IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. 1994 CLW 00324

BETWEEN	**DORRETT GAYLE WILLIS**	**CLAIMANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
	WASHINGTON WILLIAMS	**2ND DEFENDANT**

Negligence – pedestrian – whether contributory – evidence – notice of objection not filed – admissibility – knee and ankle injuries – damages – delay – whether interest on damages to be awarded.

Mr Ainsworth W. Campbell and Mr Andrew Campbell for Claimant

Miss Celia Middleton instructed by the Director of State Proceedings for the 1st & 2nd Defendants

HEARD: **30th January 2017 & 9th February 2017.**

CORAM: BATTS J.

[1] This trial concerns an accident which occurred on the 16th day of November 1993. The Claimant retained an attorney and commenced suit on the 15th November 1994. The trial commenced before this court on the 30th January 2017. In the intervening 23 years the Claimant has had at least three (3) different attorneys. One died and another disappeared in circumstances well known to most of us in the profession. The Claimant at long last now has her day in court.

[2] Her witness statements dated 26th April 2007 and 6th June 2015 were allowed to stand as evidence in chief. The Claimant says that on the day in question she

was walking on the sidewalk on the right side of the Middle Quarters Main Road in the parish of St Elizabeth. While so doing she felt an impact which threw her to the ground. She heard no horn prior to the accident. The cross examiner did not challenge this account and was content to elicit the following, and here I set out the entire cross- examination:

"Q: Mrs. Willis, that day you were walking TOWARDS Middle Quarters from Black River direction?

A: Yes

Q: Vehicles going in direction you were walking, could you see vehicles?

A: Only when I turn.

Q: You see those vehicles coming from behind you if any?

A: Yes

Q: Had there been another vehicle you could only see those coming in other direction?

A: Yes

Q: You were earning $3,500.00 per week?

A: When sell swimps.

Q: Selling shrimp and domestic work together earn you $3,500.00?

A: Swimps money different from domestic money. Everything together $5,000.00.

Q: In 1993

A: Yes maam."

[3] That was the full extent of the cross-examination. The Claimant's witness was Evadney Linton. Her witness statement, which stood as her evidence in chief, was dated the 19th June 2015. She too was very briefly cross-examined. She says she saw the Claimant walking on the left of the road coming towards Middle Quarters. She saw the Defendants' vehicle (a pickup) come up from behind the Claimant and hit her so that: "*she went up in the air and fell on* the *left side of* the *road*. *Willis was actually trying to get away from the vehicle when she was hit*. *As the vehicle came near to her I saw when she turned towards the left bank to get away from the vehicle*, *but the vehicle hit her before she could escape*."

[4] The cross-examiner did not challenge this account of the accident either. Miss Middleton was content to establish that (a) the road was a long straight road, (b) the distance of the witness from the point of collision (this was pointed out) and, (c) that the Claimant, the van which hit her and the witness were all on the same side of the road that is, the "left side". The witness said she was a fish vendor and confirmed that the Claimant was also a fish vendor.

[5] The reason for the brevity of the cross-examination became apparent when the Defendant opened its case. There was no witness available to give evidence. The 2nd Defendant was unavailable although his witness statement, dated 10th June 2008, had been filed on the same date. The Defendant's counsel indicated that a notice of intention to adduce hearsay evidence had been served on the Claimant and no counter notice had been filed or served. She applied to have the statement admitted pursuant to Section 31E of the Evidence Act.

[6] The Defendant's notice was entitled "Notice of Intention to Rely on a Witness Statement" , and was filed on the 10th June 2008. It read:

"TAKE NOTICE that at the trial of this matter the Defendants wish to rely on the Witness Statement of Lynden Washington Williams".

Mr. Campbell complained, and understandably so, that he had not been the Claimants attorney when the notice was served. He says he was unaware of the

notice. The notice was however a part of the Judge's Core Bundle filed by Mr. Campbell's office on the 10th January 2017. I therefore find that Claimant's counsel knew or ought to have known of the notice.

[7] I decided to admit the witness statement as an exhibit, # 4. My reasons are two-fold:

a) Notwithstanding the defect in the form of the notice (it made no reference to the provision of the Evidence Act pursuant to which it was filed, nor did it state which of the grounds in Section 31(4) applied), the Claimant ought reasonably to have known the purpose of the notice. This is because witness statements once filed and served are relied upon without a notice. Service of a notice was therefore a sufficient indication that the witness might not be called.

b) I had earlier allowed the Claimant to rely on documents, the subject of a notice, in not dissimilar circumstances. The Claimant's attorney had copy medical reports and receipts but no originals. The Defendant objected to the documents on the basis that there had been no order appointing the doctors who prepared the reports as experts. I admitted those reports because the Claimant had filed and served notices. The first was a "Notice of Intention to Tender" on the 15th day of June 2007. That Notice read, "*TAKE NOTICE that at the trial of the matter herein which is set for 28th September 2007*, *the Claimant intends to tender into evidence the medical report of Dr*. *Phillip D*. *Waite*, *Consultant Orthopaedic Surgeon dated the 19th day of February 2007*. *The maker of the document will not be called*." A more elaborate notice to the same effect was filed and served on the 31st day of August 2007 with respect to the medical report of Dr Nyi Nyi and receipts from Dr Waite. There had been no counter notice served.

One report is from Dr. Phillip Waite, a surgeon who has given expert evidence several times in these courts. The other is from a public hospital.

It was incumbent on the Defendant, if there was an objection, to notify the Claimant as per section 31E(3). It is manifestly unfair for a Defendant, having

remained silent at case management and pre-trial review hearings to, at trial, attempt to take technical objection to a document in respect of which notice of intention to rely has been served, and in respect of which no counter-notice was served.

[8] The profession needs to be reminded that Section 31E allows for the admission into evidence of a statement if the maker could have given direct oral evidence of the facts stated. The Section requires that a 21 day notice be served on the other parties. The parties so served have a right to serve a counter notice requiring that the maker be called. If a counter-notice is served the party intending to tender the statement need not call the maker if he is proved to be :

a) dead,

b) unfit by reason of his bodily or mental condition to attend as a witness,

c) outside of Jamaica and it is not reasonably practicable to secure his attendance,

d) cannot be found after all reasonable steps have been taken to find him, or,

e) is kept away from the proceedings by threats of bodily harm.

It really would make nonsense of the section if a party, whether or not a counter notice was served, is required to prove that the statement's maker is dead, unfit, unavailable, cannot be found or was kept away by threat. This is because, if those preconditions had to be established in any event, there would be no saving in cost or time at trial. The counter notice would be entirely irrelevant and unnecessary. Neither the party intending to put a document in evidence nor the trial process, would benefit if no counter notice was served.

The clear intention of Parliament was that in civil proceedings, provided the facts therein could have been given by the direct oral evidence of its maker, a statement was admissible in evidence if no counter notice was served. Section 31E(4) applies only where the other side requires the maker to attend. In that

event the court has a discretion to admit the document without calling the maker if the person wishing to adduce it can establish Section 31E(4) particulars. In this regard see **Paulette Robinson-Keize v. Carlos Morant [2012] JMSC CIVIL 147 (unreported judgment 5th October 2012 Batts J).** Any other construction defeats the raison d'etre of Section 31E.

[9] I am fortified in this view of the law, and my decision to admit the medical reports and receipts, by the fact that Rule 28.19 of the Civil Procedure Rules provides that "authenticity" of a document is admitted if it is contained in a list of documents filed and disclosed, but in respect of which no counter notice was served. The Claimant's list was filed on the 14th February 2007 and no counter-notice served.

[10] The 2nd Defendant's witness statement therefore became an exhibit in this case. I will ascribe to it such weight as I choose. In fact the statement corroborates Miss Evadney Linton's account of this accident. The 2nd Defendant said he had been driving from Black River in the direction of Kingston. When he arrived in the vicinity of Middle Quarters he saw the Claimant walking in the road with her back to him and heading in the same direction in which he was travelling. He says:

> *"3. There were freshly cut shrubs and stone boulders of various sizes on the left side of the road. The freshly cut shrubs and stone boulders extended for about sixteen (16) feet along the roadway in the direction I was driving. The distance from the embankment to the edge of the shrubs and boulders was two (2) feet. The lady was walking about one to one and half feet (1 – 1 1/2) from the shrubs and boulders. She was also on the* ***left*** *side of the road, the side of the road where I was driving. She was walking beside the shrubs and boulders and was walking out in the road in the path of my vehicle.* ***There was no sidewalk on either side of the road****.*

4. *When I cleared the corner the lady was about four (4) feet along the road, down from where the shrubs and boulders started. I applied my brakes then blew my horn loudly twice. I pressed on my horn for almost two seconds each time and I blew the horn the second time right after the first time. I was driving slowly.*

5. *After I blew my horn the second time, the lady turned and the right side of her body was towards me. She was facing the right side of the road and was no longer facing the direction I was going in.* ***She stopped walking and remained in that position while I drove past her****. The windows of the pickup were not tinted and they were down at the time. I saw that she was still standing as the bonnet and the left wing mirror (of the pickup) which is attached to the left door passed her.*

6. *To pass her, I had to drive the pickup over the right lane of the road. She was between the pickup and the freshly cut shrubs and stone boulders.*

7. *While I was passing the lady I did not observe anything unusual. I did not feel any impact on the pickup. I did not feel pickup run over anything. I did not feel the vehicle hit anything. I did not hear any noise or scream at the time I drove past the lady.*

8. ***I had not yet come back fully to the left of the road*** *when I heard a shout I stopped the pickup, came out and walked back to the direction I was coming from. I saw the lady I had passed earlier sitting on the left side of the road in the road. Her feet were stretched in the road. Her left foot was bleeding. Persons placed her in the back of the pickup and we all went to the Black River hospital."* [Emphases added]

[11] In closing submissions, Defendants' counsel stated she had only one submission to make on the question of liability. That submission was that the Claimant, a pedestrian, had a duty to walk on the side of the road which faces oncoming traffic. In this regard she referred to the Road Code and Section 95(3) of the Road Traffic Act. Counsel submitted that the Claimant therefore either caused or contributed to the accident.

[12] The submission fails because, assuming without deciding that a duty in law exists to walk on the side of the road facing oncoming traffic, there is on the evidence no causative relationship between the Claimant's alleged failure to do so and the accident. The Claimant, on the Defendants' account, was clearly seen by the 2nd Defendant. He had had sufficient time to blow his horn twice (for two seconds on each occasion) and alert her of his presence. He had time to slow down and, as he said, he proceeded to pass her by. She was stationary as the front of his vehicle passed by her uneventfully. In this regard the side of the road on which she was standing, or the direction in which she was facing, had no operative effect on the occurrence. The accident occurred, on the 2nd Defendant's account, whilst or before he returned "fully" to his left lane. It is fair to infer that the rear end of his vehicle struck the Claimant. There is no reference in this statement to any other vehicle on the road, nor is any other explanation proferred for her injury. It was the 2nd Defendant's error of judgment, either in thinking it was safe to pass or that he had sufficiently cleared the Claimant's position before returning "fully" to his side of the road, which caused the accident. He was entirely to blame for this accident and it mattered not whether the stationary Claimant had been facing his direction or not.

[13] The notion that a breach by an individual of the Road Code (or the Act) automatically renders a person contributorily negligent might easily be tested. A driver who, for example, has only one functional headlight is in breach. Yet if an accident occurs in broad daylight he cannot for that reason be a contributor. It is no answer to say the vehicle ought not to have been on the road in that condition. The absence of any causative relationship between the missing

headlight and the accident negates the possibility of contribution. It is for a similar reason that evidence a driver was operating a motor vehicle without a driver's licence is not evidence of negligence. This is not a case where the Claimant had an opportunity to avoid the collision and failed to take it, or a situation in which she placed the driver in a dilemma. The 2nd Defendant's statement makes no such assertion.

[14] In the final analysis I preferred the evidence of Miss. Evadney Linton to that of the Claimant. Miss Linton saw the Claimant walking to the left of the road. The Claimant said she was on the sidewalk to the right of the road. I find as a fact, as the 2nd Defendant stated, there was no sidewalk on either side of the road. I accept that the Claimant was to the left side. Cuttings and boulders prevented the Claimant walking any closer to the left side of the road than she in fact was. Miss. Linton describes the Claimant stopping to look in the direction of the Defendant's vehicle. This I find explains why it is the Claimant's left foot and not her right foot, which is impacted .It is also consistent with the 2nd Defendant's assertion that he blew his horn. Miss Linton's description, in paragraph 3 of her witness statement, of the Claimant being hit up in the air by the Defendants' vehicle is incredulous and inconsistent with the injuries described. It is also inconsistent with her earlier statement, in paragraph 2 of her witness statement that, "It was the back left side of the vehicle that hit Willis". I find as a fact that the 2nd Defendant clearly saw the Claimant. He blew his horn repeatedly and slowed down to pass her by. I accept, as the 2nd Defendant stated, that the front of his vehicle, a pick up, safely passed her by. He would have been able to proceed without incident had he not returned to his side of the road before his entire vehicle had passed the Claimant. The unchallenged evidence is that the road at that point was straight. There is no evidence of oncoming vehicles or of any reason why he needed to return "fully" to his side at that moment. I find as a fact that his decision so to do prior to completely passing the Claimant was the result of an error of judgment. The 2nd Defendant is therefore entirely to blame for the resulting accident.

[15] On the matter of damages, I had regard to the medical reports tendered. Dr. Nyi Nyi, of the Kingston Public Hospital in a report dated 23 April 1999 states that the then 35 year old Claimant, was admitted to the Kingston Public Hospital on the 2nd December 1993. She was referred there after having been seen at the Black River Hospital. No report from the Black River Hospital was put in evidence. The doctor found that the wound over the medial malleolar was infected with a foul smelling discharge. X-rays done showed: fracture of the left medial malleolar, facture of the lower one third of left fibula and a fracture dislocation of the left ankle joint (weber type C). She was discharged on the 6th January 1994. Surgery was done for orthodesia of the left ankle on the 28th November 1995. The doctor described her condition as improving after surgery except that swelling persisted around the left ankle. She was finally discharged from orthopaedic clinic on the 17th November 1999. The doctor assessed her permanent loss of function at 30% of the " right" lower limb. This latter I take to be a typographical error as the report mentions only an injury to the left leg.

[16] Dr. Phillip Waite's report is dated 19th February 2007. He saw the Claimant on the 16th February 2007. On examination he found:

1) The left lower limb is 2.5 cm. shorter than the right.
2) There is almost a full circumferential scar to the ankle region with gross swelling and numerous other smaller scars.
3) The ankle is fixed in 10 degrees of planter flexion.
4) There is tenderness to the ankle laterally.
5) both knees displayed retropatellar tenderness with a positive patelar grind.

There was also medial and lateral joint line tenderness.

Dr. Waite itemised estimated disability based on the American Medical Association's Guide. He lists each area of injury and ascribed a percentage to some of them. In two he leaves the space for the disability rating blank.

Under the heading “Total disability” he wrote:

> *“Total disability depends on whether the arthritis of the knees was due to the accident, aggravated by the accident or is a result of the abnormal gait caused by the ankle injury. The range of disability is thus 10% (for the ankle deformity and the limb length discrepancy) to (.... %) (for the ankle deformity, the limbs length discrepancy and the arthritis of the knees).”*

Under the heading “Prognosis” the doctor opined:

> *“The injury (including the cosmetic appearance) to the left ankle is permanent and cannot be improved surgically. She has a permanent limp and will always have difficulty standing and walking. This will permanently affect her ability to be gainfully employed in the capacity of a household helper and in the majority of similar endeavours. The arthritis to the knees are permanent and are expected to progress with time, the timing and extent of which cannot be predicted. She may however benefit from a course of physiotherapy and further orthopaedic management. It must be noted also that there is a psychological component to these injuries which has not been evidenced in this report.”*

[17] Mr. Campbell very late in the day asked for an adjournment to call Dr. Waite to “fill in the blanks” in his report. I refused the request. The report was made a long time ago and had been in counsel’s possession. It would be unfair to the Defendants on whom a Notice of Intention to put the report in evidence had been served. It would also not be an effective use of the court’s time to grant an adjournment so late in the trial. The benefit to the Claimant would not I think outweigh those factors.

[18] Mr. Campbell totalled the disabilities noted by Dr. Waite as 24% whole person. He submitted that that figure rather than the 10% should be applied. I agree with Mr Campbell ‘s submission. The 24% rating takes into account the osteoarthritis which has developed. The doctor opined that condition may have been accelerated by the accident, or be the result of the abnormal gait. On a balance of probabilities I find that it was the result of the abnormal gait caused by the injury. I therefore find that the disability rating consequent to the injury is 24% of the whole person.

[19] With respect to pain suffering and loss of amenities Mr Campbell submitted that an award of $12.5 million was appropriate. He relied on the authorities of: ***Taylor v Sinclair 2005 HCV 1256 (unreported Judgment of Sinclair-Haynes J, 18th April 2008); Waisome v E Phil & Son A/S et al [2016] JMSC Civ 53 (unreported Judgment of Campbell J, 29th April 2016); and, Jackson v Charlton et al (unreported Judgment of Dukharan J) annotated in Khan Vol 5 page 167.***

[20] Miss Middleton submitted that $2 million would suffice. She submitted that Mr. Campbell's authorities concerned injuries to the upper limbs and therefore even if disability ratings were similar the cases were distinguishable. The courts, she submitted, valued hands and arms far more than feet and legs. She cited the following authorities: ***Cunningham v Black, suit CL 1989/C279 (unreported Judgment of Cooke J), this was however a consent Judgment; Parkins v Taylor et al Suit CL 1989/ P 049 (unreported Judgment of G. James J); McKenzie v South CL 2007HCV 01499 (unreported judgment of Jones J) Khan Volume 6 page 66; Rodney v Binnie-Palmer et al CL 2004 HCV 1950 (unreported Judgment of Mangatal J).***

[21] I agree that the authorities on damages which concern injury to the leg were of greater assistance. The **Rodney** case, in which $650,000 (updated using the December 2016 CPI approximates to $2,015,682.41) was the award, involved a fractured ankle. The residual disability was 10% of the right lower limb. In the **McKenzie** case the award was $ 1 million (updated approximates to $1,737,500). That injury was to the left ankle and the assessed whole person permanent impairment was 4%. In the **Parkins** case the court considered "*above knee fracture of right leg*, *kidney injury necessitating an operation*". There was an unspecified permanent partial disability with shortening. Damages for pain & suffering were assessed at $180,000 (updated $3,415,000). My own research uncovered **Claim Cl2000M332 Moody (Infant b.n.f Colene Moody) v Stephenson et al (unreported Judgment of Jones J. 28th May 2004) annotated in Khan Vol 6 page 74.** In that case $1,650,000 (updated

approximates to $5,116,733) was the award when a whole person disability of 12% resulted to the 12 year old from a comminuted fracture to the right tibia and fibula. He had developed a wound infection and spent 12 weeks on ward. He walked with a limp and one limb was 1.5 cm shorter than the other. The doctors opined that his limb length discrepancy would be significant as he grew older. He had developed osteomylitis of the right tibia.

[22] It is my considered decision that an award of $7.5 million is appropriate to the circumstance of this Claimant. Her injury and its sequelae exceeds that in the cases cited on injury to lower limbs. Mr. Campbell submitted for an additional sum to reflect the psychological “damage” adverted to in the medical report. However Dr. Waite is not a professional with qualifications in that field. Further his report makes no findings with respect to the Claimant. He was pointing to the fact that with such injuries there is usually a psychological component. In any event he has not graded or quantified or otherwise explained the nature of that psychological component. There is, I should also add, nothing in either of the Claimant’s witness statements to assist in an assessment of alleged psychological damage. I therefore have not considered psychological injury in my assessment of damages for pain suffering and loss of amenities.

[23] Mr. Campbell submitted that an award was appropriate for either lost future earnings or handicap on the labour market. He did not see the need to distinguish between them both because on the facts of this case the Claimant was and had been unable to earn an income since the accident. Mr. Campbell therefore urged me to adopt a multiplier multiplicand approach to the computation. Miss Middleton for her part indicated there had been no plea for lost future earnings or for handicap on the labour market. She further submitted that at the time of the accident the Claimant was 39 years old. If her working life is assumed to be 65 then as at the date of the accident a multiplier of 10 might have been appropriate. As at today’s date, she submitted, a multiplier of no more than 2 is appropriate. Consistently with her submission on loss of earnings

past, see paragraph 26 below, Miss Middleton urged that the minimum wage be used for the multiplicand.

[24] Mr. Campbell applied to amend the claim to include a plea for loss of future earnings/handicap on the labour market. The application was opposed. I granted the application because there was sufficient in the Claimant's witness statement to alert the Defendant to such a claim. I do not think the Defendant was caught by surprise (see paragraph 9 of the statement dated 26th April 2007; and paragraph 3 of statement dated 6th June 2015).

[25] I do not accept that an award for Handicap on the labour market is appropriate in this case. The Claimant's evidence that she has been unable to work and to earn a living since the accident was not challenged in cross-examination. I therefore approach that evidence on the basis prima facie that it is true. The appropriate award to consider is lost future earnings. This must be calculated, as Miss Middleton submitted, as at the trial date. That which was lost before is loss of past earnings and constitutes an item of special damages. There was no evidence to assist me to determine the expected date at which the Claimant, had she not been injured, would have retired. This might have been elicited from herself or her witness or perhaps even some official statistic on fish vendors .In the absence of evidence, I agree with Miss Middleton, that as the burden of proof is on the Claimant, I am constrained to adopt the normal age of retirement of 65 years. The Claimant in 2017 will be 59 years of age. I agree with Miss Middleton that an appropriate multiplier is 2.

[26] The multiplicand to be adopted for the calculation of lost future earnings will be dependent on my decision as it relates to lost earnings past. It is to this that I now therefore turn my attention. Mr. Campbell submitted that $3,860,500 should be the award. He arrived at this figure as his Statement of Claim shows by utilising $3500 as the Claimant's weekly income. In fact the Claimant's evidence was inconsistent. In chief she stated that she earned a total of $3500 (paragraph 1 of witness statement dated 6th June 2015) or $4000 (paragraph 8 witness statement

dated 26th April 2007). In cross examination she said she earned a total of $5000 weekly. Miss Middleton submitted that the minimum wage in 1993 was $300.00 and that I should adopt that as the assumed average income. A chart showing the national minimum wage in the period 1992 to present was handed to the court. There was no objection.

[27] The Claimant's evidence is unreliable. I have already adverted to her inaccuracy as it related to her position on the road at the time of the accident. Her inconsistency as it relates to her income in 1993 is similarly regrettable. I accept however that, as she said, she did domestic work, sold from a stall at a school and did shrimp vending in Middle Quarters. It is more probable than not that the income from these endeavours was modest and inconsistent. We were not however told the name of the person or persons who employed her as a domestic helper or the amount paid. There is no evidence from the school at which she allegedly had her stall. Neither does her witness, who also sold shrimp in Middle Quarters, speak to her own average earnings then or now. Given its paucity and general inconsistency, I agree with Defendant's counsel that, it would be unsafe to rely on the Claimant's evidence as to her income. She did have several economic ventures and it would, I think, be unfair to award her the bare minimum wage. Doing the best I can on the evidence provided I will utilise the weekly minimum wage as at 1993 and increase it by one half. I therefore assume an income of $450.00 per week in 1993. The Claimant's loss of income in the period 1993 to 2016 is therefore: 23 x 52 x $450.00 = $538,200.00.

[28] I can now return to consider lost future earnings. Miss Middleton suggested that I utilise the current minimum wage ($5600.00) when computing future lost income. I will adjust it in similar fashion, that is increase it by one half. The multiplicand is therefore $8400. The award is: 2 x 52 x $8400 = $873,600.00.

[29] The other items of special damages pleaded were for Travel costs to and from the doctor, cost of medical reports, physiotherapy treatment and cost of extra help. Mr. Campbell was allowed to amend the claim for cost of medical reports in

order to align it with the proved receipts. My award is $30,000.00 in that regard. Miss Middleton submitted, and I accept, that there was no documentary support for the physiotherapy and travel costs claimed. There was not even evidence in the witness statements quantifying the alleged or any expenditure. I therefore make no award. The claim to extra help was also bereft of supporting evidence. The Claimant was content to say that her mother "looked after her for a very long time." The medical reports are unhelpful when it comes to determining the date at which she became ambulatory or the period for which assistance, and the extent of assistance, might be required. That there was a period in which personal assistance was needed cannot be doubted. I agree with Miss Middleton's submission that 2 years extra help at the minimum wage of $500 (1994-1996) is reasonable. The award is therefore 2 x 52 x 500 = $52,000.00.

[30] Miss Middleton submitted, relying on a decision of F. Williams J (as he then was) in ***Dion Moss v Supt. Reginald Grant et al [2013] JMSC Civil 177 (unreported judgment delivered 19 November 2013 in Suit CLM524 of 1995),*** that interest should not be awarded for the entire period since the accident. It was not, submitted Miss Middleton, the fault of the Defendants that there had been a 20-year delay between the date the claim was filed and the trial. The matter had been ready for trial since 2007 and no adjournment had been occasioned by the Defendants. The Defendants, she submitted, ought not to be punished by having to pay interest on the award.

[31] Mr. Campbell for his part, submitted that an award of interest was not a penalty. It was compensation for the Claimant being kept out of her money. It is an attempt to establish equity. The Defendants had a right to make a payment into court instead of which they had kept the money the entire time. Mr. Campbell stated, "Today's value is the same purchasing power as it was then." He asked for 6% until 2006 and 3% thereafter as per the established practice and the law.

[32] I agree with Justice Frank Williams' pronouncement made with reference to section 3 of the Law Reform Miscellaneous Provisions Act that,

> *"72. This section makes it abundantly clear that the question of whether there should be an award of interest at all; and, if so, the appropriate rate, the part of the damages to which it may be applied and the period are matters entirely within the discretion of the court. It appears to the court that the reasons put forward for the exercise of the court's discretion not to award interest for the entire period constitute quite a sound basis for the exercise of the court's discretion in the way requested. If interest should be awarded for the entire period, then that would mean that the plaintiff would in effect be allowed to benefit from, and the defendants would be saddled with, the making of added payments for periods of delay over which they had no control, to which they did not contribute and for which delay no blame can fairly be laid at their feet. That would not be just. Making an award for nine years seems to the court to strike a fair balance, having regard to the history of the matter."*

[33] The learned judge was not, in that case, considering damages for pain suffering and loss of amenities. The claim and award were made in United States currency. It must therefore be borne in mind that the values remained more or less constant from date of loss to date of award and payment. In the case, I have to consider the items of special damages invite an award in Jamaican dollars. Judicial note can be taken of the depreciation in value since 1993. The personal injury aspect of the award, although also in Jamaican dollars, is given at present day values. That is, an attempt is made by way of comparative Consumer Price Indices to adjust the amount of the award to take into account the purchasing power of the dollars as at the trial date. The distinction is I think important.

[34] In this matter, the long delay between the accident and the trial has not been occasioned by the fault of the Defendants. The Claimant was entitled to compensation when the incident occurred. In a sense, my decision means that the Defendant was liable at all times. I agree however that it would be unfair to

cause the Defendants to pay an award adjusted for inflation, as well as interest on that award, for the entire period. This is because the delay has been unreasonable and unusual. I therefore decide that interest on the award for Pain Suffering and Loss of Amenities will run for 10 years. The award of interest on Special Damages will run for the entire period. It is I think unfair for the Claimant to bear the loss (due to depreciation) for being kept out of her money, in circumstances where, as the court has found, the Defendant was entirely to blame for her loss.

[35] In the final analysis there is Judgment for the Claimant against the 1st and 2nd Defendants as follows:

General Damages:

Pain Suffering & Loss of Amenities	$7,500,000.00
Loss of future earnings	$873,600.00

Special Damages:

Extra Help	$52,000.00
Loss of earnings past	$538,200.00
Cost of Medical Reports	$30,000.00
	$8,993,800.00

Interest will run on general damages, except loss of future earnings, from the 2nd day of December, 1994 to the 2nd December 2004 at a rate of 6% per annum. Interest will run on special damages from the 16th day of November, 1993 at a rate of 6% to the year 2006 and from January 2007 at a rate of 3% to the date of Judgment.

Costs to the Claimant to be Taxed or Agreed.

David Batts
Puisne Judge