[2019] **JMSC Civ. 182**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV05986

BETWEEN	**THEOPHILUS TAYLOR**	**CLAIMANT**
AND	**DAHLIA VALENTINE**	**DEFENDANT**

IN OPEN COURT

Mr. Lemar Neale instructed by Bignall Law for and on behalf of the Claimant

Ms. Suzette Radlein of Counsel for and on behalf of the Defendant

Dates Heard: January 23, January 24, February 6 and September 23, 2019

Civil Practice & Procedure – Negligence – Motor vehicle accident – Personal injury – Whether the Claimant was contributory negligent – Apportionment of liability – Assessment of damages

CORAM: PALMER HAMILTON J

BACKGROUND

[1] This is a claim which arose out of a collision which occurred at the intersection of Knutsford Boulevard and Park Boulevard in the parish of Saint Andrew on or around the 3rd day of September, 2013. The collision involved the Claimant's Jamco motorcycle licensed 7813H and the Defendant's Honda Fit motorcar licensed 3706GC.

[2] The Claimant alleged that he was travelling along Knutsford Boulevard when the Defendant, coming from the opposite direction, turned right across his path causing her motor vehicle to collide into his motorcycle. As a result, he sustained personal injuries and suffered loss and damage.

[3] The Defendant contended that she was proceeding along Knutsford Boulevard when on approaching Park Boulevard, she indicated her intention to make a right turn onto Park Boulevard by switching on her right indicator and stopped waiting to turn. She alleges that a motorist travelling in the opposite direction stopped to allow her to make a right turn and she proceeded to turn right when the Claimant attempted to overtake her vehicle and collided in the right side of the front bumper of her vehicle.

[4] The Defendant admitted that the collision occurred but denied that the collision was caused by negligence on her part. The Defendant further denied that the Claimant was travelling in the opposite direction at the material time and stated that the collision was caused and/or materially contributed to by the Claimant who was travelling in the same direction as her and attempted to overtake her vehicle at a time when it was unsafe to do so and at a point, along the said roadway where overtaking is prohibited. The Defendant averred that she suffered loss and damage and was put to expense.

The Claimant's Case

[5] The Claimant's Witness Statement was allowed to stand as his evidence-in-chief. He stated that on the 3rd day of September 2013, between 5:15pm and 5:35pm he was traveling northerly along Knutsford Boulevard heading to work. He stated that he was riding a Jamco motorcycle.

[6] The Claimant averred that as he came along the roadway and approached Park Boulevard where the road intersects, he saw a black car coming off Park Boulevard, in the opposite direction towards him. He stated that as he was about to pass the black vehicle, a silver Honda Fit motorcar licensed 3706GC was

coming down Knutsford Boulevard in the opposite direction towards him. The Claimant further stated that as he proceeded across the intersection, the Defendant also proceeded to make a right turn without indicating same, neither did she stop at the intersection. He indicated that suddenly and without warning, he felt an impact to the right side of his motorcycle and that the Honda Fit hit him off the motorcycle and onto the road

[7] The Claimant indicated that there were no other vehicles along the road way except for his motorcycle, the Defendant's vehicle and a black vehicle which was exiting Park Boulevard. He contended under cross-examination that he was just below the exit gate of the Pegasus Hotel when he saw the Defendant's vehicle speeding down the road. The Claimant further indicated that he was in the middle of his lane barely cruising when the Defendant came down fast and just swung into what he described as the amber lane to get onto Park Boulevard.

[8] The Claimant further averred that he had not passed the left front of the Defendant's vehicle when the Defendant turned. He stated that he and his motorcycle skated a good distance down the road in the direction he was heading and ended up on the first island on Park Boulevard.

[9] He also stated that he was looking ahead of him until he saw a vehicle turn into the path of his motor motorcycle. At that point, he indicated that he had glimpsed to his right side and glimpsed over his shoulder and when he saw the Defendant's vehicle turning all he did was lean to the left. He stated that it was the muffler of his motorcycle that was damaged in the collision.

The Defendant’s Case

[10] The Defendant's Witness Statement was allowed to stand as her evidence-in-chief. She stated that at the material time, she was travelling along the Knutsford Boulevard heading to Emancipation Park which is along Park Boulevard to exercise. She further indicated that her intention was to make a right turn from Knutsford Boulevard onto Park Boulevard.

[11] The Defendant maintained that she switched on her right indicator indicating her intention to turn right. When she got to Park Boulevard she came to a stop as vehicles were coming from the opposite direction. The Defendant further stated that a few seconds after stopping, a car came in the opposite direction in the right lane and stopped to allow her to turn. She further averred that the way was clear to make the right turn and she proceeded to turn towards Park Boulevard. Whilst turning left, the Defendant stated that she felt an impact to the right side of her vehicle.

[12] She contended that she immediately stopped her car and saw that the Claimant, who was riding his motorcycle had impacted the right side of the front bumper and right fender of her vehicle. On cross-examination, the Defendant indicated that when she came to the intersection she was waiting for about two (2) to three (3) minutes. When asked how long it took her to turn onto Park Boulevard, she stated that it took her about twenty (20) to thirty (30) seconds.

[13] The Defendant maintained that she checked the rear view and side mirrors of her motorcar to make sure that the way was clear. She indicated that she could see twenty-seven (27) feet through her side mirrors.

[14] The Defendant also averred that she first saw the Claimant overtaking her when she was proceeding to turn onto Park Boulevard. She further indicated that at the time of the collision she did not get onto Park Boulevard but her vehicle was in a turn position on Park Boulevard and that possibly the front of the car was on Park Boulevard.

[15] Under cross-examination, the Defendant contended that the Claimant was speeding. She stated that it was the front fender and right bumper of her car that got damaged.

ISSUES

[16] The main issues to be determined on a balance of probabilities are: -

1. Whether the Defendant was negligent thereby causing the collision and liable to the Claimant for injury and damage?

2. Whether the Claimant, by his own action was contributorily negligent?

3. What is the quantum of damages, if any, to be awarded?

[17] Both Counsel have provided the Court with extensive written submissions for which I am grateful.

Submissions on Liability

The Claimant's submissions on liability

[18] Learned Counsel for the Claimant initiated his submissions by stating the law on negligence as it relates to motor vehicle negligence and the issue of contributory negligence. He cited the following authorities: -

1. **Norman McBean v Rainford Wade and Rupert Campbell** [2017] JMSC Civ. 74;

2. Section 51 (2) of the **Road Traffic Act, 1938**;

3. **Jowayne Clarke (By his next friend Anthony Clarke) and Anthony Clarke v Daniel Jankine** (Unreported), Supreme Court, Jamaica, Suit No. C.L. 2001/211, judgment delivered on the 15th day of October, 2010;

4. **Natalie Gray v Donald Pryce and Noel Newsome and Anor** [2015] JMSC Civ.118; and

5. **Nance v British Columbia Electric Railway Co. Ltd** [1951] 2 All ER 448.

[19] Learned Counsel for the Claimant submitted that the issue in this case turns on credibility. He proffered that the Defendant's evidence is replete with inconsistencies which is enough to undermine her credibility on a whole.

[20] Learned Counsel submitted firstly, that the Court should carefully consider the failure on the part of the Defendant to mention that the Claimant was coming from the same direction as her and overtook her vehicle in her evidence-in-chief. Learned Counsel further indicated that this omission on the part of the Defendant is very serious and it goes to the root of the Defendant's case. It was submitted that this is enough for the Court to find that the Defendant is not being truthful or forthright and so her evidence cannot be believed.

[21] Learned Counsel maintained that the Defendant cannot be believed when she said it took her twenty (20) to thirty (30) seconds, using the lower limit, to turn onto Park Boulevard from the side of Knutsford Boulevard where she was. Learned Counsel further submitted that based on the distance from where the Defendant would have stopped at the intersection to proceed onto Park Boulevard, it should have taken her about five (5) seconds to get onto Park Boulevard. He maintained that if the Claimant was coming from behind the Defendant, during those five (5) seconds, she would have had to see him. It was further maintained that this aspect of the Defendant's evidence is irreconcilable with her overall evidence and the Court should therefore find as a fact that the Claimant was not proceeding in the same direction as the defendant

[22] Cognate to that submission, the Court was urged to find that the Defendant could have seen more than twenty-seven (27) feet through her rear view mirrors. Learned Counsel submitted that the Court should therefore take judicial notice of the fact that the distance from Park Boulevard all the way up to the Hilton Hotel is a straight road and so, the Defendant could reasonably see far behind her.

Therefore, on her case, if she were to be believed that the Claimant overtook her, she would not have been keeping a proper lookout to even see whether anybody was overtaking her when she proceeded to turn onto Park Boulevard.

[23] Learned Counsel also stated that the Defendant gave evidence that the Claimant was speeding, yet, she did not see him until she proceeded to turn onto Park Boulevard. He submitted that even at twenty-seven (27) feet away, the Defendant could have seen the Claimant through her mirror speeding coming behind her. Learned Counsel further indicated that the Defendant said her motorcar is a right-hand drive car and she was looking through her driver's window, yet she did not see the Claimant until she was turning onto Park Boulevard. Learned Counsel indicated that this evidence was preposterous.

[24] Learned Counsel also insisted that if the Claimant collided into the right side of the Defendant's front bumper, as alleged by her, it would mean that the Claimant collided with the Defendant on Park Boulevard. He stated that it would also mean that the Claimant, in overtaking the Defendant's vehicle, would have had to be on the opposite side of the road to be able to impact the Defendant's vehicle where alleged. Learned Counsel also submitted that if the Claimant was on the opposite side of the road when overtaking the Defendant, it must therefore mean that the road was not heavily congested as indicated by the Defendant.

[25] It was averred that the Court should have regard to the physical evidence, especially where the parties blame each other for the cause of the collision. Learned Counsel indicated that the Claimant in cross-examination stated that it was the muffler of his motorcycle that was damaged in the collision. The Defendant on the other hand contended that it was the front fender and front right bumper of her motorcar that got damaged. However, based on the photograph tendered into evidence, Learned Counsel submitted that it does not support the Defendant's position. Learned Counsel indicated that the damage is readily seen to the front of the Defendant's motorcar. The greater impact is to the front and it moved from the front to scratches on the side of the fender.

[26] Learned Counsel submitted that the point of impact is that section at the front of the Defendant's vehicle where the colour is cut. He stated that this would be more in keeping with the Claimant's version that the Defendant collided with him while he was proceeding across the intersection. Learned Counsel further maintained that the Court would readily appreciate and visualise that the Defendant's car would turn at an angle while it was proceeding onto Park Boulevard.

[27] It was submitted that it is therefore not hard to see the Claimant proceeding across the intersection and the Defendant turning into the Claimant's motorcycle. He stated that this would support the Claimant's position that it was his muffler that was impacted. Learned Counsel further stated that it may also be inferred too that the Claimant was correct that the Defendant did not stop at the intersection as she said she did and he averred that if this inference can be drawn, it can then be inferred that the road was not congested since the Defendant did not come to a stop at the intersection.

[28] Learned Counsel asserted further that one would expect the left side of the Defendant's vehicle to be impacted if the Defendant was in a turned position and the Claimant was overtaking her. It begs the question how the Claimant managed to get in front of the Defendant's vehicle to impact the front of it. Counsel maintained that the evidence is consistent with the Claimant's version.

[29] Learned Counsel also indicated that the only statement made by the Claimant that *prima facie* may appear to affect his credibility, was when he demonstrated for the Court where the Defendant had turned onto Park Boulevard. Based on his demonstration, he said that the Defendant entered from the slip road from the direction of Oxford Road. Learned Counsel respectfully submitted that this was a genuine mistake on the part of the Claimant and in any event, it would not erode his credibility. He further stated that the fact of the matter is that the Defendant did not deny that she proceeded to turn onto Park Boulevard. Therefore, the issue of what entrance she used to get onto Park Boulevard is minutiae.

[30] Learned Counsel expressed that the Court could draw the inference from the Claimant's evidence that he made an error in terms of from where the Defendant entered onto Park Boulevard. The Claimant stated that it was as he proceeded across the intersection that the Defendant proceeded to make a right turn. The Court could readily infer that the Claimant would have driven past the slip road to get to the intersection to be able to have proceeded from the intersection.

[31] It was also highlighted that the Claimant said that there was no traffic on Knutsford Boulevard at the time of the accident. Learned Counsel indicated that this is not incredible and that the Court can take judicial notice of the fact that the 3rd day of September, 2013 would most likely still be a day when several schools across the island would not have been opened and so the traffic would not be too heavy at the time. In any event, even if the Court does not accept this portion of the Claimant's evidence, it is not enough to cast doubt on his entire evidence. Learned Counsel further stated that the Defendant's evidence, particularly where she led none in relation to the Claimant overtaking her in her evidence-in-chief, suggests that whether the roadway was congested is of no relevance. He submitted that despite these inconsistencies the Claimant has not been discredited as to how the accident happened.

[32] Learned Counsel stated that based on the evidence, the cases cited and the principles distilled therefrom, the collision was caused by the Defendant and the Claimant was not contributorily negligent.

The Defendant's submissions on liability

[33] Learned Counsel for the Defendant also adumbrated her submissions by starting with the law on negligence. She cited the following authorities: -

1. **Blyth v Birmingham Water Works Company** (1856) 11 Ex Ch 781;
2. **Nance v British Columbia Electric Railway Co. Ltd** [1951] 2 All ER 448;

3. Section 51 (1) (d) and (g) and Section 51 (2) of the **Road Traffic Act, 1938.**

[34] Learned Counsel submitted that the Defendant's version of the accident is far more likely on a balance of probabilities. She stated that the Claimant contended that he was going to Jamaica Money Market Brokers ("JMMB") on Knutsford Boulevard to visit his girlfriend and from there, he intended to travel along Trafalgar Road to get to work at the Bustamante Children's Hospital. The Claimant explained on cross-examination that JMMB was across from Scotiabank and beside NCB. Learned Counsel stated that when it was suggested to the Claimant that a shorter route to his final destination from JMMB would have been to travel back down Knutsford Boulevard and then onto Oxford Road, he denied this saying that the shorter route would have been Trafalgar Road onto Swallowfield and then leaving Swallowfield, he would end up at the Hospital.

[35] Learned Counsel submitted that judicial notice can be taken of the fact that JMMB is on the right hand side of the dual carriage way going in the direction of Trafalgar Road and so, upon leaving JMMB, the Claimant would have had to travel towards the stoplight at the intersection of Knutsford Boulevard and Grenada Crescent, make a U-turn to head back to Trafalgar Road and then travel some distance to get to Swallowfield before ending up at the Hospital. She further maintained that a less circuitous route, and one which would seem more likely, is for the Claimant having left JMMB, to proceed straight onto Arthur Wint Drive where the Hospital is located. Counsel averred that this route would place the Claimant in the direction from which the Defendant contended he was coming from, that is, from behind her.

[36] In relation to the Claimant's averment that there were no other vehicles on the road except for his motorcycle, the Defendant's vehicle and a black vehicle which was exiting Park Boulevard, Learned Counsel submitted that the Court should take judicial notice that at that time of the year and at that hour of the afternoon, that is 5:00pm to 5:30pm as indicated by the Claimant, the thoroughfare in and out of New Kingston is likely to have been busy. Learned Counsel stated that this would

accord with the Defendant's evidence as she indicated that it was peak hour traffic so there were a lot of vehicles on the road and she had to wait for a vehicle to stop to allow her to turn onto Park Boulevard.

[37] As it relates to the speed at which the parties were travelling, Learned Counsel submitted that if the Claimant was travelling as slowly as he claimed and if the Defendant was travelling as fast as he claims, then it seems unlikely that the vehicles would have collided or in the alternative, it would be more likely that the damage to the Defendant's vehicle would have been to the left side rather than to the right side. She further submitted that it should be noted that the Claimant denied that he had passed the left front side of the Defendant's vehicle when the Defendant allegedly turned on him. This further supports the contention that if he was travelling in the middle of his lane at a slow speed and the Defendant was travelling at a fast speed the impact should have been to the left front side or left side of her vehicle.

[38] Learned Counsel also submitted on the point of impact and the position of rest of the Claimant and his motorcycle. She indicated that on the Claimant's version, the Defendant turned across his path but instead of falling in the vicinity of the impact, he and his motorcycle skated a good distance down the road in the direction he was heading and ended up by the first island on Park Boulevard. Learned Counsel averred that this version is inherently impossible and unbelievable and it is far more likely that the Claimant was coming from behind the Defendant when he attempted to overtake her vehicle as she turned. The Defendant's version would more likely on the balance of probabilities have caused the Claimant and his motorcycle to end up where he marked on Exhibit 1.

[39] On the physical evidence of damage, Learned Counsel submitted that it is consistent with the Defendant's version. On the Defendant's version the Claimant was attempting to overtake her vehicle on the right of her when she turned. This meant that the first point of contact would have been the front side of the Defendant's vehicle as reflected on Exhibit 2. Learned Counsel also maintained

that the fact that neither the Claimant's motorcycle nor the Defendant's motorcar collided with the black vehicle that was exiting from Park Boulevard, and also, the fact that the impact did not obstruct the black vehicle's exit onto Park Boulevard is improbable and unlikely and not in keeping with what would reasonably have been expected to happen on the Claimant's version of the accident. Learned Counsel cited the case of **Calvin Grant v David Pareedon et al** (Unreported), Court of Appeal, Jamaica, [Supreme Court] Civil Appeal No. 91/87, judgment delivered on the 4th day of October, 1988 to support her submission that physical evidence may well be of crucial importance in assisting a tribunal of fact in determining which side is speaking the truth.

[40] Learned Counsel averred that the Claimant's action upon seeing the Defendant turning into the path of his motorcycle seems improbable and unlikely. The Claimant stated that all he did was to lean to the left. Learned Counsel maintained that based on the makeup of the roadway the Claimant would have ample space swerve out of the path of the Defendant if she turned on him as he alleged. The Claimant's action when faced with the threat of collision is not in keeping with his duty to avoid a collision pursuant to section 51(2) of the **Road Traffic Act, 1938.**

[41] It was also proffered by Learned Counsel that the Claimant's version ought not to be believed. By comparison, the Defendant's version has remained consistent throughout the trial. Learned Counsel submitted that the inconsistencies as may have arisen on the Defendant's evidence with respect to how long she waited before turning and where the front of her vehicle possibly was after impact, were minor and did not impact upon her credibility, but can be attributed to the fact that at the time of trial, almost six (6) years had passed since the accident. It was further averred that all the inconsistencies on the Claimant's case by comparison are irreconcilable and support the Defendant's version of the accident. Learned Counsel also indicated that the physical evidence of damage supports the Defendant's version making it far more probable, credible and the Court will be asked to find so accordingly.

[42] Learned Counsel maintained that the Claimant failed to comply with his duty of care for the following reasons: -

> *a. On approach to the intersection he did not toot his horn even though he allegedly saw a black car exiting Park Boulevard to enter his path of travel and a grey vehicle speeding down the road, which vehicle swung into the "amber lane" as he called it.*
>
> *b. When asked if he was concentrating on the vehicle which was approaching or on the black vehicle which was exiting he says he was concentrating on neither. This speaks to the fact that he was not keeping a proper lookout, which would explain why he did not see the Defendant's indicator.*
>
> *c. On seeing the Defendant's vehicle allegedly turning the Claimant did not stop even though he says he was "barely cruising".*
>
> *d. The Claimant's evidence is that he did not slow down nor did he swerve to avoid the impact. All he did was to allegedly lean left. He tried to suggest that by leaning left he had swerved but he agreed in cross examination that he did not leave his lane of travel to avoid the collision.*

[43] Learned Counsel stated that on the Defendant's version, she complied with her duty of care by indicating her intention to turn right, checking her mirrors and stopping to wait until the way was clear before she effected the right turn. The presence of the unbroken white lines and markings at the location indicate that overtaking is and was not permitted at that time. Accordingly, it would not have been reasonably foreseeable for the Defendant to expect that the Claimant would attempt to overtake her at that location. Learned Counsel cited the case of **Murphy v Menzie and others** [2014] JMSC Civ. 243 and quoted paragraph 18 in support of this submission. She asked that the Court conclude that there was in fact no negligence on the Defendant's part as she did all that she was required to do at the material time.

[44] Learned Counsel for the Defendant, on her final point of submission asked that liability ought to be apportioned between the Claimant and the Defendant if the Court does not find favour with her previous submissions. She cited the case of **McNally v Mahabir** [2012] JMSC Civ. 26 in support of the proposition that an apportionment of 70/30 in the Defendant's favour would be reasonable. The case

of **Thompson and another v Guiles Hall** [2016] JMSC Civ. 105 was also cited in support of the 70/30 apportionment.

Submissions on Damages

[45] The medical reports were all agreed. The medical reports are as follows: -

1. Two reports from the Kingston Public Hospital dated the 23rd day of September, 2013 and the 14th day of November, 2013 respectively;

2. The medical report of Dr. George Lawson BSc, (Hons.), M.B.B.S dated the 12th day of September, 2013;

3. Two reports from Dr. Andrew Ameerally M.B.B.S D.M. (Ortho) dated the 15th day of June 2015 and the 23rd day of July, 2015;

4. The medical report of Dr. Konrad Lawson BSc. (Hons.), M.B.B.S dated the 7th day of April, 2017.

[46] On the day of the accident the Claimant was presented at the Kingston Public Hospital where he was seen by Dr. C.A. Reid. He was diagnosed with soft tissue injuries to the left ankle and chest, abrasion to the left upper and lower limb, abrasions to wrist and left ankle and abrasion with mild chest trauma. He was treated with painkillers and sent home.

[47] The subsequent report from the Kingston Public Hospital gave the same findings. The diagnosis was cervical spasm, back strain and dislocation of the left lunate. He was treated with Plaster of Paris, open reduction of the left lunate and physiotherapy.

[48] The Claimant was subsequently seen by Dr. George Lawson on the 12th day of September, 2013 and the diagnosis is similar to that of Dr. C.A. Reid. The Claimant was seen by Dr. Andrew Ameerally on the 1st day of November, 2014. On examination of the cervical spine he was found to have left trapezius muscle tenderness in the lumbar spine, scar to left wrist, tenderness in the left hip, mild

swelling in the left ankle and tenderness over the antero-talofibular ligament in the left ankle. The diagnosis was paraspinal muscle strain in the cervical spine, paraspinal muscle strain in the lumbar spine, contusion to the right arm, left elbow, left wrist, left hip and left ankle sprain.

[49] Dr. Andrew Ameerally recommended physiotherapy. The Claimant did a total of six (6) physiotherapy sessions between the period of the 27th day of March, 2015 and the 1st day of May, 2015. He was discharged as he had no pain, very minimal numbness and active movements and muscle strength were achieved to near normal. He was advised to consult his doctor and resume physiotherapy if numbness and weakness persisted.

[50] Dr. Andrew Ameerally reviewed the Claimant on the 9th day of July, 2015. He reviewed an x-ray that was done on the Claimant's left wrist by Dr. Sundeep Shah, Consultant Radiologist. His prognosis was that the Claimant, at that time only experienced pain and weakness in the left wrist. The report dated the 23rd day of July, 2015 revealed that the Claimant was previously operated on for scapho-lunate dissociation. X-rays showed failed surgical treatment and this would require reconstruction of the scapho-lunate ligaments to improve his functional outcome and his quality of life. Dr. Andrew Ameerally assigned a six percent (6%) whole person impairment.

[51] The Claimant was seen by Dr. Konrad Lawson on the 26th day of January, 2017. On examination, the left upper limb demonstrated full and pain free range of motion of the left wrist joint along with grade 5 muscle grip strength and healed scar at the volar aspect of left wrist. His diagnosis was left wrist sprain with mild instability and he assigned a four percent (4%) whole person impairment.

The Claimant's submissions on damages

[52] Learned Counsel adumbrated his submissions on damages by commencing with special damages. He indicated that special damages in the amount of One Hundred and Seventy-Seven Dollars Five Hundred Dollars ($177,500.00) were

agreed. Learned Counsel stated that Nine Thousand Six Hundred Dollars ($9,600.00) was proven for transportation costs and therefore, the total sum to be awarded for special damages is One Hundred and Eighty-Seven Thousand One Hundred Dollars ($187,100.00).

[53] Under the head of general damages, Learned Counsel submitted that the Claimant is entitled to recover damages for pain and suffering and loss of amenities.

[54] In relation to the difference in whole person impairment rating assigned, Learned Counsel indicated that Dr. Andrew Ameerally's impairment rating would be based on the x-ray that he caused to be done. He stated that there is no indication in Dr. Lawson's report that he had sight of that x-ray report. It would therefore appear that Dr. Lawson's report has not taken into account the full extent of the Claimant's injuries.

[55] Learned Counsel further submitted that general damages are awarded for pain and suffering. It would be contrary to the very rationale of general damages for the Court to base an award on improvement. This would basically disregard pain and suffering endured prior to improvement. In the circumstances, Learned Counsel asked that Dr. Ameerally's report be preferred.

[56] Learned Counsel submitted that the following authorities are instructive: -

1. **Lorna Hinds v Robert Edwards and Reginald Jankie** reported at Volume 5 of **Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica** by Ursula Khan; and

2. **Leroy White v Winston Waldron** reported at Volume 4 of **Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica** by Ursula Khan.

[57] Learned Counsel further submitted that the case of **Lorna Hinds v Robert Edwards and Reginald Jankie** *(supra)* is instructive in informing an award for the Claimant. The dominant injuries were comparable. However, the Claimant in the

instant case suffered multiple and more serious injuries than the Claimant in **Lorna Hinds v Robert Edwards and Reginald Jankie** *(supra).* The Claimant's prognosis suggested that the Claimant will need surgery to improve his functional outcome and his quality of life. Learned Counsel also submitted that the award ordinarily should be increased to reflect the severity of the Claimant's injuries and asked for an award of Three Million Two Hundred Thousand Dollars ($3,200,000.00) under this head.

The Defendant's submission on damages

[58] Learned Counsel for the Defendant also addressed the difference in whole person impairment rating assigned and submitted that Dr. Konrad Lawson's report provided the most current and up to date evidence of the Claimant's assessment and is to be preferred.

[59] Under the head of general damages, she submitted that useful guidance can be found from the following cases: -

1. **Syblies v Lyn** reported at page 267 of **Assessment of Damages for Personal Injuries** by Karl S. Harrison and Marc S. Harrison;

2. **Young v Chen & Thorbourn** [2017] JMSC Civ. 31;

3. **Reeves v Morgan** (Unreported), Supreme Court of Jamaica, Suit No. C.L. R077 & S121/88, judgment delivered on the 30th day of September, 1996;

4. **Peter Marshall v Cole** reported at page 109 of Volume 6 of **Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica** by Ursula Khan; and

5. **Wollaston v Christie** (Unreported), Supreme Court of Jamaica, Claim No. 2011 HCV 00754, judgment delivered on the 25th day of May, 2012.

[60] Learned Counsel submitted that given the wrist injury, the alleged neck and back symptoms and the 4% whole person impairment, general damages between the sums of One Million Five Hundred Thousand Dollars ($1,500,00.00) and One Million Seven Hundred Thousand Dollars ($1,700,000.00) would be appropriate along with proven special damages of One Million Seven Hundred and Seventy-Seven Thousand, Five Hundred Thousand Dollars ($1,77,500.00) and costs to be apportioned if the Court finds that liability is to be shared between the parties.

[61] Learned Counsel also stated that the Defendant's counterclaim is in respect of the estimated cost of repairs to her vehicle in the sum of Eighty-One Thousand Six Hundred and Eighty-Eight Hundred Dollars and Ninety Cents (81,688.90).

[62] Learned Counsel further disclosed that the Defendant seeks judgment in her favour and the alternative, if the Court is of the view that liability should be apportioned then the Defendant submitted that the apportionment should be 70/30 split in the Defendant's favour and damages awarded on that basis.

LAW & ANALSYIS

[63] It is not in dispute that a collision took place on the date stated and that it involved the motorcycle and motor car of the Claimant and the Defendant respectively. On an examination of the totality of the evidence, there are two diametrically opposed accounts. The case turns solely on the credibility of the witnesses as there was no independent evidence allowed in respect of liability for my consideration.

[64] The question which proves more difficult to resolve is who ought to be held liable for the collision. It is trite law that in order to succeed on a claim for negligence, the Claimant must prove on a balance of probabilities that the Defendant owed him a duty of care, there was a breach of that duty and damage resulted from that breach. There have been many attempts at a precise definition of negligence. The

definition that I find most useful is that given in the seminal case of **Blyth v Birmingham Water Works Co** [1856] 11 Ex. Ch. 781: -

> *The question which proves more difficult to resolve is who ought to be held liable for the collision. It is trite law that in order to succeed on a claim for negligence, the Claimant must prove on a balance of probabilities that the Defendant owed him a duty of care, there was a breach of that duty and damage resulted from that breach.*

[65] There is also settled law that there is a duty on the driver of a motor vehicle to observe ordinary skill and care towards persons using the highway whom he could reasonably foresee as likely to be affected. The **Road Traffic Act** places a number of duties on users of the roadway. In particular, Section 51(2) provides: -

> *Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.*

[66] After carefully reviewing the evidence, assessing the credibility of the witnesses, the basis of the allegations and the relevant law, I find as a fact, on a balance of probabilities that the Defendant's version is more probable than that of the Claimant. On the totality of the evidence, I find that both the Claimant and the Defendant were travelling in the same direction along Knutsford Boulevard and as the Defendant proceeded to turn right, the Claimant attempted to overtake her vehicle and collided in the right side of her front bumper.

[67] The Claimant on the other hand lacked credibility, I do not accept his evidence that he was travelling in the opposite direction of the Defendant and that as he proceeded across the intersection the Defendant collided in his motor motorcycle. I reject his evidence in that respect.

[68] I have arrived at this position having considered the evidence of physical damage to the motor vehicles. I accept the principle laid down in the case of **Grant v David**

Pareedon *(supra)* referred to by Learned Counsel for the Defendant. In this case Carey J.A.: -

> *Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks, if any, location of damage to the respective vehicles or parties, and any permanent structure of the accident site... This physical evidence may well be of crucial importance in assisting the tribunal of fact in determining which side is speaking the truth." [My emphasis]*

[69] In my judgment, the evidence was lacking objectivity such as an assessors report or evidence from an accident reconstructionist. However, in examining the location of the damage to the respective vehicles, I agree with Learned Counsel for the Defendant that the physical evidence of damage is entirely consistent with the Defendant's version. I believe that the Claimant was attempting to overtake the Defendant's vehicle when she turned. It follows therefore, that the first point of contact would have been the front right of her vehicle as she turned and this was consistent with the physical damage to her motor car.

[70] I find it difficult to appreciate that on the Claimant's version, he was travelling in the opposite direction and as he proceeded across the intersection the Defendant made a right turn without indicating and collided with his motor motorcycle. It would therefore mean that the impact would be greater towards the front left of the Defendant's vehicle and this was not supported by the documentary evidence presented.

[71] I also examined the action of the Claimant pre-impact to determine liability. In the case of **Brandon and Another v Osbourne Garrett and Company Limited and others** [1924] 1 K.B. 548 at 552 Swift J said that the applicable principle of law as stated by Lord Ellenborough in **Jones v Boyce** 1 Star 493: -

> *...if a person is placed by the negligence of the defendant in a position in which he acts under a reasonable apprehension of danger and in consequence of so acting is injured, he is entitled to recover damages, unless his conduct in all the circumstances of the case amounts to contributory negligence.*

[72] I find that the Claimant did not take any evasive measures to avoid the collision. It was not enough for him to merely lean to the left, especially if I was to accept his submission that the roadway was not heavily congested. I accept the submission of Learned Counsel for the Defendant that based on the makeup of the roadway, the Claimant would have ample space to avoid the collision. In my view the Claimant did not act in self-preservation and did not act as a reasonable driver would when faced with the threat of collision. I find that he acted contrary to the duty placed on him by section 51 (2) of the **Road Traffic Act** and that he did not take any reasonable action to avoid the accident. I therefore find that there is evidence of contributory negligence on the Claimant's part and that the Claimant is substantially to be blamed for the collision.

[73] Whilst I find that the Claimant breached his duty of care, I also find that the Defendant bears liability for her failure to have kept a proper lookout and to take action that might have avoided the collision. I accept the submission proposed by Learned Counsel for the Claimant that the Defendant should have been alert to the presence of the Claimant's motor cycle bearing down on her. The failure of the Defendant to see the Claimant bearing down on her was inexplicable given that she attested that she checked her mirrors and could see approximately twenty-seven (27) feet through her mirrors, especially with no evidence of anything obstructing her view, and that she had been stationary at the intersection for some about two (2) to three (3) minutes.

[74] Accordingly, I find that the Claimant is eighty-five percent (85% liable for the collision and the damages should be assessed accordingly. At this juncture, I will say that at the start of the trial, Learned Counsel for the Defendant made an application to have admitted into evidence the Statement of Mr. Nigel Cameron. The application was made under section 31E (4) (d) of the **Evidence Act**, as amended. Having heard extensive submissions by the parties, I excluded the evidence. I did not find that the statutory basis for admissibility was met by the Defendant in that no reasonable steps were taken to locate the witness. However, though having not admitted the statement, this was not to the detriment of the

Defendant's case. It merely came down to the credibility of the witnesses, that is, whether I believed the Claimant or the Defendant. The evidence of the Defendant was far more convincing than that of the Claimant. Accordingly, in my view, the absence of the corroborating statement was not fatal to the Defendant's case.

[75] In assessing damages that should be awarded to the Claimant for pain and suffering and loss of amenities I am guided by the case of **Cornilliac v St Louis** (1965) 7 WIR 491 that illustrates the factors that a tribunal should take into account in assessing damages for personal injury claims. I also place reliance on the case of **Livingstone v Rawyards Coal Company** [1880] Appeal Cas.25 where Lord Blackburn at page 39 enunciated: -

> *I do not think there is any difference of opinion as to it being a general rule that, where any injuries to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation." (my emphasis)*

[76] In relation to the difference in whole person impairment rating assigned I prefer and accept the 4% whole person impairment assigned by Dr. Konrad Lawson as this report is later in time than that of Dr. Ameerally and suggest that the Claimant is improving. I consider the submission of learned Counsel for the Defendant that it would be contrary to the very rationale of general damages for the Court to base award on improvement. In my view, there is not a great chasm of a difference between the whole person impairments assigned. Further, in assessing damages under this head, I directed myself not only to the percentages assigned, but more controlling, to the nature of the injuries and the period of incapacity. I place reliance on the dictum of the Honourable Mr. Justice Morrison at paragraph 30 in the case of **Veronica Irving v Brian Rowe and Phillip Peart** (unreported), Jamaica, Supreme Court, Claim No 2006 HCV 03177, judgment delivered on the 8th November, 2013: -

> *What ought to matter is not the percentages that have been assigned as the permanent impairment rating but rather the injuries and the period of total incapacity.*

[77] In seeking to arrive at an appropriate award for pain and suffering, I adopt the dicta of Lord Hope of Craighead at page 507 of the case of **Wells v Wells** [1998] 3 All ER 481: -

> *The amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the claimant's general damages.*

[78] Having considered the similarities and distinguishing features of the cases submitted for comparison, I found the decision of **Peter Marshall v Cole** (supra) most instructive. In this case, the Claimant suffered a moderate whiplash injury and moderate lower back pain and sprains as well as a sprained, swollen and tender left wrist and left hand. After four months of medical case he was discharged with no symptoms. An award of Three Hundred and Fifty Thousand Dollars ($350,00.00) was made with in October 2006 which updates to Eight Hundred and Ninety-One Thousand Four Hundred and Eighty-Two Dollars and Ninety-Six Cents ($891,482.96). While I find that the dominant injuries are consistent with those of the instant Claimant, his injuries and treatment were more severe and he has continuing symptoms. The award will have to be adjusted to reflect this.

[79] I also find that the case of **Dalton Barrett v Poncianna Brown and Another** (Unreported), Supreme Court of Jamaica, Claim No. 2003 HCV 1358, judgment delivered on the 3rd day of November, 2006 is analogous. Dalton Barrett's injuries were tenderness around his right eye and face, tenderness in the lumbar spine, tenderness in left hand. There was also medical evidence of pain to the lower back, left shoulder and left wrist. Also, there was contusion to his lower hip, lower back and left shoulder. Later, the claimant was seen by an Orthopaedic Surgeon who assigned him 0% impairment. He was awarded Seven Hundred and Fifty Thousand Dollars ($750,000.00) in November 2006 for pain and suffering which updates to One Million Nine Hundred and Fourteen Thousand Five Hundred and Twenty-Five Dollars and Twenty Cents ($1,914,525.20). After nine (9) months the claimant in the **Dalton Barrett** case healed without disability, whereas in the

present case the Claimant may continue to experience the symptoms and may require surgical intervention to alleviate same.

[80] The case of **Kimani Davis-Reid v Eugene Nolan** [2018] JMSC Civ. 163 is also a useful guide. In this case the claimant suffered chronic mechanical back pain with muscle spasm, cervical strain/whiplash injury, paraspinal muscle strain of the lumbar region, mild residues of lumbar strain and he was assigned two percent (2%) whole person impairment. The award of One Million Six Hundred Thousand Dollars (1,600,000.00) was awarded for pain and suffering in December 2018. This award updates to One Million Five Hundred and Ninety-Seven Thousand Four Hundred and Eighty-Seven Thousand and Twenty-Four Cents ($1,597,487.24). The injuries of the instant Claimant are far more extensive.

[81] The parties agreed special damages in the amount of One Hundred and Seventy-Seven Dollars Five Hundred Dollars ($177,500.00) in respect of the Claimant. The sum of Nine Thousand Six Hundred Dollars ($9,600.00) was proven for the Claimant's transportation cost. Therefore, the total sum to be awarded for special damages is One Hundred and Eighty-Seven Thousand One Hundred Dollars ($187,100.00). I will also make an award of special damages to the Defendant in the sum of Eighty-One Thousand Six Hundred and Eighty-Eight and Ninety Cents ($81,688.90) for the cost to repair her vehicle.

ORDERS & DISPOSITION

[82] Accordingly, I make the following Orders: -

1. Judgment for the Defendant with liability assessed at 85% on the part of the Claimant and 15% on the part of the Defendant;

2. General damages awarded to the Claimant in the sum of Two Million Dollars ($2,000,000.00) with interest at a rate of 3% per annum from the date of service of the claim to the date of judgment;

3. Special damages awarded to the Claimant in the agreed sum of One Hundred and Eighty-Seven Thousand One Hundred Dollars ($187,100.00) with interest at a rate of 3% per annum from the date of the accident to the date of judgment;

4. Special damages awarded to the Defendant in the agreed sum of Eighty-One Thousand Six Hundred and Eighty-Eight and Ninety Cents ($81,688.90) with interest at a rate of 3% per annum from the date of the accident to the date of judgment;

5. Each party to bear their own costs.

6. Claimant’s Attorneys-at-Law to prepare, file and serve Orders made herein.