of Mr. Blue. If the JUTC bus was driving through the intersection as implied in the statement, the damage on the bus would be different, as the damage on the bus did not have horizontal striation marks.

[48] Counsel suggested to him that by ignoring that the bus did not stop his opinion is not impartial, but MR. Thomas insisted that he had factored that in. Counsel suggested that in that case his evidence would include Mr. Blue's statement that Mr. Holding failed to stop. He stated that the distance travelled by the JUTC would have been beneficial to the statement of Mr. Blue, but when he checked the statement of Mr. Blue as compared to the damage to the bus they did not match.

[49] Counsel asked if the bus did not stop at the bottom of Church Street if he would agree that it would take less than 6.1 seconds to travel across Ocean Boulevard to the point of impact and he agreed. Counsel asked if this shorter time would mean that Mr. Blue would have travelled a shorter distance to the point of impact he stated that the report has to be taken in its totality. Factoring in the extent of damage to the vehicle Mr

Thomas said that with the conservative numbers given (for speed), they don't match the damage seen on both vehicles and the speed of 50kmph was grossly understated.

[50] Mr. Thomas opined that 50kmph as Mr. Blue alleged and applying the principle of reverse engineering, the car would have been 85m from the impact area when the JUTC bus moved from the stop bar. That distance, according to Mr. Thomas would be considered a safe distance for the bus to enter Ocean Boulevard, and was an appropriate action based on the calculated distance. He also concluded that at that distance, if the bus driver were to drive into the intersection and onto Ocean Boulevard, the Claimant would have sufficient time to slow and stop his vehicle. The actual distance required to stop at his speed of 50kmph would be 14.06 meters or 46.12 feet.

[51] He also stated that if the Claimant only saw the bus a car length away before impact, at that close a distance the bus could not leave Church Street and drive into the path of the Toyota without applying excessive speed and finally excessive braking. No brake mark or skid marks were seen from the JUTC bus tyres to suggest excessive speeding was done by the bus driver.

[52] In his report he concluded that the driver of the JUTC was not driving with an excessive speed as no tyre skid mark was seen to suggest it was travelling at a high velocity. The concave indentation damage made on the side of the bus did not have any striation marks. The lack of striation marks is also an indication that the bus was in little to no motion at impact and could not be travelling at an excessive speed.

[53] Counsel asked if it was less time than the distance travelled would be less and he stated that it would be. He stated that he would be closer but the damage seen shows that the speed travelled by Mr. Blue would be far in excess of that and so the time would also increase.

[54] Counsel suggested that there was no evidence that Mr. Blue increased his speed so that he would travel further. He stated that he was not saying that he increased his speed his is saying that the speed of 50kmph that Mr. Blue gave could not be correct. The eighty-five meters is on the basis that if he was traveling at 50kmph. He again

maintained that that is the evidence he received in the statement but the statement does not match the damage to the Toyota Corolla.

[55] Counsel suggested that based on scientific evidence it was not safe for Mr. Holding to leave the bottom of Church Street. He stated that if you look at time distance factors, two hundred (200) plus feet away would be considered a safe distance away. If something is seen two hundred feet away, then you would be able to say that it is a safe distance. Another factor he considered was that there were no skid marks in the road.

[56] Counsel suggested that he stated that when he saw the bus it was a car length away. He stated that that is why he found it difficult. The bus has a greater mass than the car, if the car was to leave Church Street to Ocean Boulevard at fourteen feet, for it to go that distance through the intersection it would have had to go at an extremely excessive speed. One car length would be eight (8) to ten (10) feet away and the bus would have to be travelling at an excessive speed and require a lot of braking. A vehicle of that mass would not be able to stop at that distance.

[57] Counsel asked if his analysis was based on the fact that Mr. Holding stopped, he stated that he worked with the data that was given to him. Mr. Thomas gave evidence that he also considered Mr. Blue's account that Mr Holding did not stop and arrived at a conclusion on the statement that matches the damage and scientific data.

[58] Counsel showed a photograph to the witness and asked if the bus started to turn and he stated that how vehicles turn is from a pivot point. The bus has a pivot point at the rear while most vehicles pivot point is near the front. This bus was in the process of turning. It did not complete turning. He is of the opinion that it started to turn because it could not have entered on to Ocean Boulevard in that manner. Mr. Thomas disagreed that the damage to the front of the bus based on its angle meant that Mr. Blue was in or very close to the intersection with Church Street at the same time Mr. Holding drove out on Church Street.

[59] In re-examination Mr. Thomas was invited to further explain his point made about the buses pivot point. He stated that the nature of the bus is that it has a pivot point at the

rear axle. Cars then to have a pivot point at the front axle. Therefore, in turning, the action of the bus would be a lot different from the action of a car. While it might appear that the bus is just diagonal in the road, the bus moving from the intersection to the point of impact then that distance of 85 km would be greater, provided there is nothing stopping it or any other external force.

CLAIMANT'S SUBMISSIONS

[60] Counsel submitted that negligence arises where there is a breach of a legal duty to take care and this breach results in damage to a person to whom the duty is owed. It is the Claimant's position that Mr. Holding was in breach of the Road Code, specifically Section 51 (1) (e) of the Road Traffic Act, which states:

"a motor vehicle proceeding from one road to another shall not be driven so as to obstruct any such other road".

[61] Counsel argued that the 2nd Defendant had a duty not to obstruct the Claimant when proceeding from Church Street on to Ocean Boulevard. Counsel argued that 51(2) of the Act imposes a duty on all drivers of motor vehicles to take such action as may be necessary to avoid an accident and Section 5(3)(a) stipulates that a motor driver obstructs other traffic if it causes a risk of accidents thereto.

[62] Counsel argued that the credibility of the parties is crucial to the resolution of the issue of liability in this matter. Counsel submitted that in order to address the issue of liability it is necessary to consider the details of how the accident occurred. In particular, Counsel highlighted Mr. Holding's actions before turning and whilst turning on to Ocean Boulevard - the speed of the vehicle; the view down Ocean Boulevard available to him and whether he stopped at the entrance of Ocean Boulevard before turning left on to that roadway.

[63] Counsel contended that where there is divergence between the evidence of the parties, the Court is urged to look at the independent physical evidence of the parties (See ***Calvin Grant v David Paradeen and Augustus Paradeen Scca No. 91/87***).

Counsel argued that Mr. Blue is a witness of truth despite a few minor deviations, if any, in his evidence which mainly relate to the point of swerving.

[64] Counsel argued that the Claimants evidence is that the front section of his vehicle collided with the mid to front side of the bus and this was confirmed by the photographs taken by Huan Morrison. Counsel posited that the damage to the vehicles is a tell-tale sign of how the accident occurred. The damage to the front section of the Claimants vehicle suggests a head-on collision with the front right of the bus and then a pushing action of the Claimants vehicle, which caused the left side to be positioned against the wheel of the JUTC bus when the vehicles came to a stop, post-impact. Counsel argued that this would account for the Claimant's vehicle originally driving in the left lane but then coming to a rest against the JUTC bus's front wheel at a slant angle mostly on the right side of the dual carriageway on Ocean Boulevard.

[65] Counsel averred that the damage to the JUTC bus's right front wheel and lower panel is consistent with a long bus turning on to another roadway without stopping or with any warning and into the path of the Claimant's vehicle. Furthermore, its position virtually straight across Ocean Boulevard would cause frontal damage to the Claimant's vehicle heading in a straight direction.

[66] Counsel argues that had the front of the JUTC bus been curved towards the left lane of the dual carriage way on Ocean Boulevard, this would have allowed for an argument that the Claimant would have seen his manoeuvre with enough time to stop or brake. Counsel argued that the fact that the photographs showed that the JUTC bus was straight across the roadway of Ocean Boulevard tells that he only seconds before emerging on to that roadway. Counsel therefore submits that the Claimants account of how the incident took place should be accepted.

[67] Counsel urged the Court to reject Mr. Holdings account that he stopped and checked that the roadway was clear. Counsel argued that there was no obstruction identified neither did the weather conditions affect visibility. According to Counsel, if the 2nd Defendant had kept a proper look out, he would have seen the Claimant's motor car

approaching and would have had ample opportunity to take action, if even to brake which would mean that the bus would not have straddled the entire road leaving room for evasive options for the Claimant.

[68] Counsel argued that both parties agree that the point of impact was to the front right or the front wheel of the JUTC bus and not in the middle or rear of the bus. The evidence suggests that the Claimant's vehicle had already ventured into the area of the roadway that intersects with Church Street when the accident occurred. If the bus had turned on to Ocean Boulevard when the Claimants vehicle was further back from the intersection, it would be expected that the damage to the JUTC bus would have been to the middle or the rear of the said bus.

[69] Counsel contends that the Defendants' evidence that Mr. Blue had told him that he did not see the bus was inconsistent with that of Mr. Blue who stated that he saw the bus when approaching the intersection. Counsel argued that the size and colour of the bus makes it far more visible to drivers on the road and was a deliberate design. Counsel argues that the Claimant could not have missed the bus, and his account is more credible than that of the 2nd Defendants.

[70] In closing, Counsel submitted that Mr. Holding's account is not consistent with the clear view that Mr. Blue was said to have. He argued that though the expert, Mr. Thomas, had tried to explain it away with a theory that applied only to Mr. Blue, he should have put before the Court the reason why Mr. Holding may not have seen Mr. Blue. Counsel however, accepted that he did concede that a failure to stop would affect his sight of oncoming traffic.

[71] Counsel argued as a possibility, that Mr. Holding did see Mr. Blue, but misjudged his speed. He posited that if this is so, he was careless and failed to keep a proper look out. Counsel argued that a worse but more likely explanation is that he did not stop, drove straight across Ocean Boulevard in his haste to go to Scotiabank and get to Rockfort, resulting in the accident.

[72] Counsel argued that the Claimant had the right of way, there being a stop sign on Church Street. Counsel submitted that Ocean Boulevard is a major road with dual carriageway on both sides and Church Street is a minor road. As such, the Claimant had the right of way along the roadway.

[73] Counsel asked that the Court find the evidence of the 2nd Defendant as unreliable and incredible. Counsel maintained that the accident was the fault of Mr. Holding, as he failed to keep a proper look out and to heed the presence of the Claimant's vehicle. Further, the 2nd Defendant failed to ensure that it was safe for him to turn from a minor roadway on to a major roadway and did so when it was unsafe.

[74] Counsel relied on the case of **Davis v Swinwood** [2003] CIY 3029 and **Brown v Central Scottish Motor Traction** 1949 SC9, 1949 SLT 66, involving accidents in which parties were travelling on and proceeding onto major roads and the Court found that the parties who were proceeding on the major road to have not been negligent. In the case of **Davis v Swinwood** the court stated:

"Although the court found as a fact that the defendant's indicator had not been displayed, the court held that this was not the relevant issue, as the claimant had been seeking to enter a major road from a minor road. As the defendant had precedence on the road the onus was clearly on the person entering the major road to enter safely. This, the claimant failed to do. The claim was dismissed with judgment entered in favour of the defendant."

[75] Counsel argued that the expert report of Mr. Thomas was flawed and partial to the Defendant's case, as it only took into account the omissions and actions of Mr. Blue without addressing those of Mr. Holding. Counsel argued that the expert had ignored the account given by Mr. Blue in his analysis and was thereby partial.

[76] As it relates to General Damages, the Claimant relied on the Medical Report of Dr. St. Juste, dated December 10, 2014, emphasizing the fact that the surgery that rectified the fracture was not performed until three (3) weeks between the accident and the surgery, and between that time the Claimant endured excruciating pain. His post-surgery recovery had to be aided by physiotherapy and the chest pains he was experiencing required him to take forty-two days sick leave from work.

[77] Counsel argued that regardless of the fact that the surgery has assisted him in regaining maximum medical improvement, his evidence shows that he still suffers pain and is unable to perform his usual activities as he would have prior to the accident. In his argument for general damages counsel relied on the following cases: **Donald Blake v Edward Barnaby & Northern Cash and Carry Limited** 2000 HCV02758 of 2009, **Jotham Treasure v Thomas Bonnic & Ors** CL 2001/T 026, **Turkheimer Moor v Elite Enterprises Ltd & Ors** CL 1995/M168, **Barrington Walford v National Water Commission & Dunn** CL 1996/W 073, **Michael Lawrence v Leon Bell & Ors** 2012HCV02862. The cases of **Turkheimer Moor v Elite Enterprises Ltd & Ors** and **Jotham Treasure v Thomas Bonnic & Ors** were especially helpful.

[78] In **Jotham Treasure v. Thomas Bonnick & Ors** the Claimant sustained a fracture to the right clavicle resulting in pain to the shoulder. He was awarded \$650,000.00 on 28th March, 2008 using a CPI of 47.1. The updated award is \$1,758,174.09.

[79] In the **Turkheimer Moore v Elite Enterprises LTD & Ors** case delivered 29th February, 2000 the CPI at that time being 20.3, The claimant was awarded \$275,000.00. The claimant suffered a fracture of right clavicle, multiple bruises to upper limb, multiple bruises to head with hematoma & possible cerebral concussion, and loss of consciousness. Mild functional disability was assessed at 3% of the upper left limb, equivalent to 2% PPD. This award updated to \$1,725,862.06.

[80] As it relates to special damages the Claimants claimed Damages in the sum of Eight Hundred and Eighty-One Thousand Six Hundred and Fifteen Dollars and Fifty-One Cents (\$881,615.51) for Medical expenses, vehicular related expenses and transportation.

THE DEFENDANTS' SUBMISSIONS

[81] The JUTC avers that the collision was caused solely by the negligence of Mr. Blue or at least greatly contributed to it by his negligence. Referencing the case of **Blyth v Birmingham Waterworks Company** (1856) 11 Exch 781, Counsel submitted that there must be a duty owed to a claimant and there must have been a breach of duty by the

defendant. Counsel submitted that the duty to take reasonable care at both common law and statute is owed by road users, not only towards each other but to themselves, this duty would also be imposed on Mr. Blue (**See Pamela Thompson and others v Devon Barrows and others** (CL 2001/T143, paragraph 11). Counsel submitted further that it is a well-established principle that where there are two or more vehicles involved in an accident, each owe to the other a duty of care to avoid causing harm to the other (See Section 51(2) of the Road Traffic Act).

[82] Counsel submitted that it is a question of fact in each case whether the driver operated at the standard of care required of him by keeping a proper lookout, avoiding excessive speed and observing traffic rules and regulations. (See **Jowayne Clarke and Anthony Clarke v Daniel Jenkins** Claim No. 2001/C 2011 delivered 15/ 10/ 2019).

[83] Counsel argued that Section 95 (3) of the Road Traffic act is applicable, as follows:

“Any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which it is in question in those proceedings.

[84] This section, it was submitted, codifies the common law principle that a breach of the road code does not amount to a presumption of negligence (See **Rudolph Kennedy v Wheels & Wheels Auto Brokers Ltd, et al** [2016] JMSC Civ 169). Counsel contended that Section 95(3) has to be appropriately applied depending on the facts and the circumstances of the particular case, this would therefore require a proper assessment of each case. Specifically, in this case, the nature and conduct of the parties must be properly assessed. As the duty of care was a reciprocal responsibility between both JUTC and Mr. Blue.

[85] Counsel argued that a motorist is required to exercise reasonable care but is not required to be a perfectionist. Counsel relied on the case of **Lang v London Transport Executive** 1959 WLR PS1168 at page 1176 in which Havers J stated:

“If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere

possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.”

[86] Counsel in closing argued that there were inconsistencies in the evidence of Mr. Blue as to when he saw the bus and posited that his evidence demonstrates that he was not keeping a proper look out as he stated that the bus was fifteen to twenty feet away before the collision. Counsel emphasized the fact that the front of his vehicle collided with the right-hand side of the bus which calls into question the lane that Mr. Blue had actually been positioned in at the time of the accident. Counsel argues that if he was in the left lane as he said, there would have been a clear right lane for him to have swerved as he said he was the only vehicle on the road. It was contended that it was also questionable whether a swerve in the left lane could have taken him all the way over to the right lane. Counsel maintained that based on his evidence, it is clear that he was in the right lane and did not mention swerving in his witness statement. Counsel argued that the evidence of Mr. Thomas was directly relevant, and his report was supportive of a finding that Mr. Holding was not the cause of the accident. Counsel argued that there is no medical evidence that Mr. Blue returned to the doctor after 2014, and it was contended that he is exaggerating his injuries.

[87] Counsel took note of the cases of ***Jotham Treasure v Thomas*** and ***Turkheimer Morre v Elite*** as submitted on behalf of the Claimant, and submitted that the award to Mr. Blue would have to be discounted and an award between One Million Two Hundred Thousand Dollars (\$1,200,000.00) and One Million Four Hundred Thousand Dollars (\$1,400,000.00) was reasonable. Counsel submitted that Mr. Holding was a witness of truth and on a balance of probabilities the accident occurred according to the account that he had given. Counsel argued that it is true that vehicles on the major road have the right of way and vehicles from the minor road should give way.

[88] Counsel averred that if the court is minded to find the JUTC liable then it asks that the court notes that Mr. Blue was on a straight road and managed to crash head on without any evidence of attempting to avert the collision. In such a case, where contributory negligence is in question the question to be asked is whether the Claimant

in the ordinary sense of the business contributed to the accident (See **Admiralty Commissioners v SS Volute** [1922] 1 AC 129.)

[89] Counsel further submitted on the point that the case of **Froom v Butcher** [1975] 3 All ER 520 was applicable when the court stated:

“Negligence depends on a breach of duty whereas contributory negligence does not. Negligence is a man’s carelessness in breach of duty to others. Contributory negligence is a man’s carelessness in looking after his own safety. He is guilty of contributory negligence if he out reasonable to have foreseen that if he did not act as a reasonable prudent man he might hurt himself “

[90] Counsel submitted that had Mr. Blue been more alert to the presence of the bus up ahead on the straight road on which he was travelling, he might have taken some evasive action, given that no vehicle was before him and he had a clear passage in front of him. Counsel submitted that JUTC was not responsible for the collision despite having entered an intersection from a minor road. The expert report of Mr. Peter Thomas demonstrates that Mr. Blue had failed to keep a property look out to avoid any possible collision.

ANALYSIS

Liability

[91] The Claimant’s case is that he was travelling at a moderate speed, within the stipulated speed limit for that area, when he says that he saw the JUTC bus. Though he agrees that he had not said so in his statement, he gave evidence that he attempted to veer to his right when he saw the bus across the road. While he says the bus was not travelling fast, he saw the bus shortly before the collision, but did not have sufficient time to avoid it.

[92] On the evidence, Mr. Holding was coming from Church Street and turning on to Ocean Boulevard where there is a dual carriageway. He claims to have made a complete stop at the intersection of Church Street and looked down Ocean Boulevard where he could see up to 120 feet and saw no vehicles coming. He then says that he cautiously entered the thoroughfare as he negotiated the left turn on to Ocean Boulevard. When the

collision occurred, he did not even know the direction from which it came and so he clearly did not see Mr. Blue's vehicle, though in the direction he was going along the dual carriage way, the only traffic that should have concerned him, was traffic coming from his right.

[93] What I found to be most significant was that Mr. Holding in his evidence stated that after he began to proceed on to Ocean Boulevard, he started to look in his left mirror. From the accident reconstruction report, the illustrative analysis shows that when the bus had turned on to Ocean Boulevard, Mr. Blue would have been travelling towards the right of the bus. At that time, Mr. Holding had his attention fixed to the left rear of the bus, perhaps to ensure that, given the length of the bus, it would clear the curb as it turned left. Traffic on that side of the dual carriage would be coming exclusively from his right at the point that the manoeuvre was attempted.

[94] I do not accept Mr. Holding's evidence that he was able to see three bus lengths up the road, before he moved out on to Ocean Boulevard. I do not find that he had actually made a complete stop at the stop sign at the intersection. Given the width of the dual carriage way on Ocean Boulevard I believe that he thought that he could navigate the bus into the turn and had to slow and block the road as he checked the bus's left side. I find that he did not see Mr. Blue approaching as he did not take the time to ensure that the road was clear but immediately proceeded to make the turn on to Ocean Boulevard. As he approached the intersection, his full attention was to his left rear-view mirror, as he focused on ensuring, as he said, that the bus did not ride the curb. This explains why his evidence is that he could not tell which side of the bus had been impacted, as he failed to keep a proper look out and failed to stop at the stop sign. The undisputed evidence is that Mr. Blue's vehicle was the only vehicle on the road, so for Mr. Holding's account to be credible, after he looked and could see up the road for at least 120 feet, that after he turned across the road Mr. Blue was travelling at a speed greater than what he said as he blindly ploughed into the right of the bus. I do not accept Mr. Holding's version of events as credible. Short of Mr. Blue falling from the sky, had Mr. Blue paid due care and attention to his right, where vehicles along that portion of the dual carriage would have been proceeding, he could not have missed Mr. Blue coming.

[95] As it relates to Mr. Blue, I did find that there were inconsistencies in his evidence. These inconsistencies, in my view, are accounted for, in part, by the length of time that passed between the time of the collision and of giving evidence at trial. I also believe that though the bus was not travelling as fast as a vehicle would be were it travelling in a straight line, that because it did not stop at the intersection, it came into his path and obstructed it quicker than he could react to avoid the collision. A party travelling along a major road could not be expect to apply brakes when approaching every intersection because it sees a vehicle that should stop, approach the intersection. If one travels along a road on which there is not stop sign passing a minor road on which there is, it would be reason to expect that the party on the minor road would stop in observance of the stop sign and your right of way. I believe that at the point that Mr. Blue realized that the bus he saw was not stopping, he veered left expecting it would observe his right of way and when he realized that it would not, it was too late to avoid the collision.

[96] That Mr. Holding, and vicariously JUTC, owes to other users of the road, a duty of care when manoeuvring such a large vehicle on public road could not be disputed. And certainly, even with a right of way, there is no dispute that Mr. Blue had an obligation to take reasonable steps to avoid the collision, if for no other reason, for his own safety. Counsel for the Defendants relied on the authority of ***Lang v London Transport Executive*** 1959 WLR PS1168 at page 1176 in which Havers J stated:

"If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions."

[97] Is it foreseeable that a large vehicle driving suddenly from a minor to a major road would occur to apply one's brakes as soon as you approach the intersection? That is hardly practicable. A bus of that size travelling across a dual carriageway even at a pedestrian pace of say 10 km per hour, that does so without observing the stop sign and in a manner so as to cause a complete obstruction of both lanes of the road, is not foreseeable. There is also every indication that had he navigated in a manner that allowed him to continue to monitor his right side, would have afforded him the ability to have

stopped the bus before it blocked both lanes, to allow oncoming vehicles to pass safely on the right, as Mr. Blue attempted to do.

[98] The main thoroughfare along Ocean Boulevard had no stop sign for vehicles travelling along it in the vicinity of the Church Street intersection. It is impractical for vehicles travelling along Ocean Boulevard to stop at every point where a minor road can enter it, where there is no stop sign, just in case a vehicle approaches the intersection from a minor road and does not stop. The fact of seeing the bus would not signal him to stop as he could not have known it was not the intention of the bus not to stop until it was already into the dual carriage way. While his duty to take reasonable steps to avoid a collision is not diminished, Mr Blue had the right of way along Ocean Boulevard. I accept his evidence that he had swerved to avoid hitting the bus, but was unable to successfully stop the vehicle in time to avoid the collision.

[99] Mr. Thomas's evidence is that Mr. Blue was travelling faster than his stated fifty kilometres per hour at the point of the collision. Based on the fact that his analysis of the collision was bereft of any instructions that considered the actions or inactions of Mr. Holding, I do not find that portion of his evidence to have presented conclusive and reliable results.

[100] Notwithstanding the above, I do maintain that Mr. Holding is the cause of the accident as I believe that the accident could have been avoided if he had actually stopped at the stop sign. He infringed on the Claimants right of way and that caused the accident. Mr. Holding failed to consider the size of his vehicle and the fact that when making a turn on such a corner it was likely that the bus would have occupied majority of the width of the road. His speed as he was turning may not have been excessive perhaps had it been travelling in a straight line but was sufficient as he went on to Ocean Boulevard and blocked both lanes, to have prevented Mr Blue from avoiding the collision. Seeing the bus about a car length away, aware of his right of way and perhaps believing that the bus would observe the stop sign, Mr. Blue, when he was left with no option, veered to his right in a last-ditch attempt to avoid the collision. Though he omitted this fact from his witness statement, it is the only explanation for the fact that the collision occurred in the right lane,

and I accept his evidence on a balance of probabilities on how the collision occurred. I would therefore adopt the view of the Court in the case of ***Davis v Swinwood***, as submitted by Counsel for the Claimant.

CONTRIBUTORY NEGLIGENCE

[101] According to the Halsbury's Laws of England 4th Edition Volume 34, Paragraph 14 Page 15

"an allegation of contributory negligence must be distinctly pleaded and will not be found by the court of its own motion."

[102] Though raised in the submissions of Counsel for the Defendants, contributory negligence had not been pleaded by either party. Notwithstanding, as stated above, I find Mr. Holding, the JUTC's servant and/or agent, to be the cause of the collision.

SPECIAL DAMAGES

[103] Having found the Defendant liable, The Court would ordinarily move to assessing damages, to include special damages. However, based on the agreement of the parties as to the quantum of special damages in any event, I see no need to commence that exercise. The parties having already agreed to Special damages in the sum of **Six Hundred and Seventy-Five Thousand One Hundred and Seventy-Eight Dollars and Two Cents (\$675,178.02)**, judgment will be given for the Claimant in that amount.

GENERAL DAMAGES

[104] I found that the following cases were most applicable to the case at bar despite their vintage. The figures will be updated using the CPI for April 2023, which is 127.4.

[105] In ***Jotham Treasure v. Thomas Bonnick & Ors*** the Claimant sustained a fracture to the right clavicle resulting in pain to the shoulder. He was awarded \$650,000.00 on March 28, 2008 using a CPI of 47.1. The updated award is to the sum of One Million Seven Hundred and Fifty Eight Thousand One Hundred and Seventy Four Dollars and Nine Cents. (\$1,758,174.09).

[106] In ***Turkheimer Moore v Elite Enterprises LTD & Ors*** delivered February 29, 2000 using a CPI of 20.3, the Claimant was awarded \$275,000.00. The Claimant suffered a fracture of right clavicle, multiple bruises to upper limb, multiple bruises to head with haematoma & possible cerebral concussion, and loss of consciousness. Mild functional disability was assessed at 3% of the upper left limb, equivalent to 2% PPD. This award updated to One Million Seven Hundred and Twenty-Five Thousand, Eight Hundred and Sixty Two Dollars and Six Cents (\$1,725, 862.06).

[107] Having considered the evidence of the Claimant, though I don't think it impossible that he continues to suffer pain as a result of the accident, there was no further medical assessment to contradict or update the prognosis of Dr. St. Juste's that he was able to perform his daily activities pain free and had 0% whole person impairment. It is clear that the injuries as sustained by the Claimant in ***Turkheimer Moore***, are more severe than those suffered by Mr. Blue. As such, these sums will be discounted accordingly. I find that the sum in ***Turkheimer Moore*** is closer to the range of general damages which could be reasonably awarded in this case, especially in light of the fact that in the ***Jotham Treasure*** case, the Claimant had only suffered a fractured left clavicle, nevertheless, damages awarded in each of these cases were not dramatically different.

[108] In ***Jotham Treasure*** the court had taken into consideration the ***Turkheimer Moore*** case, and had given a higher award based on the fact that the Claimant in the ***Jotham Treasure*** case was still experiencing pain 9 years after the incident while the Claimant in the ***Turkheimer*** case at the time of his award had only been suffering pain as a result of the incident for a total of six years. It must however be noted that though the Doctor in the ***Jotham*** case was not an orthopaedic specialist he had required the claimant to see him on regular intervals for check-up, and as Counsel in that case submitted, that demonstrated that he was likely to suffer long term effects of his injury. I also considered the fact that the Claimant in the ***Turkheimer*** case has suffered whole body impairment. Comparing these cases to the case at bar I believe that the sum to be awarded would have to be discounted.

[109] Mr. Blue suffered with the pain of his fractures for three weeks without being diagnosed, had to undergo surgery, physiotherapy and required time off from work as a result of this incident. I find that an award of ***One Million Five Hundred and Fifty Thousand Dollars (1,550,000.00)*** is appropriate in the circumstances.

[110] Having found that on a balance of probabilities that liability of the accident rests with the 2nd Defendant, the 1st Defendant's agent, and based on the foregoing, judgment is given for the Claimant, Mr Blue against the Defendants as follows:

- (i) On Special damages, judgment in the sum of \$675,178.02 with interest at 3% from February 16, 2014;
- (ii) On General damages, judgment in the sum of \$1,550,000 with interest at 3% from July 1, 2015;
- (iii) Costs to the Claimant against the Defendants to be taxed if not agreed;
- (iv) Claimant's Attorneys at law to prepare file and serve the orders herein.