[2018] JMSC Civ. 25

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2013HCV04916

BETWEEN	**VALENTINA WORGS**	**CLAIMANT**
AND	**LEON BELL**	**DEFENDANT**

IN OPEN COURT

Mr Leonard Green and Mr Makene Brown instructed by Chen, Green & Company for the Claimant

Mrs. Suzette Burton-Campbell instructed by Burton-Campbell & Associates for the Defendant

Heard: 6th of November 2017 and 28th of February 2018

Negligence – Motor Vehicle Accident – Personal Injury – Assessment of Damages

McDONALD J

The Claim

[1] By way of claim form, filed the 5th of September 2013, the claimant is seeking damages for personal injuries which she allegedly sustained in a motor vehicle collision. At the time of the collision she was a passenger in the defendant's Toyota Hiace minibus, registered PP822P, (the 'minibus'). The defendant was both the owner and driver of the said minibus.

[2] The claimant alleges that on the 9th of February 2010 while she was seated in the second to last row of the minibus, the defendant negligently drove the minibus along the Cave Main Road in Westmoreland so as to cause the minibus to collide

into a trailer truck, registered TT7105. The claimant recalls that at the time of the accident, the driver was driving at a fast rate of speed and that the road was a straight one with no bend.

[3] The particulars of negligence alleged are as follows:

a) Driving at a speed which was too fast in the circumstances;

b) Failing to keep any or proper lookout;

c) Failing to give any or any adequate warning of his approach; and

d) Failing to heed the presence of other users on the said road;

e) Failing to stop, to slow down, to swerve or in any way so to manage or control the said motor car so as to avoid collision.

[4] After the collision the claimant recounts that she became dizzy and felt pain all over her body. She was taken by ambulance to the Savanna-La-Mar Public General Hospital where she was admitted and treated overnight. As a result of the collision, the claimant states that she sustained severe injuries, suffered loss and incurred expenses. These injuries include back and neck pain as well as soft tissue injury to both.

[5] At the trial, the claimant gave evidence on her own behalf. Her witness statement dated the 28th of June 2016 (filed the 5th of July 2016) was allowed to stand as her evidence in chief, save for certain portions which were struck out. Two medical reports dated the 31st of July 2012 and the 5th of September 2016 were admitted into evidence (Exhibits 1 and 2, respectively). With regard to the second medical report (exhibit 2) a portion of the report was deleted.

[6] Dr Toe T Lwin, Orthopaedic Surgeon, after conducting a local examination made the following observations in his medical report dated the 5th of September 2016:

1. *There was a reduced range of movement in the claimant's neck and tenderness around the area of mid cervical spine region. No neurological deficit was noted in the upper limbs.*

2. *Lower back was tender around L3-4 region with no deformity or swelling.*

3. *There was a slight reduced touch and pin point sensation at the dermatome area of L5 on the left lower limb. The power, tone and reflexes were normal.*

Based on MRI results the claimant also has multiple discs herniation with L5 nerve root impingement. Dr Lwin also opined that although the claimant may have underlying degenerative discs disease, the accident has triggered the pain and it may recur again and again during her later life. She will also need to do a MRI scan of the cervical spine later and will need physiotherapy on and off.

[7] A number of receipts were also admitted into evidence. Counsel for the defendant objected to the tendering of some of the receipts as those expenses were not pleaded and had now become statute barred. This objection was upheld in relation to four (4) of the receipts, these being numbers four (4), six (6), eight (8) and nine (9) as listed on the claimant's Notice of Intention to tender in evidence hearsay statements made in a document.

The Defence

[8] The defendant admits that he was the owner and driver of the minibus. He also admits that the said minibus was involved in a collision with a tractor trailer on Cave Main Road. The defendant however denies that he was negligent in causing the accident. He avers that even though he exercised all reasonable care, he was unable to avoid the accident.

[9] According to the defendant, at around 7:30 to 8:00 p.m. he was driving along an unlit section of Red Gate Main Road, in Cave Westmoreland. He describes the roadway as being very dark as there were no street lights. He recalls having to use his bright lights and dimming them when he came up on a line of vehicles driving

in the opposite direction. He states that he was driving at about 35 kmph and seconds after brightening his headlamps while negotiating a slight bend in the road he came upon a tractor trailer which was negligently parked in the left lane of the roadway. To make matters worse, there were no lights or reflectors. Upon seeing the tractor trailer, the defendant says he applied his brakes and quickly swerved right to avoid a collision. Nonetheless, he says that the left front section of the minibus hit the back of the tractor-trailer and stopped on impact.

[10] He described the tractor-trailer as being parked in the roadway close to the corner, which made it impossible for him to see it from a distance. He recalls that the engine was off and there was no flashing hazard lights or cones. He stated also that there was no one in the area to warn him of the tractor-trailer which was stationary in the roadway.

[11] On the defendant's account, the accident was caused and/or contributed to by the negligence of a third party who allowed his trailer (which was attached to a truck) to remain stationary and unlit on the driving surface of the road. He blames a Mr Orville Brown who he says was the driver/operator of the tractor trailer, licenced TT 7105, which is owned by an entity called More Mix.

[12] The negligence of Mr Orville Brown was particularised as follows:

> *1) Failing to given [sic] any warning to oncoming motorists given that the unlit trailer was allowed to remain or park in a bend, in such a position so as to obstruct or likely obstruct oncoming motorists.*
>
> *2) Failing to give any directions to oncoming motorists given that the area was unlit.*
>
> *3) Parking the trailer in a negligent and/or careless and/or reckless manner along the roadway.*
>
> *4) Causing or permitting trailer [sic] to be unlit and stationary along the roadway when it was unsafe so to do.*

5) *Allowing the trailer to remain along the roadway where it is not clearly visible to oncoming motorist travelling towards Savanna-la-Mar in circumstances where the road is unlit.*

6) *Failing to keep any or any proper look out on the roadway.*

7) *Allowing the tractor trailer to remain parked along the roadway at night with no lights or reflectors.*

8) *Failing to given [sic] any consideration for the safety of other users of the roadway.*

[13] It should be noted that neither More Mix nor Mr Orville Brown were joined to the instant claim by way of an ancillary claim or otherwise.

[14] At the trial, the defendant gave evidence on his own behalf. His witness statement dated the 9th of June 2016 (filed the 10th of June 2016) was allowed to stand as his evidence in chief.

[15] It is to be noted that the defendant, at paragraph 5 of his witness statement, gave evidence that the tractor trailer (also referred to by him as the truck) was parked in the roadway close to the corner which made it impossible for him to see it from a distance. In cross-examination however the defendant stated the tractor trailer was in the roadway but appeared to deny saying that it was close to the corner. When shown his witness statement (particularly paragraph 5) he explained that he made a mistake.

[16] It is also to be noted the defendant stated in his witness statement (at paragraph 6) the licence plate number of the tractor trailer, the alleged owner (More Mix) and the operator/driver (Mr Orville Brown). In cross-examination, the defendant stated that he did not know who the operator was. He also stated that he never got the licence plate number of the said tractor trailer. This glaring discrepancy was never explained and may be relevant in assessing the defendant's credibility.

Submissions on behalf of the claimant

[17] Counsel for the claimant, Mr Green, submitted that the sole factual issue on the question of liability ought to be determined based on the credibility of the witnesses.

[18] It was submitted that there is no evidence provided by the defendant that is capable of negating the claimant's contention that the defendant's manner of driving was negligent. Counsel asserted that it cannot be sufficient for the defendant to refer to a name without any supporting documentation to authenticate the existence of one Mr Orville Brown and/or that that he was in any way connected to the tractor trailer. It was further submitted that it was incumbent on the defendant to join the said Mr Brown or any other party who he claims was the negligent party and who was the sole cause of the collision on the 9th of February 2010.

[19] Mr Green is also asking the court to consider that there is no evidence to suggest that the defendant pursued a claim against Mr Brown or the owner of the tractor trailer to recover damages. Similarly, the defendant did not provide any evidence to suggest that Mr Brown was ever prosecuted.

[20] With regard to the claimant's evidence, it was submitted that she was not discredited by the cross-examination. She denied that there was a curve in the road where the accident took place. She also maintained that the defendant was driving at a fast rate of speed when it became dark, and she was not challenged on this point. When questioned as to why she did not tell the defendant to slow down, her answer was that she was anxious to get home as it was getting late.

[21] It was submitted that the defendant was totally discredited in cross-examination and as such the claimant's account ought to be preferred. Particularly as it relates to the collision taking place on a straight road rather than a curved one.

[22] Mr Green has asked the court to consider the defendant's evidence that the oncoming vehicles had on their bright lights and he dipped his own headlights.

When he turned back on his bright light he was not able to see the parked tractor trailer which had no lights or reflectors. Counsel submitted that it is significant that the defendant did not give any evidence of slowing down at the time when the oncoming vehicles with bright lights were approaching. It was also pointed out that the defendant did not deny that he omitted to give evidence of slowing down.

[23] Further, Mr Green contends that the court should consider that the defendant's witness statement provides no evidence that he applied his brakes prior to the collision. Counsel submitted that the court should not accept the defendant's evidence in cross-examination that he applied his brakes as this was not a part of his defence. This according to counsel is tantamount to a failure to set out one's case and as such he may not rely on same, as provided by rule 10.7 of the **Civil Procedure Rules**.

[24] Mr Green also drew the court's attention to two aspects of the defendant's evidence under cross-examination. Firstly, the divergence between the defendant's evidence in relation to the position of the tractor trailer, as summarised at paragraph [15] herein.

[25] Secondly, the defendant's admission that he had to swerve quickly in an attempt to avoid the collision. This, according to Mr Green, establishes beyond peradventure that he was driving in a manner which did not allow for him to avoid the collision after negotiating what he claims was a blind corner where lighting conditions were poor.

[26] Finally, counsel submitted that the defendant's account was nonsensical, particularly as it relates to the speed at which he was driving. According to Mr Green, the defendant would have been able to avoid the collision if he was indeed driving very slowly, as he contended. It was submitted that it was the defendant's negligent manner of driving, immediately prior to the collision, which did not allow him to manoeuvre his vehicle so as to avoid the collision *'in the face of the oncoming vehicles with bright lights.'*

[27] Counsel submitted that the issue of liability to be resolved is a factual one and as such there is no need for authorities.

Submissions on behalf of the defendant

[28] The essence of counsel for the defendant, Mrs. Burton-Campbell's submissions is that liability for the collision does not rest with the defendant. Further, she contends that no issue can be made of the fact that the defendant did not bring an ancillary claim for indemnity against the owner and/or driver of the tractor- trailer *as 'this is not something within his control and may not have been pursued for one reason or another.'* It was submitted that any observation made by counsel for the claimant on this point must equally apply to the claimant since she sought to recover only from the defendant.

[29] In determining liability counsel asked the court to have regard to two factors. Firstly, the speed of the defendant's vehicle and secondly, whether the defendant failed to keep a proper look out and if that contributed to the accident.

[30] In relation to the speed, it was submitted that the claimant has offered no evidence as to the estimated speed of the defendant at the time of the accident or in relation to the speed limit along that section of the roadway. Further, it was submitted that there was no evidence of excessive speed throughout the journey. Reference was made to the claimant's evidence that the time in which it took to travel between Kingston and Cave Main Road was between three to four hours, and that it took the defendant about the same time on the day of the accident.

[31] The court was asked to accept the defendant's evidence that he was travelling at 35 kmph. Not only is this unchallenged, but is supported by the fact that the minibus stopped on impact and could be driven from the scene of the accident. Counsel contends that a high speed impact would have likely caused the bus to travel beyond the point of collision as well as severe damage to the bus rendering it impossible to be driven. According to counsel, the behaviour of the claimant did not support her 'self-serving' allegation that the defendant was speeding. She

admitted that she did not indicate to the defendant any concern or fear about the speed at which he was driving or request him to lower his speed. Also, her evidence that she was about to attach her headphones to her cellular phone, is according to counsel, hardly the action expected of a person in fear of the speed at which she was being driven.

[32] Counsel submitted that even though there is no evidence from which the court can conclude that defendant was speeding, it would be useful to consider the approach taken by courts in dealing with speed and motor accident cases. According to counsel, it is well established that speeding is not tantamount to negligence or even evidence of negligence. In order to determine whether speed amounted to negligence and caused or contributed to an accident, the proper approach is for the court to first determine whether there was speeding and then consider the precise circumstances in which the speeding took place. Reliance was placed on the case of ***King v Scott*** [1965] 2 All ER 588.

[33] In the instant case, there is no dispute that the parties were travelling on the roadway at night. There is also evidence that the road was unlit. The defendant was not impeded by this as he stated that he had the bright lights on and dimmed them at one point to increase the visibility of the road. What is disputed is whether the road was straight, as the claimant contends, or had a bend. Counsel submits that the defendant's account is to be preferred, that he was travelling slowly as he was negotiating a bend and as he said he could not be sure if anything was around the bend. Counsel again emphasised the claimant's behaviour, the checking of her phone as well as the fact that the minibus was not extensively damaged.

[34] In relation to the second factor, whether the defendant kept a proper look out, counsel submitted that the court must decide as a matter of fact whether there was a bend in the roadway at the point of impact. If so, the court should go on to consider whether the tractor-trailer was parked around the bend and if it was visible and should have been seen by the defendant prior to the accident. In resolving this issue, counsel emphasised that the claimant, by her own admission, was seated

in the second to last row in the minibus. There were three rows of seats in front of her, which were occupied by other passengers. Counsel contends that from this vantage point there can be no doubt that she would not have a clear view of the roadway, which the claimant states was dark although there was a street light somewhere on the road.

[35] Counsel further submits that the claimant was also distracted by her cellular phone and only looked up when she heard screams from other passengers. From this, counsel submits that it was clear that the claimant cannot give credible evidence as to whether or not the minibus has gone around a bend. Further, the claimant stated that she had to be assisted from the minibus after the collision and there is no evidence that she viewed the layout of the road at that time. Even so, counsel submits that any such evidence would have been unreliable given her shaken condition following the impact.

[36] It was submitted that the claimant did not provide any evidence as to the presence and position of the tractor-trailer on the roadway. Counsel submits that this is because she did not see it at all or thought it irrelevant to her case. On this issue, it was noted that the claimant said that when she raised her head she saw a small red light like a reflector directly in front of the bus and shortly afterwards I felt an impact. Counsel contends that there is no evidence that this small red light was attached to or came from the tractor-trailer. It is therefore unclear from the claimant's evidence what this small light was and where it came from. However, counsel submits that if it is accepted that there was a small red light directly in front of the bus and that it was attached to the tractor-trailer then it must also be accepted that the tractor-trailer was parked on the roadway directly in the path of the minibus.

[37] Counsel also submitted that the claimant's evidence that the screams of the passengers was quickly followed by the collision suggests the suddenness of the impact, which is indicative of the short time between when the tractor-trailer became visible to the passengers who screamed and the collision taking place. It

was submitted that this can only be explained by the fact that the tractor-trailer was not visible from a distance but only when the defendant drove around the bend.

[38] In response to Mr Green's assertion that the defendant's evidence, in relation to where the tractor-trailer was parked, was inconsistent, it was submitted that a close examination of the evidence reveals no such inconsistency. The defendant clarified the statement by saying the truck itself was in the bend, while the trailer was near to the bend. Even though there was no evidence in relation to the length of the tractor-trailer, counsel asserts that a truck/tractor to which a trailer is attached is not a small vehicle likely to occupy a few feet of space. The trailer was behind the truck/tractor and if that portion was in the bend then the trailer could not also be in the bend. The trailer would have to be behind the truck/tractor and therefore near to the bend.

[39] Counsel has asked that the court be mindful that the defendant, who describes himself as a transport operator, may not have appreciated the fine distinction between something being near a bend or in a bend. Mrs. Burton-Campbell submits that these terms seem to mean the same thing to the defendant.

[40] According to counsel, the fact that the defendant had dimmed his light and then saw the tractor-trailer only after putting on his bright lights, should not be considered a factor in determining liability since no amount of light could show a vehicle around what the defendant describes as a blind bend until it was reached.

[41] It was contended that no fault can be attributed to the defendant who proceeded towards this bend with caution. Counsel submits that it could hardly be expected for the defendant to stop along the roadway and check that there was no obstruction on the corner. The dicta of Lord Uthwatt from ***London Passenger Transport Board v Upson*** [1949] AC 115 was commended to the court, his Lordship stated: *'…a driver is not bound to forsee every extremity of folly which occurs on the road… he is bound to anticipate any act which is reasonably*

foreseeable, which the experience of a road uses teaches people do, [sic] albeit negligently.'

The Law

[42] It is settled law that in order to succeed in a claim for negligence, the claimant must prove on a balance or probabilities:

(i) that the defendant owed her a duty of care;

(ii) a breach of the duty of care; and

(iii) damage resulting from the breach.

[43] I would adopt my brother Laing J's statement of the law at paragraphs [31] – [33] of ***Elizabeth Brown v Daphne Clarke et al.*** [2015] JMSC Civ. 234 wherein it is stated that:

> *[31] The driver of a motor vehicle must exercise reasonable care to avoid causing injury to persons or damage to property.*
>
> *[32] Reasonable care is the care which an ordinary skilful driver would have exercised under all the circumstances and includes an avoidance of excessive speed, keeping a proper look out and observing traffic rules and signals (see Bourhill v. Young [1943] AC 92.)*
>
> *[33] Section 51(2) of The Road Traffic Act ("the RTA") imposes a duty on motorist to take such action as may be necessary to avoid an accident.*

[44] Both the **Road Traffic Act** and the Island Traffic Authority Road Code, 1987 ('The Road Code') are also relevant. Section 95(3) of the **Road Traffic Act** provides that –

> *The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind,* ***but any such failure may in any proceedings*** *(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 is in question in those proceedings.*** *(emphasis added)*

[45] Section 51 of the **Road Traffic Act** sets out a number of driving rules which drivers of motor vehicles must observe. Section 51(2) is instructive, it states:

> *(2) 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.*

[46] A number of rules relating to parking and stopping are set out at paragraphs 39 to 41 of the **Road Code**. Drivers are instructed not to park or stop their vehicles on main roads carrying fast moving traffic, at or near a bend, on the 'wrong side' of the road at night (see: paragraphs 39(c), (e), and (h)). Further it is clearly stated that when parking or stopping, drivers should pull in as close as possible to the left edge of the road or kerb (paragraph 40).

[47] There are also rules relating to vehicles which have broken down on the roadway. In those instances, drivers are instructed to get the vehicle to the nearest point where it will be of little inconvenience to other road users. If this occurs at night, drivers are instructed to turn on park lights and/or hazard lights before attempting to repairs and to look out for other speeding vehicles. Where the vehicle requires major repairs drivers are instructed to remove it from the highway as soon as possible and to avoid leaving it parked on the roadway overnight and not to abandon vehicles indefinitely (paragraph 41). It should be noted however that there is no evidence before this court about the condition of the tractor trailer and in particular whether it was broken down, just that it was stationary.

Analysis

[48] There can be no dispute that the defendant owed the claimant, a passenger in his minibus, a duty of care. The question for this court is whether the defendant breached said duty. I must remind myself that the defendant's duty was to exercise reasonable care, and that amounts to the care which an ordinary skilful driver

would have exercised under all the circumstances and includes an avoidance of excessive speed, keeping a proper look out and observing traffic rules and signals.

[49] I agree with Mr Green's submission that the question of credibility is critical to the determination of the case at bar. The parties' accounts are quite different and the court must determine which version is to be preferred.

[50] I also agree with Mrs. Burton-Campbell that it must be decided as a matter of fact whether there was a bend or curve in the road, as the defendant contends, or if the road was straight as alleged by the claimant. I wish to note something in relation to the defendant's description of the bend. From his witness statement (paragraph 4) the bend is described as 'slight'. I am unable to find where in the defendant's evidence, he describes it as a 'blind bend' as counsel on both sides submitted (see: paragraphs [25] and [40] herein). From the court's record, the defendant never used the words 'blind bend' but stated that he could not see around the curve and that it was impossible to see the truck from a distance. I note also that in cross-examination the defendant stated that he was about a yard away from the tractor-truck when he first saw it.

[51] It seems to me that the term 'blind bend' suggests a curve or bend in the road that you cannot see around as you are driving. This is clearly not the same as a slight bend. I am inclined to accept that there was a bend and that it was a slight bend, as the defendant stated in his witness statement and as Mrs. Burton-Campbell suggested to the claimant. On balance, the defendant being the driver, would be in a better position to observe the road and give a description. The claimant herself stated that she was seated towards the back of the minibus, in the second to last row by the window, and the minibus was fully loaded with passengers. She also stated that prior to the collision she was not observing the road but was attempting to connect her headphones to her cellular phone. It is also possible that claimant may not have perceived the bend, given that it was slight. In general, I found the claimant to be truthful and forthright in giving her evidence.

[52] It is not in dispute that it was sometime around 7:00 p.m. when the collision took place, and that the roadway was unlit as there were no street lights. Where the road conditions are suboptimal, such as it being dark, slippery, unpaved or uneven road surface, even a cautious driver may encounter difficulty in avoiding injury to persons or damage to property. However, in such instances, it is expected that drivers will exercise due care and perhaps act with a heightened sense of awareness and caution. In the instant case I accept the defendant's evidence that it was dark (perhaps even very dark as he says) and as a result he had to use his bright headlights and dim them when the oncoming vehicles were passing.

[53] There is also no dispute that there was an obstruction in the path that the defendant sought to drive. I accept the defendant's evidence that this obstruction took the form of a tractor trailer. While there is no evidence which gives or even estimates the dimensions of the said tractor trailer, I agree with Mrs. Burton-Campbell that it is reasonable to infer that this was not a small vehicle likely to occupy a few feet of space. However, I do not agree with her submission that there is no inconsistency in the defendant's evidence regarding where the tractor-trailer was located. I think it useful to set out the exchange between Mr Green and the defendant in cross-examination:

> *Q: Your evidence is that you swerved away from parked truck? True?*
>
> *A: Yes*
>
> *Q: You know what you collided into?*
>
> *A: A tractor trailer back*
>
> *Q: How far away from corner…The trailer truck that you spoke about in witness statement is the same thing you call tractor trailer?*
>
> *A: Yes*
>
> *Q: How far away was it parked from the corner?*
>
> *A: It in the corner*
>
> *Q: Did you tell anyone at all that the tractor trailer was close to the corner?*
>
> *A: Yes, close to the corner*

Q: Which is true, was the tractor trailer in the corner or close to corner?

A: In the corner

Q: So why did you say or tell on another occasion that it was close to the corner?

A: In the corner (long pause) I admit it was in the corner

Q: But why would you say it was close?

A: Because the head was down in the corner and the back was into the corner, near to the corner to how it set

Q: Did you use these words, "the truck was parked in the roadway close to the corner which made it impossible for me to see it."

A: Yes, it was impossible for me to see it. Yes, I said in road way no I didn't say close to the corner.

(Defendant was shown his witness statement at paragraph 5)

Q: Can you read and write?

A: Yes, I can read and write a little.

Q: You see there where you said in roadway close to corner?

A: Well I make a mistake while…

[54] From this exchange, I understand the defendant to be referring to the front part of the tractor/truck as the 'head' and the 'back' being the trailer. It is the defendant's evidence in his witness statement that *'the truck was parked in the roadway close to the corner which made it impossible for me to see it from a distance.*' In cross-examination his evidence was less clear. The defendant alternated between stating that the tractor trailer was in the corner, and that it was close to the corner. When asked by Mr Green which was true, the defendant maintained that it was in the corner. When further asked why he previously said that it was close to the corner, he stated that it was a mistake. At no time did the defendant express that these two terms meant the same thing to him. I would therefore disagree with Mrs. Burton-Campbell's submission that the two terms meant the same thing to the defendant and that he, being a transport operator, was incapable of drawing such a 'fine distinction'. Accordingly, this is a consideration which goes to the defendant's credibility.

[55] Also in relation to credibility, the defendant stated in cross-examination that he did not tell his Attorney-at-Law or his insurance company the name of the operator of the tractor trailer as he did not know who it was. He also stated that he never got the licence number of the tractor trailer. It is noted however that in his witness statement (at paragraph 6) the defendant gave evidence that, *'The truck bore licence plate numbers and letters TT 7105 and I later became aware that it was owned by More Mix and operated by Orville Brown.'* This discrepancy was never explained by way of re-examination or otherwise.

[56] Another matter that must be considered is what the defendant's evidence is in relation to what he did to avoid the collision. In his pleadings, it is stated that he quickly swerved right to avoid a collision. In his witness statement, which forms part of the evidence, the defendant stated (at paragraph 4), *"…As soon as I saw the truck* ***I applied my brakes*** *and swerved to the right in an effort to avoid a collision."* (emphasis added) This is consistent with the defendant's evidence in cross examination. I therefore do not accept Mr Green's submission that the defendant's witness statement provides no evidence that he applied his brakes prior to the collision and that the first time he said so was in cross-examination.

[57] I accept the defendant's account that he applied his brakes and swerved to the right. This is supported by the damages to left of his minibus. On the point of damages to the minibus, the only evidence came from the defendant himself who stated that impact was 'small'. When asked to describe how his minibus was damaged he said that the *'left hand door crimp out, the windscreen broke and there was a scratch to the side.'* The defendant also stated that the minibus could have been driven from the scene but that a wrecker was used to remove it, at the insistence of the Police. It is reasonable to infer that the impact was perhaps understated by the defendant, given his own evidence about the damage (which included a broken windscreen) and that the Police insisted that the minibus be moved by a wrecker.

[58] In all the circumstances, I find on a balance of probability that the defendant failed to exercise reasonable care and as such he breached his duty of care to the claimant. Exercising reasonable care involves keeping a proper look out and avoiding excessive speed.

[59] Based on the defendant's own account, particularly in relation to the road conditions, it seems that he ought to have driven even more cautious than normal. He agreed in cross-examination that it was his normal practice to go around a curve cautiously and that he did so because *'something can bruk down around there.'* He also agreed that on this occasion when the collision took place he was driving in a manner which took into account that something might have been broken down around the corner.

[60] Essentially, the defendant is asking this court to accept that he was driving on an unlit road at about 35 kmph around a slight bend when he observed the tractor trailer from about a yard away (which is about three feet) and that he despite applying his brakes and swerving to the right he was unable to avoid colliding into the parked tractor trailer. I am unable to accept the defendant's account. Not only were there issues with the defendant's credibility, but it seems to me that if the defendant actually drove in the manner which he describes, then he would have been able to avoid the collision.

[61] I am of the view that the collision took place due to the defendant driving at a speed which was too fast in the circumstances and failing to keep a proper lookout. If the defendant was driving slowly (at about 35kmph), anticipating that there may have been an obstruction and then seeing such an obstruction from at least three feet away, it seems that the defendant would have been able to stop the minibus. In the circumstances described by the defendant, this is what an ordinary, reasonable and careful driver would have done. Instead, the defendant's response was to slow down, by applying his brakes, and to swerve to the right side of the road.

[62] Having regard to section 51(2) of the **Road Traffic Act**, it was the defendant's duty to take such action as may be necessary to avoid the accident, and the breach by another cannot exonerate him from his duty. The court might have been able to consider the apportionment of liability, if the owner and/or operator of the tractor-trailer had been made a party to this claim. It is however completely a matter for parties as to how they wish to conduct their cases (see: the dicta of McDonald-Bishop JA at paragraphs [40] – [44] of ***Lena Hamilton v Ryan Miller et al*** [2016] JMCA Civ 59).

Assessment of Damages

[63] Having found liability on the part of the defendant, I will proceed to the assessment of damages.

Special Damages

[64] No sum was agreed by the parties in relation to special damages. Mrs. Burton-Campbell submitted that special damages should be confined to the items of medical expenses for which a receipt has been provided. She is opposing the claimant's claim for loss of earnings for one month which amounts to $60,000.00. Mrs. Burton-Campbell contends that the court has no basis to make such an award as there is no evidence that the claimant was unable to work due to her injuries. It is noted that the claimant gave evidence of the nature of her work which requires lifting goods and standing for long periods of time and stated that she was unable to do either for about four weeks. From the medical report, it is noted that Dr. Lwin stated generally that *'During her illness, she was not able to perform her normal daily full activity on and off until now.'*

[65] It was also submitted that while the claimant stated that she is a vendor, there is no evidence as to what she sells, how many days per week, or what her sales are compared to her expenses. In essence, Mrs. Burton-Campbell submitted that there is nothing to show how the figure was arrived at. While the claimant would not be expected to 'prove her loss of earnings with the mathematical precision of a well

organized corporation' (per Wolfe JA (Ag.) as he then was, ***Walters v Mitchell*** (1992) 29 JLR 173,176), there appears to be merit in Mrs. Burton-Campbell's submission. I am guided by the dicta of Lord Goddard CJ from ***Bonham-Carter v Hyde Park Hotel Ltd*** (1948) 64 TLR 177 at page 178:

> *'Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying: "This is what I have lost, I ask you to give me these damages". They have to prove it.'*

Although Lord Goddard CJ found it possible to arrive at a conclusion despite the extremely unsatisfactory evidence as to damages, I do not find it possible in the case at bar. Accordingly, I find that the claimant is not entitled to recover for loss of earnings as she has failed to prove same.

[66] No submission was made in relation to the transportation expenses.

[67] Based on the receipts admitted, the total of the medical expenses is $43,768.14. In addition to this sum, the claimant is seeking to recover $10,000.00 for reasonable transportation expenses. I would allow this. The award for special damages is therefore, $53,768.14.

General Damages

[68] The claimant was treated at the Savanna La Mar Public General Hospital by Dr Toe Lwin. In his report dated the 31st of July 2012 (Exhibit 1) he stated the claimant was admitted and discharged on the 10th of February 2010 and diagnosed with soft tissue injury of neck and back. Dr Lwin noted that upon examination the claimant, she was found to have no bony tenderness at neck or back. The x-rays showed no fractures but there were some degenerative changes unrelated to the motor vehicle collision. She was treated with painkillers and did follow ups at the Orthopaedics Outpatient Department up to the 4th of October 2011.

[69] In his further report dated the 5th of September 2016 (Exhibit 2), Dr Lwin stated his findings upon examining the claimant on the 24th of February 2016 at the Royale Medical Centre and Hospital. The local examination revealed:

> 1. *There was a reduced range of movement in her neck and tenderness around the area of the mid cervical spine region. No neurological deficit was noted in the upper limbs.*
>
> 2. *The lower back was tender around L3-4 region with no deformity or swelling.*
>
> 3. *There was a slight reduced touch and pin point sensation at the dermatone area of L5 on the left lower limb. The power, tone and reflexes were normal.*

[70] Dr Lwin prescribed oral anti-inflammatory medication and Pregabalin. The claimant was given dietary and weight reduction activities. She was also instructed to do an MRI scan. The MRI results showed that the claimant has multiple discs' herniation with L5 nerve root impingement. Dr Lwin also opined that although the claimant may have underlying degenerative discs' disease, the accident triggered the pain and it may recur again and again during her later life. She will also need to do a MRI scan of the cervical spine later and will need physiotherapy on and off.

Submissions on General Damages

[71] Counsel for the claimant, Mr Green, submitted that the appropriate award for general damages would be $2,500,000.00. He relied on two cases as being instructive in assessing general damages which includes pain and suffering and loss of amenities.

1. ***Marcia Leslie v Danesh Chandra Panoe et al*** (unreported), Supreme Court, Jamaica, Suit No. CL 1996 L 113, date of award 17 July 1997. The Claimant was a Teacher in her thirties. She was hit by a car whilst on a side walk. She suffered from a loss of consciousness for a few minutes, bruises to the left knee and severe backache. She was diagnosed as having severe whiplash. She had tenderness to the lumbar spine and experienced limitation of her activities such as long standing and sitting. She was advised to start physiotherapy. She was

awarded $400,000.00 for general damages. This would update to $2,265,148.06 using the current CPI of 248.6.

2. ***Elaine Graham v Daniel James and anor*** (unreported), Supreme Court, Jamaica, Suit No. C.L. 1998 G 103, date of award 29 September 2000. The claimant was a 55 year-old Cultivator and Higgler who was injured in a motor vehicle accident, whilst she was a passenger in a bus. She had a concussion and lost consciousness for 90 minutes. It was noted that she experienced memory loss and would need an evaluation from a specialist. Further, she sustained injuries to her back, left lower limb and neck. She was diagnosed with whiplash injuries to cervical and lumbar spine with mild lumbar disc prolapse. She suffered complete disability for eight (8) weeks and partial disability for three (3) months. She continued to suffer intermittent pain. As a part of her treatment, she was given potent analgesics and muscle relaxants and put on two weeks' bedrest. Her Doctor was of the view that complete resolution was likely to take several years during which time she was required to avoid heavy lifting and any strenuous bending of her back. She was awarded $600,000.00 for general damages for pain and suffering and loss of amenities. This would update to $2,660,246.12.

[72] Counsel for the defendant, Mrs. Burton-Campbell, submitted that both cases relied on by Mr. Green are inappropriate guides. In both claims the claimants suffered unconsciousness which the claimant in the instant case did not. It was submitted that this would have influenced the award of damages given the seriousness with which injuries to the head are viewed. Counsel also distinguished the cases by highlighting that in the ***Elaine Graham*** case, the claimant suffered memory loss in addition to the neck and back injuries. In the ***Marcia Leslie*** case, it was submitted that the assessment was complicated by the fact that the claimant had not taken steps to mitigate her loss.

[73] Mrs. Burton-Campbell submitted that an appropriate award would be $1,000,000.00 and commended to the court two authorities.

1. ***Lascelles Allen v Ameco Caribbean Incorporated and anor*** (unreported), Supreme Court, Jamaica, Claim No. 2009HCV03883, date of award 7 January 2011. The Claimant, a taxi operator, was in involved in a motor vehicle collision. He suffered injuries to his side, neck and back and complained of numbness in his left hand. He was diagnosed with whiplash injury. With the help of physical therapy sessions, he recovered fully within four months of the accident. He had no permanent partial disability. He was awarded $600,000.00 for general damages for pain and suffering and loss of amenities. This would update to $888,915.38.

2. ***Derrick Munroe v Gordon Robertson*** [2015] JMCA Civ 38. The Court of Appeal upheld the award of $300,000.00 for general damages. As a result of a motor vehicle collision, the claimant suffered the following injuries: tenderness in the region of the left costochondral joints with increased tenderness during respiration and all chest movements, and tenderness in the lumbar region in all ranges of motion. He had no permanent irreparable deformity or disability, but was partially disabled for 14 days. He was diagnosed as having tenderness in the chest and lower back pain. He was also given analgesics. The date of assessment by the trial judge was the 18th of June 2009, as such the award would update to $525,211.27.

[74] I am inclined to agree with Mrs. Burton-Campbell's submissions in relation to the authorities cited by Mr. Green. While there are some similarities in the injuries sustained by those claimants, I find them to be somewhat incomparable.

[75] Firstly, the claimant in ***Marcia Leslie*** suffered from a loss of consciousness and was diagnosed with severe whiplash. Whereas there is no evidence that the claimant in the instant case suffered from unconsciousness, although she said that she felt dizzy after the collision. The claimant in the ***Elaine Graham*** case not only became unconscious but had a concussion and later complained of memory loss. Part of her treatment involved two week's bed rest. She also suffered complete disability for eight (8) weeks (or two months) and partial disability for three (3)

months thereafter. It was opined that compete resolution would take several years. No specific length of time was given for the claimant's disability (whether complete or partial), all that was said by Dr Lwin is that during her illness, she was not able to perform normal daily full activity on and off until August 2016. I regard the injuries of Marcia Leslie and Elaine Graham to be more serious than that of the instant claimant. In view of this I would not regard a similar award to be appropriate.

[76] By contrast, I am of the view that the awards made in the authorities submitted would be too low. In the ***Lascelles Allen*** case the claimant recovered fully within four months of the accident. This is not so for the claimant in the instant case who may have recurrent pain during her later life. I am mindful that she will also need to do a MRI scan of the cervical spine sometime in the future and will need physiotherapy on and off.

[77] In the circumstances, I find that an award of $1,250,000.00 would be appropriate for pain and suffering and loss of amenities.

Disposal

[78] It is hereby ordered -

1. Judgment entered in favour of the Claimant with damages assessed as follows:

   General damages - pain and suffering and loss of amenities in the sum of $1,250,000.00 with interest at 3% p.a. from the 17th of October 2013 to today's date.

   Special damages - $53,768.14 with interest at 3% p.a. from the 9th of February 2010 to today's date.

2. Cost to the Claimant to be agreed or taxed.