{2016} JMSC Civ.187

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV05910

BETWEEN	**JOAN CARR**	**1ST CLAIMANT**
AND	**MARJORIE LEVY**	**2ND CLAIMANT**
AND	**KEVIN BENNETT**	**1ST DEFENDANT**
AND	**ROY WILLIAMS**	**2ND DEFENDANT**

Mrs Helene Coley Nicholson for the Claimants

Mr. Harrington McDermot instructed by Campbell & Campbell for the

1st Defendant

2nd Defendant absent and unrepresented

Negligence - Motor vehicle accident – Liability of parties – Apportionment of Liability Damages – Assessment – Handicap on the Labour Market – Loss of Earnings.

Heard: July 18 and 25, 2016 and November 4, 2016

LINDO, J.

[1] The claimants in their joint claim filed on October 30, 2012, are seeking to recover damages for Personal Injury, Loss and Damage arising from a Motor Vehicle

Accident which occurred at about 3:30 am on February 10, 2009 along the Spanish Town Road in parish of Kingston. The 1st Defendant, (Mr. Bennett) was at all material times the owner and driver of the Toyota Hiace bus Registered PD6292 in which the claimants were passengers and the 2nd Defendant was the owner and driver of a Honda CRV Registered 0465DE. The claimants claim that as a result of the negligence of the defendants in the driving, management or control of their respective vehicles, the accident occurred.

[2] On July 12, 2013, the 1st defendant filed an acknowledgement of service of the claim and on July 22, 2013 he filed a Defence in which he denied any negligence on his part and indicated that the accident was caused by the negligent driving of the 2nd defendant.

[3] No acknowledgment of service or defence was filed by the 2nd defendant and an interlocutory judgment in default of acknowledgement of service was entered against him and noted in **Binder 763 Folio 166.**

[4] In the Particulars of Negligence of the 1st Defendant, the Claimants allege:

i. Failing to see or to see in time that the motor car which was travelling in the same direction ahead of the motor bus in the same middle lane of the 3 lane dual carriageway along Spanish Town Road towards Six Miles was attempting to turn right;
ii. Failing to travel a reasonable distance from the motor car which was less than a length of ½ of a car in front of the motor bus;
iii. Failing to put sufficient distance between the motor bus and the car to allow for sufficient braking distance as was necessitated by rainy weather and wet asphalted road surface;

[5] In relation to the 2nd Defendant, the Claimants allege the following:

Failing to see or to see in time the motor bus which was travelling immediately behind the car;

i. Failing to give the 1st Defendant any or any sufficient warning of his intention to turn right at the Callaloo Meadows intersection of the dual carriageway so that the 1st Defendant could avoid colliding with the motor car; and

ii. Driving in such a manner as to cause the front of the motor bus to collide with the rear of the motor car

[6] It is not disputed that at the material time both claimants were passengers in the motor vehicle driven by Mr Bennett and that the accident occurred at sometime near three o'clock in the morning. It is also not in dispute that the bus came into contact with the right side of the back fender of the Honda CRV and damage was done to its front bumper, headlight, right front door and front wheel. What is in dispute is how the accident happened and in light of this dispute it falls to be determined who should be held responsible, whether the 1st or 2nd defendant, or both, and the extent of such liability.

The Evidence

[7] The two claimants and the 1st defendant gave evidence at the trial during which time the Assessment of Damages in respect of the Judgment entered against the 2nd Defendant took place.

[8] A number of documents were agreed as between the claimants and the 1st defendant and admitted into evidence. The medical reports of Dr Louis Richards dated June 5, 2014, Dr Wayne Palmer dated June 24, 2016, Dr Mansingh dated September 6, 2010 and the report of Dr Monique Van Spankeren, registered physical therapist dated January 26, 2010 were also admitted into evidence without the need for the doctors to attend and give oral evidence or to be cross examined.

[9] Special damages were agreed as between the claimants and the 1st Defendant, in the sum of $69,189.43 in respect of the 1st Claimant, and in the sum of $95,077.79 in respect of the 2nd Claimant.

[10] The evidence of Joan Carr, the 1st claimant, is that on February 10, 2009 at about 3:30 am she was a passenger in a bus owned and driven by the 1st defendant. She indicates that she was sitting on the seat immediately behind the driver, Marjorie

Levy, the 2nd Defendant, was also a passenger, sitting at the front beside the driver, and that the bus was travelling in the middle lane along Spanish Town Road. She **states** that it was raining and the road was very wet.

[11] She states further that she saw a Honda CRV registered 0465DE travelling ahead of the bus, in the same lane and direction, and that the bus was travelling closely behind it "so that the distance...was less than ½ the length of a car" and that the car started to turn right and the bus swung left, but the front of the bus "ran into the back of the motor car". She states that she was thrown forward by the impact of the collision, hit her head on the seat in front of her, burst her right lower lip and also hurt her left shoulder and was taken to the University Hospital where she was given medication and given three days sick leave. Miss Carr also states that as a result of the accident she had severe pains in her neck and had poor circulation and that she lost her job on July 27, 2015 as "my employers suggested that I take medical redundancy which I did".

[12] In Cross-Examination, she maintained that it was raining. She was not able to say how fast the 1st Defendant was driving and indicated that the bus did not skid before the collision and neither did the driver lose control of the vehicle. She admitted that the Hiace was close behind the CRV before the collision and agreed that the CRV did not put on an indicator and did not slow down, but made a sudden right turn.

[13] She agreed that in turning right, the CRV was moving away from the Hiace and that in swerving left the bus was attempting to move away from the CRV. She also agreed that the right hand back fender of the CRV was impacted and the right front door and wheel and the right headlight of the Hiace were damaged. She disagreed that it was the CRV which came over on the side that the Hiace was travelling and also disagreed that the CRV made a "U" turn and came over on the Hiace.

[14] Marjorie Levy also gave evidence that it was raining and the road was wet. She states that she was sitting in the front of the bus, beside the driver and that the Honda CRV was "just ahead of us ... the car started to turn right...did not turn on his indicator.

The Hiace attempted to swing left but could not avoid hitting the CRV because it was too close".

[15] She also states that she felt severe pain as a result of being "jerked backward and forward" by the impact and that she went to work, got dizzy and was taken to Dr Richards who treated her, prescribed medication and gave her 14 days sick leave.

[16] Under cross examination she indicated that the distance between the Hiace and the CRV was less than 2 feet, (a distance pointed out by her in court and actually measured and found to be 19 inches). She disagreed that the Hiace was travelling in the extreme right lane, and insisted that the CRV was in the middle lane. When it was suggested to her that CRV made a U turn and drove directly in the path of the Hiace, she also disagreed.

[17] In relation to her claim for loss of earnings, especially with regard to part time occupation of baking, she was unable to explain to the court how much she earned although she indicated that after the accident she sat down and considered it.

1st Defendant's Case

[**18]** At the start of the case for the 1st Defendant, Counsel made an application for the particulars of defence to be amended to as it relates to the Honda CRV making a "U turn". The court was not satisfied that it had been shown that such an amendment should be made and the application was refused.

[19] The 1st Defendant's evidence in chief is contained in his Witness Statement dated December 11, 2015. He states that on the morning, at about 2:30, he was driving at about 50kmph in the right lane which is the lane closest to the median and noticed a Honda CRV travelling in the middle lane ahead of his vehicle. He adds that he was "catching up to the CRV when the driver suddenly and without indication turned the motor vehicle right and came over to the right lane". He indicates that he swerved left to move away from the CRV but his bus collided with the right hand back fender of the CRV.

[20] His evidence further is that the front door, headlight and front wheel of his vehicle were damaged and that the two claimants came out of the vehicle and "were complaining of pain to their neck and that they were jerked up."

[21] When cross examined, he stated that when he said, "U turn" in his defence, he meant right turn. He then stated that the CRV was in the left lane and he was in the right lane and when he was catching up on the CRV it suddenly made a right turn and he swerved to avoid the collision but the CRV stopped suddenly. He later said the CRV did not stop and when pressed said "when the vehicle was hit, it automatically stopped".

[22] In further cross examination, he stated that he could not recall whether the 2nd defendant's vehicle had stopped before his bus hit it. He however admitted that when he swerved left it was too late. In relation to the damage done to the CRV, he stated that it was to the back fender and spare wheel and when asked if the wheel was to the middle of the vehicle, he admitted that it was to the right hand side. He also stated that he was one car length away from the CRV and the road was "dampy". When it was suggested to him that the road was very wet, he said "no water at all was on it".

The Submissions in Relation to Liability

[23] Mrs Coley-Nicholson, Counsel for the claimants, pointed out that the 1st Defendant gave various contradictory versions of how the accident occurred and submitted that none of these account for the physical damage to the vehicles. She asked the court **to** find that the 1st Defendant was not a witness of truth and that the claimants' version is more credible and to be preferred.

[24] She noted that there is no dispute that the bus collided into the right side of the back fender of the CRV where the wheel was fixed to the rear of the vehicle and damaged the front bumper, headlight, right front door and front wheel. She further submitted that had the CRV turned right from the middle lane across the 1st defendant's vehicle in the right lane, it would be moving towards the bus and the vehicles could only be moving away from each other when the CRV turned right and the bus swerved left travelling in the same lane.

[25] Counsel pointed out the 1st defendant's unwillingness to admit that the road was wet and asked the court to find that the defendant was not speaking the truth on this point also, and that the claimants' description of the road condition was correct.

[26] Mr McDermot, Counsel for the 1st Defendant, submitted that on the Claimants' evidence, it is clear that the 1st Defendant was not the negligent party and suggested that, on the totality of the evidence, the 2nd D efendant was the sole cause of the accident.

[27] He pointed out that in relation to the distance between the two vehicles before the accident, the 1st Claimant, under cross examination, could not say what the distance was, while the 2nd Claimant was able to point out this distance. In relation to the damage done to the vehicles, he noted that the evidence of the 1st Defendant accords with that of the claimants and as it related to speed, although it was pleaded, no evidence was given by the claimants but the unchallenged evidence of the 1st defendant is that he was travelling at 50kph.

[28] Counsel submitted that based on the claimants' account of the accident it is highly improbable that the right front hand side of the bus would have collided in the back fender of the CRV as the 1st claimant had indicated that the right section of the CRV and the right front section of the Hiace were moving away from each other.

The Law

[29] It is settled law that in every claim for negligence, in order to succeed, 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.

[30] It is also settled, that all users of the road owe a duty of care to other road users (see **Esso Standard Oil SA Ltd & Another v. Ian Tulloch (1991) 28 JLR page 553.)** Additionally, drivers of motor vehicles must exercise reasonable care to avoid causing injury to persons or damage to property.

[31] Reasonable care is the care which an ordinary, skilful driver would have exercised under all the circumstances. This includes avoiding excessive speed and keeping a proper look out. (see **Bourhill v. Young [1943] AC 92.)**

[32] Section 51(2) of the Road Traffic Act states that a driver of a motor vehicle has a duty to take such action as may be necessary to avoid an accident.

[33] In the Privy Council decision of **Nance v British Columbia Electric Railway Co. Ltd. [1951] AC 601** Viscount Simon at page 611 said:

> *"Generally speaking when two parties are so moving in relation to one another so as to involve risk of collision each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle."*

[34] In determining liability in respect of the 1st defendant in this case, the credibility of the parties is important. There is no independent evidence and the 2nd defendant is not participating in the trial, as he failed to acknowledge service or file a defence.

[35] The case of the claimants has consistently been that the 1st defendant's Hiace bus was travelling in the middle lane, close behind the CRV, and that it attempted to swerve away from the CRV which turned suddenly without indicating.

[36] A point raised by the 1st defendant's defence is that the accident occurred after he was travelling in the extreme right lane and the 2nd defendant without any indication, swerved from the middle lane and into the path of his vehicle. His differing accounts, however, raise some significant questions regarding the overall cogency. On one of his accounts, he saw the CRV in the middle lane ahead of him and he was in the right lane "catching up to it..." when it turned suddenly, while in cross examination he spoke to the 2nd defendant being in the left lane.

[37] I agree with Counsel for the claimants that the 1st defendant's versions of how the accident happened are quite contradictory and I find it difficult to see how the accident could have occurred as he outlines.

[38] Having assessed the parties as they gave evidence, I was not impressed with the 1st defendant's demeanour. He appeared shaky in cross examination and he was less than candid. His differing accounts of where the CRV was travelling prior to the collision and his unwillingness to agree that the road surface was wet lead me to believe that he is not being truthful and therefore his accounts of the accident cannot be accepted.

[39] The 1st claimant, I believe, was in a better position than the 2nd claimant to see what happened as she was sitting in the front passenger seat beside the 1st defendant while the 2nd claimant was seated behind him. Both claimants remained consistent in evidence in chief and in cross examination that both vehicles were travelling in the middle lane and that the 1st defendant was travelling close to the CRV.

[40] Having taken into account all the evidence and the submissions of Counsel and having considered the relevant legal principles, I find that the accident occurred along the dual carriageway on the Spanish Town Road in the vicinity of Callaloo Meadows at about 3 o'clock in the morning when the roadway was wet. The 1st defendant, who was speeding in the circumstances, was driving to close to the CRV which was in front of it, in the middle lane, and the CRV without indicating, turned suddenly to the right. The 1st defendant swerved to his left and the right side of his vehicle collided into the right rear of the CRV.

[41] I find that due to the closeness of the two vehicles, the 1st defendant did not have sufficient time to avoid the accident. He should have been travelling at such a speed and at such a distance from the vehicle ahead of him that would have allowed him to swerve and prevent the accident or to stop. I find that the 1st defendant must have been travelling much faster than he would have the court believe and that this would account for his inability to swerve in time and or stop in order to avoid the accident.

[42] I therefore find the claimants' account of how the accident occurred to be more probable than that stated by the 1st defendant. I find that the description of the point of impact on the respective vehicles, which has been agreed, would be more probable as occurring when both vehicles were travelling in the same lane and I accept the evidence of the 1st claimant, where on cross examination, she agreed that in turning right the CRV was moving away from the Hiace, in swerving left the bus was attempting to move away from the CRV and that with the CRV turning left, the right back section of the CRV and the right front section of the Hiace were moving away from each other.

[43] I am satisfied that the 2nd defendant, the driver of the CRV, made an injudicious turn when it was not safe to do so and also find that he failed to keep a proper look out as a reasonable prudent driver of ordinary skill would have done in the circumstances, and is therefore negligent.

[44] I accept that the 1st defendant having been travelling behind the CRV would have had the opportunity to make observations and since he saw that the CRV was turning, he should have stopped his bus. I accept that he in fact swerved to the left, but it was too late. The fact that he was "catching up" with the CRV on a road which he describes as "dampy", in my view means that while he was in the same lane as the CRV, he failed to keep a proper lookout and failed to exercise reasonable care to avoid the collision. He ought to have been proceeding with sufficient care and have given himself sufficient time to stop the bus as the need arose and should not have been travelling so closely to the vehicle ahead of him. The court therefore finds that the 1st defendant was also negligent.

[45] Having found that both drivers were negligent in the driving of their respective vehicles on that morning, it becomes necessary to determine the extent of the liability of each defendant.

[46] In determining the apportionment of liability, I find that an instructive authority is **Brown v Thompson** [1968] 2 All ER 708 **i**n which it was stated, *inter alia:*

> *"...regard must be had not only to the causative potency of the acts or omissions of each of the parties but to their relative blameworthiness".*

[47] I note also that in **Uden v Associated Portland Cement Manufacturing Ltd** [1965] 2 All ER 213, Lord Pearce, at page 218, made the point that the question of apportioning blame *"is one of fact, opinion and degree".*

[48] Having weighed all the circumstances of this case as to causation and blameworthiness, I am led to the conclusion that the 2nd defendant is more blameworthy for the accident than the 1st defendant. It is his act of turning without indicating which I find was mainly responsible for the collision.

[49] I apportion 60% liability to the driver of CRV as it is my considered view that he should take more responsibility for the accident and the 1st defendant Hiace driver is 40% responsible. He was under a duty to stop and or take some defensive action to prevent the collision and the fact that he swerved and still collided in the CRV shows that he was driving too fast in the circumstances and too close to the CRV.

[50] I will now determine the quantum of damages that the claimants ought to be awarded.

Submissions on Damages

[51] Counsel for the claimants relied on the following cases as guides to quantifying a reasonable award for general damages in relation to both claimants:

1. **St. Helen Gordon & Anor v. Royland McKenzie,** Suit No CL1997/G025, noted in Khan, Vol. 5, page 152, where the claimant suffered whiplash, pain around the neck and shoulder and was recommended to do physical therapy and had a PPD assessment of 3%. She was awarded general damages of $400,000.00 in July 1998(CPI 48.37) which updates to $2,253,548.23 (CPI 234.2.September)
2. **Merlene Nelson v Edgar Cousins o/c Leo Cousins**, Suit No CL1986/N078, ...November 29, 1996. (CPI 41.57) In this case the claimant, 56 years old suffered injury to neck and back; tenderness over lower cervical and mid dorsal region of spine; cervical spondylosis C3 -6. She was diagnosed with whiplash injury to her neck which aggravated her cervical spondylosis and her PPD was

assessed as not exceeding 10%. She was awarded $525,000.00 which updates to $2,957,782.05

3. **Wesley Glanville v Delroy Campbell and Gwendolyn Brown**, Suit No. 2000/G012, Khan, Vol. 5 at page 174 where on June 4, 2001 he was awarded $975,000.00 (CPI 58.33) which updates to $3,914,709.41. He suffered injuries in a motor vehicle accident resulting in*, inter alia*, neck pains and stiffness, reduced sensation in the right hand and reduced muscle power in right upper limb and at the end of one month he was significantly improved.

[52] In relation to the 1st Claimant, Counsel submitted that having regard to her job, a fair award "is a sum greater than $2,000,000.00 but less than that awarded to Merlene Nelson who had a 10%PPD". She indicated that the 1st claimant seeks an amount of $2,500,000.00.

[53] With regard to the 2nd claimant, Counsel submitted that, like the 1st claimant, she has degenerative cervical spine disease with symptoms triggered by the accident, as well as whiplash injury. She expressed the view that a fair award would be no less than $2,000,000.00

[54] The following cases were commended to the court by Counsel for the 1st defendant in relation to general damages to be awarded to both claimants:

1. **Anthony Gordon v Chris Meikle and Esrick Nathan,** Suit No. CL1997/G047 Khan Vol 5, page 142 July 7, 1998, where the claimant was diagnosed with cervical strain, contusion to the left knee and lumbo sacral strain, was assessed at 5% PPD and was awarded general damages of $220,000.00 (CPI 48.37) which updates to $1,065,205.70; and
2. **Carolyn Cooper & Kathryn Shields- Brodber v Ralston Smith**, Suit No CL1994/C115, decided April 29,1997 and cited in Khan, Vol. 4, page 159. In this case, the 2nd claimant who suffered whiplash injury, severe neck pains with radiations of pains into both shoulders, marked restriction in all movements of the cervical spine and headache, was assessed as having 6% PPD and was

awarded $275,000.00 in general damages (CPI 42.94). This sum updates to $1,499,883.55.

[55] In relation to the 1st claimant, Counsel for the 1st defendant expressed the view that the injuries suffered by the 1st Claimant are less severe than those suffered by the claimants in the cases cited, and using the case of Carolyn Cooper as the principal guide, suggested that the court make an award of $800,000.00 for general damages. This, he noted, was having regard to the higher disability rating assigned to the claimant in the case of Carolyn Cooper, the fact that claimant was significantly disabled up to three years post accident and moderately disabled thereafter, as well as the deficiencies he highlighted in the medical report of Dr Mansingh.

[56] Counsel had suggested that the court reject the explanation provided by Dr Mansingh, as well as his approach in relation to his management and diagnosis of the 1st Claimant, as he stated that he was made aware that the claimant had a previous medical condition that was unrelated to the accident but based on his report he "seems to have taken the claimant's word that she had no symptoms prior to the accident". He cited the case of **Cherry Dixon-Hall v Jamaica Grande Limited**, unreported, SCCA No 26 of 2007, delivered November 21, 2008 as being instructive in this regard.

[57] In relation to the 2nd Claimant, Counsel for the 1st defendant was also critical of the medical report of Dr Richards and expressed the view that, similar to Dr Mansingh who treated the 1st claimant, he "fails to make any enquiry as to whether the 2nd claimant's pre-existing conditions were causing her pain prior to the accident". Counsel also noted that the doctor "proceeds to make an assessment of the 2nd claimant's permanent incapacity without providing the source or literature upon which it is based" and expressed the view that Dr Palmer's report is to be preferred.

[58] Counsel for the 1st defendant submitted that an award of $1,000,000.00 be made to this claimant, also using the case of Carolyn Cooper as the guide, and reducing the award made in that case, bearing in mind the higher disability rating in the case of Cooper.

Handicap on the Labour Market

[59] Counsel for the 1st claimant noted that the 1st defendant's counsel having challenged the documentary evidence of the 1st claimant's earnings, there was no challenge to the actual amount which she claimed she earned. She asked the court to find that she has proven her usual earnings before medical redundancy and that she has in fact taken medical redundancy.

[60] She reviewed the evidence of the 1st claimant and expressed the view that the claimant has lost the autonomy she previously enjoyed and is in fact handicapped on the labour market. She expressed the view that the real and substantial risk of her losing her job has already materialized as she is no longer in employment, noting that she has been made medically redundant "due in part to her injuries which are the subject of the claim". Counsel also stated that given the nature of her job as an assistant chef, her reduced eligibility for employment of a similar nature is clear.

[61] Counsel for the 1st defendant submitted that in order for the court to make an award under this head there must be proper evidential basis and noted that there is no medical or other evidence which suggests that the 1st claimant is handicapped on the labour market; no evidence which suggests that she was dismissed from her previous employment as a result of her injuries and therefore likely to be handicapped on the labour market. He therefore submitted that no award should be made.

[62] Counsel submitted that although the 2nd Claimant is still in employment, there is a remarkable similarity between the facts of her case and that of the 1st Claimant and that the risk if her losing her job before the estimated end of her working life is not "merely" fanciful. She indicated that should the 2nd claimant lose her job her chances of getting a job or an equally paid job would be affected by her advanced age and "the general depressed state of the economy".

[63] She submitted that a multiplier of 4 years is appropriate and having noted that the 2nd Claimant is currently earning a net monthly income of approximately $40,043.39 indicated that the claimant "asks for compensation in the amount of $1,922,082.72 for this head of damage".

[64] Counsel for the 1st defendant submitted that the medical evidence of the 2nd Claimant does not suggest that she will be handicapped on the labour market and noted that Dr Richards had been treating her from 2009, his last examination of her was in May 24, 2014 and in his report dated June 5, 2014 he expressed the view that her neck pain and stiffness would affect her normal work and domestic activities.

[65] He pointed out however, that the 2nd Claimant was seen by Dr Wayne Palmer on June 23, 2016 and he does not state in his report, in relation to the history related to him by the 2nd claimant, that she complained that her injuries were affecting her job. He therefore indicated that Dr Palmer's medical report does not point to an award for handicap on the labour market and no award should be made.

Loss of Earnings re 2nd Claimant

[66] Counsel for the 2nd claimant submitted that this claimant did business from home in addition to her full time employment and that she did 'good business in December baking Christmas cakes'. She indicated that as a result of her injuries she has been unable to do the regular business from home. She indicated that the claimant makes a claim for loss of earnings for 388 weeks from February 10, 2009 to July 18, 2016, "and continuing" in the amount of $1,513,200.00. She stated that on a weekly basis the 2nd claimant earned a total of $3,900.00.

[67] Counsel for the 1st defendant submitted that the 2nd claimant has failed to prove the losses alleged. He submitted that this was a classic case of the claimant throwing figures at the court and asking for an award of damages. He therefore asked the court to reject the 2nd claimant's claim for loss of earnings.

Findings re 1st Claimant

Pain and Suffering

[68] In the case of Cherry Dixon-Hall, the Court of Appeal agreed with Supreme Court Judge's rejection of the evidence of an expert on the basis that he was not in a position to make a proper assessment as to the pre existing condition of the claimant, as he had not examined her or her medical records in relation to the particular condition. I find that

the case of Cherry Dixon-Hall is distinguishable on its facts and circumstances from the case of the 1st claimant in the case at bar. Dr Mansingh, indicated that he examined her on March 6, 2009, sent her to do a CT scan and having seen her again on March 17, 2009 with the results of the CT scan, diagnosed her as having strained muscles in the left side of her neck with concomitant nerve root impingement at C5 C6 and he assigned a disability rating of 3%.

[69] Dr Mansingh explained that he did not request her previous medical records as in the referral letter from Dr Richard Reid, he had stated that there was no other significant issue in her history and that in his own interview "questions were asked of previous medical conditions, medications being taken etc. None was noted".

[70] After careful consideration of Counsel's submission, I accept Dr Mansingh as an expert witness. His findings and the conclusions he has arrived at have not been contradicted by any evidence presented to this court and I am prepared to accept these findings.

[71] Miss Carr's injuries appear to be closest in comparison to St Helen Gordon, including the fact of the 3% PPD rating given. Although the 1st claimant had to wear a neck brace for some time and was unable to look up, turn her head or lift things because of the pain she experienced, I find that her period of disability was shorter than that of St Helen Gordon and find that the sum of $1,400,000.00 would be reasonable compensation and I so award.

Handicap on the Labour Market

[72] Under this head, the court is required to assess the claimant's reduced eligibility for employment or the risk of future financial loss and the authorities show that the claimant is required to provide evidence, however tenuous it may be, in order for the court to make an award.

[73] I agree with Counsel for the 1st defendant that there is nothing on the evidence from which I can find that the 1st claimant is handicapped on the labour market. She has not provided any medical or other evidence to show that as a result of the injuries

she sustained in the accident she is unable to work and although she gave evidence that she lost her job in July 2015, I do not find on a balance of probabilities that it was related to the accident. I will therefore make no award under this head.

Findings re the 2nd Claimant Marjorie Levy

Pain and Suffering.

[74] Dr Richards initially diagnosed the 2nd claimant as having blunt neck trauma resulting in a whiplash neck injury and tension headaches. He prescribed muscle relaxant and anti inflammatory pain relievers and ordered 14 days mandatory rest. When he examined her again on December 20, 2010, having requested neck x-rays, he subsequently diagnosed her as having "chronic whiplash injury aggravated by pre-existing cervical spondylosis and degenerative cervical disc disease".

[75] On a review of the 2nd claimant on May 24, 2014, he assessed that she has "a permanent chronic whiplash neck injury" and estimated that her recurrent neck pain and stiffness will cause an overall 5% permanent incapacity..."

[76] Dr Palmer diagnosed the 2nd claimant as having chronic whiplash and cervical spondylosis and indicated that the accident "may also trigger symptoms from her underlying spondylosis". He concluded that her PPD rating is 2%.

[77] I prefer and accept the report of Dr Palmer as his assessment is more recent and at the time of his assessment of the 2nd claimant he had the benefit of the report of Dr Richards.

[78] I believe an award of $1,200,000.00 would be adequate compensation for this claimant.

Handicap on the Labour Market

[79] It is my view that medical evidence is required to substantiate any claim for inability to work at the pre-accident level as a result of injuries sustained in the accident.

I agree with Counsel for the 1st defendant that the medical report of Dr Palmer, which is a fairly recent report, and which speaks to the 2nd Claimant's current medical condition, does not point to an award for handicap on the labour market. I will therefore make no award under this head, as I find no evidential basis on which to do so.

Loss of Earnings

[80] As a general principle, a claimant is entitled to compensation for any loss of earnings resulting from the negligence of the defendant and this should be from the date of the accident. Additionally, it has been shown that the fact that a claimant cannot establish his earnings by way of documentary evidence is no bar to recovering such damages. (See **Greer v Alston Engineering** (2003) 63 WIR 385.

[81] On the evidence that the loss of earnings claimed by the 2nd claimant is in respect of a part-time baking business, I believe that in those circumstances she may not have kept any record of accounting. She was not able to provide any evidence to satisfy the court on a balance of probabilities as to what amounts she made on a part time basis and as such the court will make no award in that respect.

Disposition

[82] In view of the foregoing there will be judgment for the claimants with liability apportioned at 40% on the part of the 1st defendant and 60% on the part of the 2nd defendant.

[83] Damages are assessed and awarded as follows:

1st Claimant - General damages awarded in the sum of $1,400,000.00 with interest at 3% from the date of service of the claim form to the date hereof.

Special damages awarded in the sum of $69,189.43 with interest at 3% from February 10, 2009 to the date hereof.

Costs to the 1st claimant to be agreed or taxed and apportioned 40-:60 as between the 1st and 2nd defendants.

2nd Claimant – General damages for pain and suffering awarded in the sum of $1,200,000.00 with interest at 3% from the date of service of the claim form to the date judgment.

Special damages awarded in the sum of $95,077.70 with interest at 3% from February 10, 2009 to the date of judgment

Costs to the 2nd claimant to be agreed or taxed and apportioned 40-:60 as between the 1st and 2nd Defendants.