[2016] **JMSC Civ. 28**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 06399

BETWEEN	**MATTHEW WALLACE**	**CLAIMANT**
AND	**MARK ANTHONY KETTLE**	**DEFENDANT**

Mr. John Clarke and Ms. Kimberly Facey, instructed by Bignall Law, Attorneys-at-Law for the Claimant

Ms. Arlene Williams and Mr. Monroe Wisdom instructed by Nunes, Scholefield Deleon & Co. Attorneys-at-law for the Defendant

Heard: 8th, 9th, 10th February and 2nd March 2016.

Negligence - Motor vehicle collision - Claimant switching lanes when unsafe to do so - Defendant failing to brake - Contributory negligence - Assessment of damages - General damages for whiplash injury

K. LAING, J

[1] On the 15 September 2008 at approximately 6.10 a.m. there was a collision along Hope Road in the parish of St. Andrew, between a 1998 Honda Civic motor car ("the Honda") which was being driven by the Claimant and a 1996 Toyota Levin ("the Toyota") which was being driven by the Defendant.

[2] The Claimant claims against the Defendant for damages for negligence and the Defendant in turn has counter-claimed for damages he asserted he suffered as a result of the negligence of the Claimant.

Summary of the law related to negligence

[3] It is settled law that in every claim for negligence, in order to succeed, the Claimant must prove on a balance of probabilities:

(i) the existence of a duty of Care, owed to the Claimant by the Defendant,

(ii) a breach of that duty, and

(iii) damage resulting from that breach

[4] It is similarly settled law that all users of the road owe a duty of care to other road users (see **Esso Standard Oil SA Ltd & Another v. Ivan Tulloch** (1991) 28 JLR page 557.)

[5] The driver of a motor vehicle must exercise reasonable care to avoid causing injury to persons or damage to property. 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).

[6] Section 51(2) of The Road Traffic Act ("the RTA") also imposes a duty on motorist to take such action as may be necessary to avoid an accident.

[7] There was no dispute between the parties as to these principles.

The Claimant's Case

[8] The Claimant asserted that he was travelling in the direction of Half Way Tree at a speed of approximately 45 kilometres per hour along Hope Road which is a dual carriageway separated by a concrete median. There are 2 lanes heading in the direction of Half Way Tree and he was travelling in the right lane. There was a white motor car bearing red registration plates signifying that it was a taxi cab (the Taxi"), which started "drifting" from the left to the right lane in which the

Claimant was travelling, so he said he sounded his horn and the Taxi became properly re-aligned in the left lane.

[9] The Claimant said he was overtaking the Taxi when he heard a loud sound similar to a motor car "gearing down" (engaging a lower driving gear). He checked his central and left rear view mirrors and felt an impact to the rear of the Honda, which pushed it forward. This caused him to lose control of the Honda and it started to spin. The rear of the Honda then hit into a wall at the left of the roadway and the car rolled back across the roadway, eventually stopping on the concrete median located at the edge of the right lane in which he had initially been travelling.

[10] The Claimant's evidence is that he emerged from his vehicle and saw the Defendant's Toyota which was stationary on the sidewalk along the left lane. He said to the Defendant "*Big man you mash up mi car*" and the Defendant kept repeating the words, "*Jah know, Jah know star*".

The Defendants Case

[11] The Defendant asserted that he was travelling at a speed of approximately 50-60 kilometres per hour ("KPH") along Hope Road in the left lane heading towards Half Way Tree and he stopped at the traffic light located at the intersection of Hope Road and Liguanea Avenue. He was then at the front of the line of traffic in the left lane and at the front of the line of traffic in the right lane was a Toyota Prado sport utility vehicle ("the Prado"). There is also a turning lane at this intersection for vehicles turning right onto Liguanea Avenue and another further down the road at Richings Avenue but these traffic features played no part in the accident.

[12] The Defendant said that when he reached the vicinity of the entrance to Campion College, that is, Hopefield Avenue which is on the left, he was still in the left lane when he saw the Honda travelling in the right lane behind the Prado. The distance between the Honda and the Prado became reduced to a distance of

less than one car length and he saw the Honda which was now right behind the Prado "veering" left and coming over into the left lane in which he was travelling. The Defendant says he sounded his horn but the Honda continued to come over into the left lane. The Defendant's evidence is that he caused the Toyota to swerve further left, but the left rear side panel section and left rear fender of the Toyota collided with the right front door and fender of the Toyota, pushing the Toyota into the left sidewalk where it came to a stop.

[13] The Defendant asserted that he asked the Claimant if he was "ok" but had no further conversation with him. In response to suggestions by Counsel for the Claimant he denied that the Claimant accused him of mashing up his car and denied responding by saying "*Jah know star*" or any similar words.

Analysis of the evidence

[14] Each party has asserted that he was travelling in his "correct" lane when the accident occurred. If that were true then the accident could not have happened as it did. It is therefore patently clear that the version of one party is not accurate.

[15] The Claimant's evidence by way of his witness statement was not very detailed. His evidence contained therein referred to the Taxi but does not mention that the Prado was driving in front of the Honda. It does not speak to whether he saw anything in his rear view mirrors when he checked them. The account in his witness statement of the circumstances which may have led or contributed to the accident was woefully deficient in details. In summary, it was simply that the Defendant crashed into the rear of his vehicle while he was travelling in the right lane.

[16] The witness statement of the Defendant in contrast was very detailed and offered a clear description as to the relative positions of the various vehicles that were travelling on the roadway at the relevant time. A clear account was given of the interaction between the various vehicles and their respective drivers and an explanation proffered as to exactly how the accident occurred. Evidence was

given from his perspective an observations as to exactly what caused the accident, which was that it was the result of an improperly timed and poor attempt at switching of lanes by the Claimant.

[17] In amplification of his witness statement and in cross examination a clearer picture emerged as to the Claimant's version of the events. In amplification the Claimant was very clear that the first time he saw the Toyota was after the impact. He admitted that he saw the Prado and was travelling behind it in the right lane from Matildas Corner, that is, before the intersection of Liguanea Avenue and Hope Road. The Claimant was adamant that there was the Taxi which he first saw when it drove from the bus stop across from the Sovereign shopping Center and that the Taxi was travelling in the left lane.

[18] In cross examination the Claimant said the traffic was light. In fact, he said he only recalled seeing the Prado which was travelling about 3 to 4 car lengths in front of his Toyota in the right lane and the Taxi. He said he did not stop behind the Prado at the intersection of Hope Road and Liguanea Avenue and that the Prado and the Toyota were driving continuously from the Matildas corner/Old Hope Road intersection. After Richings Avenue the Prado was still about 3 to 4 car lengths ahead of his Honda. The Claimant said he could not say which lane was travelling faster but that "momentum" carried him past the Taxi, and he emphasised that "momentum can do that".

[19] The Claimant said that after he passed the Taxi he glanced and the Taxi was about 1/2 of a car length behind him but in the left lane. That was the last time he saw the Taxi before the accident. The Claimant insisted that he was only travelling at a speed of about 45 KPH, but said that after the impact the Toyota came to a stop about 40 to 50 metres from the point of impact.

[20] In re-examination the Claimant explained that he was confident that the was travelling at 45 KPH because he was maintaining his speed from Sovereign and that he had looked at his speedometer before the stoplight at Liguanea Avenue.

The evidence of the Claimant was that the Taxi was travelling in front of him but in the left lane while he was in the right lane. If the Taxi did not reduce its speed then the Toyota must have increased its speed to have been able to overtake it. The Defendant travelling behind both the Taxi and the Toyota would have been in a position to observe that the Toyota was travelling faster than the Taxi and had in fact passed the Taxi.

[21] In light of the evidence of the Claimant that he checked his rear view mirrors when he heard the car "gearing down" behind him and in the absence of any evidence as to what he saw on so checking, at the end of the Claimant's case I asked him what did he see when he checked his mirrors at that time. He responded by saying that he "vaguely" saw the Toyota and that it was right behind him. In response to his Counsel when permission was granted to Counsel to ask questions arising from the Claimants answer to the Court's question, the Claimant explained that he when he said "vaguely" he meant he saw the colour of the Defendant's Toyota because the first time he really saw the Toyota was after he exited the Honda.

[22] This evidence of the Claimant that the Defendant was behind him in the right lane is not the only such evidence coming from the Claimant. In cross examination he said he knew in which lane the Defendant was travelling because he heard the sound of the Claimant's car directly behind him.

[23] On the Claimant's case the only reasonable conclusion to be drawn is that the Toyota must have been immediately behind the Honda in the right lane at the time of the collision. The evidence of the Claimant is that he had just passed the Taxi and was about a half of a car length in front of it when he heard the Toyota behind him gearing down. If the Claimant had only just passed the Taxi then there would have been no space in the left lane at that time to be occupied by the Toyota and which would have placed the Toyota in a position in which it was capable of colliding with the Honda. If the Taxi was occupying the position which

the Claimant says it was then the only way in which the Toyota could only have collided with the Honda was if it was directly behind it in the right lane.

The Physical evidence

[24] The Physical evidence in this case is very important in assessing exactly how the collision occurred because of the diametrically opposed versions of the events presented by each party and because I have found the evidence of both parties to be unreliable in certain areas.

[25] The evidence of the Claimant is that the impact of the Toyota was to a portion of the left section of the bumper and the rear left quarter panel of the Honda. He said that the damage did not extend beyond the left rear wheel. He explained that he "suspected" that the most of the damage to the Honda on its left side was as a result of the impact of the Honda with the wall which was also on the left side of the road.

[26] The evidence of the Defendant as contained in his witness statement is that the impact with the Honda caused damage to the right front fender of the Toyota in the region of the right front tyre and the driver's door. In cross examination he maintained this assertion and rejected the suggestion that the point of damage to the Toyota started at the right indicator. His evidence was that there was also damage to the left control arm, rack end and rim but that this was as a result of the Toyota being pushed to the sidewalk.

[27] There is therefore not much difference in the evidence of the parties as to where the damage was sustained on the respective vehicles as a result of the impact between them. This is very important in the context of this case given the importance placed by the Court on the physical evidence. The main difference is that the Claimant asserted that the damage to the Toyota began at the indicator which was forward of the point asserted by the Defendant. I do not accept that anything would turn on whether it started at the indicator or not, since each would be equally consistent with my finding as to the sequence of events which led to

the collision. In any event, I do accept the Defendant's evidence as to the areas of damage to the Toyota arising directly from the impact between the vehicles.

[28] If the Toyota collided with the Honda from behind while both vehicles were in the right lane, if is difficult to see how the impact would have caused the damage to those areas of both vehicles disclosed in the evidence and which I accept (right front fender and left rear quarter panel). If the Toyota was behind the Honda in the same lane and collided with it, one would reasonably expect that the areas damaged on impact as a direct result of that interaction would be more centrally located on both vehicles, that is to say, the damage would be concentrated in the area of the middle portion of the rear bumper of the Honda and the front grille/bonnet area of the Toyota.

[29] If the collision occurred as the Claimant described it, is also less likely that the Honda would have gone into a spin. I find that the Honda reacting as it did on impact is much more consistent with the version of events as described by the Defendant and the rotational forces which would arise from the "momentum", of the right front section of the Toyota moving forward in the left lane, colliding with the left rear portion of the Honda while the Honda was moving from the right to the left lane.

[30] I also agree with the submission of Counsel for the Defendant that if the Honda had been struck by the Toyota when the Honda was about a half a car length in front of the Taxi as the Claimant asserted, it is wholly improbable that the taxi would have avoided a collision with the Honda and/or the Toyota, especially bearing in mind the fact that the Honda went into a spin and struck the wall on the left side of the road. I therefore accept the evidence of the Defendant that there was no Taxi in the left lane at the time of the accident.

[31] On the issue of the lane in which the various vehicles were travelling I accept the evidence of the Defendant which was cogent and on which he was unshaken in cross examination. His evidence is supported by the physical evidence accepted

by the Court as to the location of the damage on both vehicles, such physical evidence being sufficient without more to convince me that at the time of the collision the Toyota was travelling in the in the left lane and the Honda in the Right lane. I also find that the Honda travelled across the white line into the left lane in which the Defendant was driving his Toyota. I do not find there to be any significance in the fact that the Defendant may have described this improper lane transgression as a “drifting”, a “veering” or alternatively as a “driving” into the left lane. The Honda was under the control of the Claimant and he was responsible for the lane departure whatever the description accorded to it. I do however find that the departure was not sudden and I will subsequently address the implication of this.

Was the Claimant travelling at an excessive e speed in the circumstances?

[32] The Claimant explained that he was confident that the was travelling at 45 KPH which is below what has been agreed to be the proper speed limit in that area which is 50 KPH. The Claimant’s evidence is that after the impact the Honda spun, hit the wall on the left side of the road and came to rest 40 to 50 metres from the point of impact. This suggests that the Claimant was travelling at a speed greater than 45 KPH (although the Claimant said he did not think that he applied his brakes after the impact and this would affect the stopping distance). I arrive at this conclusion even after accepting the Defendant’s evidence that the Toyota was travelling at a speed of between 50 to 60 KPH. However being unable to make a reasonably accurate assessment as to the speed at which the Claimant was travelling, there is no basis for a finding as to whether the speed of the Claimant was a causative factor in the accident. As a consequence I will not draw any adverse inferences, save to say that I do not accept that the Claimant was credible on this point.

Was the Defendant travelling at an excessive speed in the circumstances?

[33] The evidence of the Defendant is that at 50 metres before the point of impact he was travelling at a speed of between 50 to 60 KPH. He admitted that the speed limit in that area is 50 KPH. In paragraph 6 of his witness statement the Defendant stated:

> *"...as the distance between my car and the Prado was reduced, I noticed that the Honda Civic which was now behind the Prado in the right lane was veering left and was coming into my left lane."*

In cross examination he said this "reduced distance" between the Toyota and the Prado was half of a car length. He said that when he was half of a car length behind the Prado he was travelling at a speed of between 50-60 KPH but he began to slow because there is a curve there.

[34] The Defendant had stated that he was very familiar with that stretch of Hope Road, and in answer to a question from the Court, declared that the area where the accident occurred is "not generally straight". This was in contrast to the evidence of the Claimant. The Defendant also said that the curve would affect the visibility of the driver of a vehicle travelling in the left lane.

[35] Counsel for the Claimant, not surprisingly, latched on to the evidence of a curve being of significance. Counsel even managed to get the Defendant to accept that a vehicle travelling in the left lane in that area had a "special duty of care" and it was suggested to the Defendant that he was travelling at an excessive speed in all the circumstances, including the presence of curve and the obstruction to visibility posed by it.

[36] Counsel for the parties and the Court were agreed that a visit to the *locus in quo* would be beneficial to the Court in resolving, *inter alia*, this issue which had arisen as to whether the road in the area of the accident was generally straight or not. A visit to the *locus in quo* had been suggested by counsel for the Defendant earlier in the trial, but the Court had then agreed with Counsel for the Claimant that there would not be much value in such a visit given the issues to be

resolved. The Court reconsidered its earlier decision and the parties visited the relevant portion of Hope Road.

[37] The approximate point of impact was agreed between the Claimant and the Defendant and was pointed out to be a spot in an imaginary straight line extending from the middle of Walford Close which intersects Hope Road on the left. Naturally, there was a difference between the parties as to whether along that imaginary line, the point of impact was in the left or right lane.

[38] What was clear from the visit to the *locus in quo* is that from the point of impact one has a clear unobstructed line of sight, past the intersection of Richings Avenue to the corner which would be after Hopefield Avenue (if one is coming from the Matidas Corner end). This distance was estimated by the Court and Counsel to be approximately two hundred and fifty (250) metres. There is no corner which would obstruct the vision of a driver in the left lane. Two Hundred and fifty (250) meters would also be the distance from which a driver travelling in the left lane one travelling from Matildas Corner would have been able to view the eventual point of impact (that is, looking in the opposite direction). The Defendant was therefore proved to be unreliable on this point.

[39] I find that travelling at between 50-60 KPH at approximately 6:20 am along the section of Hope Road beyond the intersection of Richings Avenue where the accident occurred was not in and of itself, evidence of negligence in all the circumstances, considering the relatively light traffic at that time of the morning and the distance which the Defendant would have had a clear line of sight ahead of him, looking down Hope Road. I am also influenced in this conclusion by my finding that there was no Taxi and the Defendant's Toyota was the only vehicle travelling in the left lane for a reasonable period before the accident.

Did the Defendant fail to slow sufficiently?

[40] The Court having found that the Defendant was travelling in the left lane, raises the issue as to whether the Defendant was negligent in failing to slow the Toyota

on seeing the Honda moving into the left lane. The evidence of the Claimant is that he heard the sound of the Defendant's vehicle "gearing down" which suggests that the Defendant might have changed to a lower gear or gears in order to use that retarding force to slow the Toyota. This is an act which would be familiar to experienced drivers and especially drivers of vehicles equipped with a manual transmission. The Defendant in cross examination did not accept the Claimant's Counsel's suggestion that one way of bringing the vehicle to a quick stop is to use the gears, but in response to the Court agreed that "gearing down" or changing to a lower gear is one method of slowing a vehicle.

[41] In cross examination the Defendant said he did not recall gearing down but that he might have. If the evidence of the Claimant is accepted that he heard the defendant gearing down, then the fact that he had sufficient time to "gear down" or change gears but nevertheless did not manage to stop or sufficiently slow the Toyota in order to avoid the collision is evidence which, if accepted, is suggestive of negligence on the part of the Defendant.

[42] The Defendant made a number of admissions in cross examination that he did not brake on seeing the Honda begining to move to the left and infringe on his lane. At one point he said he did not brake or slow because he was not going fast. However, later in cross examination the specific particulars of negligence were being put to him and it was suggested to him that he failed to apply his brake so as to prevent the collision from occurring. He did not accept that suggestion. Instead he asserted, for the first time during the trial, that he did apply his brakes. The Defendant insisted that he had said earlier that on the Honda veering towards his lane he blew his horn and when he saw that the Honda was not stopping he applied his brakes to avoid the accident. His witness statement was presented to him and he conceded that he had not stated that in his witness statement.

[43] Whether the Defendant applied his brakes in circumstances such as those surrounding the accident would be such an important fact and I would expect that

the Defendant would have recalled this and would have included it in his witness statement if he did do so. This is particularly so in the context of what I have found was a very detailed witness statement. That omission, combined with the Defendant's admission, more than once, in the early stages of his cross examination, that he did not apply his brakes, has led me to find on a balance of probabilities that he did not apply his brakes on seeing the Honda moving into the left lane.

[44] Driving a motor vehicle in the left lane as the Defendant was doing invariably involves an element of trust in the driver in the right lane, that he will maintain his course and that you will be able to pass that vehicle safely in the left lane if you are travelling at a greater speed. Once the driver in the right lane starts to move to the left lane in circumstances where it is not clearly safe to do so, then that trust must immediately evaporate.

[45] In **Berrill v Road Haulage Executive** [1952] 2 Lloyds Rep 490 Slade J expressed the duty of care which would be appropriate in these circumstances as follows:

> *"Paraphrasing the words of Lord Uthwatt in London Passenger Transport Board v Upson [1949] AC 155, a driver is not bound to foresee every extremity of folly which occurs on the road. Equally he is certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of a road user teaches that people do, albeit negligently."*

[46] I accept the evidence of the Defendant that he did sound his horn. There were 2 likely possibilities on this happening. The first, was that the Claimant might have been alerted and would return fully to the right lane thereby allowing the Defendant safe passage and thus avoiding the collision. The second possibility which I find was reasonably foreseeable, was that the Claimant would have continued to move to the left, in which case a collision was almost unavoidable if

the Defendant continued unchecked on his path and did not manage to slow or stop.

[47] I find that it was negligent for the Defendant to have assumed the first possibility and to have not applied his brakes. As a reasonably prudent driver he ought to have anticipated the second possibility and should have applied his brakes to reduce or avoid the possibility of a collision if the Claimant continued the leftward movement of the Honda into the left lane, (as I have found that the Claimant did).

[48] In the case of **Pamela Thompson and others v Devon Barrows and others** Claim No. C.L. 2001/T143 delivered 22 December 2006, my learned brother Campbell J, in examining the duty of a driver to avoid an accident made the following observation with which I wholly agree and adopt:

> *"Section 23 of the Road Traffic Act places a duty on each driver to take steps to avoid an accident. I find that neither driver was exhibiting the necessary care and skill in light of all the circumstances. Mr Campbell submitted the driver who is on his correct side should not be saddled with additional responsibility. I understand that to mean that a driver who is operating correctly if confronted with a collision which he can avoid has no responsibility to do so. I find that repugnant to the spirit and intendment of section 23 of the Road Traffic Act."*

[49] I find that the Defendant, although he was operating correctly by proceeding in the left lane in which he had been safely travelling, was negligent in not braking especially in light of the fact that the evidence suggests that he had sufficient time and distance within which to do so from the point at which he first saw the Honda moving to the left. Unfortunately, the evidence as to exactly how far from the Honda the Toyota was when the Defendant first saw it moving to the left is not very helpful. This is because much of the cross examination utilised the supposedly vision-impairing corner as a reference point and as was confirmed there is no such corner immediately before the point of impact.

[50] The evidence relating to the collision occurring within 10 seconds of the Honda first being seen by the Defendant is somewhat helpful. The Defendant in cross examination said that he sounded his horn about a second after he saw the

Honda veering but it continued coming over to his side. He said he then swerved between 5 to 6 seconds after sounding his horn. Although the accuracy of the Defendant's opinion as to time was not demonstrated or proved, what his estimate does is to lead the Court to infer, that the events did not unfold suddenly without the Defendant having ample time to react, but rather, that the Defendant did have sufficient time within which to apply his brakes. I find that he instead made a conscious decision not to do so in those circumstances and accordingly I find that he breached the duty of care owed to the Claimant and was negligent.

Contributory Negligence

[51] There is no suggestion that the Court is not entitled to make a finding of contributory negligence on the Claimant's part pursuant to the provisions of the **Law Reform (Contributory Negligence) Act**. It is also accepted by Counsel for the parties that if the Defendant's negligence or breach of duty is established as causing the damage, the onus is on the Defendant to prove that the Claimant's contributory negligence was substantial or material on a balance of probabilities (per Lord Wright in **Caswell v Powell Duffryn Associated Collieries Ltd. [1940] A.C. 152 at page 172**).

[52] In the case of **Pratt v Bloom** 1958 Times 21 October, Div Court found at page 85 in **Bingham and Berryman's Personal Injury and Motor Claims Cases** 10th edition it was held that the duty of a driver changing direction is (1) to signal and (2) to see that no one is incommoded by his change of direction the duty being greater if he first gives a wrong signal and then changes it. There is no evidence that the Claimant signalled his change of lanes but the evidence is clear that the Defendant was incommoded.

[53] Having regard to the Court's findings as detailed earlier in this judgment as to how the accident occurred, I find that the Claimant caused the Honda to move to the left and thereby caused a portion of the Honda to go into the left lane in which the Defendant was travelling. I find that he did not make proper checks of his

surroundings and by looking in his rear view mirrors before doing so or he would have seen the Toyota in the left lane. The Claimant in moving into the left lane at the time he did so, failed to take proper care in the circumstances for his own safety and contributed to the accident and damage.

[54] Central to my decision in assessing the level of contributory negligence is the fact that this was not a "dilemma case" in which the Claimant's change of direction was so sudden that the Defendant had to act instinctively for his own preservation. The Defendant had sufficient time to react by applying his brakes but failed to do so. Although the Claimant was the driver of the vehicle changing directions, I see no basis for a finding that he had a greater duty of care on the facts as found by the Court. In looking at all the circumstances in the round, I accordingly assess the Claimant's contributory negligence at 50%.

General Damages

[55] The Claimant relied on the medical reports of Dr. George Lawson, General Practitioner, dated 6 October 2009 and Dr. Randolph Cheeks, consultant Neurosurgeon dated 15 February 2011. His first visit to Dr. Lawson was on 17 September 2008 which was 2 days post accident. He was then was diagnosed as suffering from whiplash injury (grade 2) to rule out bony injury; Lumbo-sacral strain with lower back pain, abrasions to chest, right shoulder and left forearm, as well as soft tissue injury to the right shoulder. Dr. Lawson's report indicates that on a follow up visit on 23 September 2008 the Claimant reported improvement in his neck pains, shoulder and knee pains but the back pains were only marginally better.

[56] On 15 February 2011 which was 2 years and 5 months post accident, the Claimant visited Dr Cheeks whose report indicates that the cervical whiplash type injury and the acute lumbar injury were resolved. The report also states that the Claimant had advised Dr. Cheeks that the neck and back pains prevented him from working for 3 months.

[57] Counsel for the Defendant submitted that based on Dr Lawson's report the period of pain and suffering of the Defendant would extend approximately 8 weeks from 17 September 2008 to 20 November 2008 which was the last date he was seen by Dr Lawson as recorded in the report. Counsel further submitted that the Claimant's evidence that he was unable to return to work for approximately one year and that he continues to experience pain as a result of the injuries he sustained ought not to be accepted in light of the medical evidence.

[58] As it relates to the treatment for physiotherapy Counsel submitted that this evidence ought to be rejected since the Claimant's evidence on this was very vague. Although he said he received 4 o r 5 sessions of treatment his recollection was limited to the general location of the treatments (somewhere in New Kingston), the sex of the physiotherapist (female) and the cost of transportation.

[59] I agree with the submission of Counsel for the Defendant that the medical evidence and in particular the evidence of Dr Lawson who first treated the Claimant does not support his assertion that he could not work for one year and I reject his evidence on this point. I also reject his evidence that he was suffering from any pains to his knee, Dr Lawson's report not disclosing that as having formed a part of the complaints when first seen on 17 September 2008. Similarly, I do not accept his evidence of treatment by a physiotherapist given his lack of specificity in his oral evidence and under cross examination, especially in the absence of any supporting receipts, report or any confirmatory documentation.

[60] Counsel for the Defendant submitted 4 cases for the Court's consideration in assessing pain and suffering. At the upper limit was the case of **Avril Johnson v Lionel Ricketts et al Iris Smith v Arnett McPherson and Anor.** reported at **Khan** Vol.5 page 48 whether the claimant suffered a whiplash injury causing back pains but also suffered an injury to her eye, laceration to the shin and a bruised right hip. Her impairment was not assessed but the doctor was of the opinion that she was likely to suffer intermittent back pain for several years

causing her partial disability. In February 1998 she was awarded $235,000.00 which equates to $1,184,400.00. At the lower limit was the case of **Peter Marshal v Carlton Cole et al** reported in **Khan** Vol. 6 at page 109. The Claimant in that case suffered moderate whiplash and moderate lower back pain with spasm and a sprain to the left wrist and hand accompanied by pain and swelling. These pains resolved within 4 months with no disability and the Court awarded $350,000.00 in October 2006 for pain and suffering which updated equates to $814,450.00.

[61] Counsel for the Defendant submitted that the injuries suffered by the Claimant in this case are not as serious as those suffered by the claimant in **Avril Johnson** and having regard to the cases relied on, an award in the sum of between $800,000.00- $850,000.00 for pain and suffering and loss of amenities would be a reasonable award.

[62] Counsel for the Claimant has sought to rely on three main cases in respect of the quantum of damages for pain and suffering and loss of amenities. The first is **Wilford Williams v Nedzin Gill and Anor** Suit No. C.L 1999 W 169 cited at **Khan** Vol. 5 page 148 in which the Claimant was awarded $350,000.00 in November 2000 for a whiplash injury. This figure when updated using the December 2015 CPI of 232.3 equates to $1,446,708.18.

[63] The second case is **Dalton Barrett v Poncianna Brown and Another** – Claim No. HCV 01358 cited at **Khan** Vol. 6 page 104, in which the Claimant was diagnosed as suffering from lower back pains and a mild cervical strain as well as pain to his left shoulder and left wrist. He received an award of $750,000.00 in November 2006 which when updated using the December 2015 CPI equates to $1,749,246.99.

[64] The third case is **Kavin Pryce v Raphael Binns & Michael Jackson** 2013 HCV 00732 in which the Court in May 2015 awarded $1,500,000.00 to the Claimant

who had suffered a cervical strain, lower back strain soft tissue injury to the left thigh and left knee sprain. This figure when updated equates to $1,554,192.69.

[65] It is settled law that in these courts, compensation for pain and suffering and loss of amenities is achieved by an award of a sum of money calculated on the basis of established principles and the use of comparable cases as a guide. This principle was approved in the case of **Beverly Dryden v Winston Layne** SCCA 44/87 delivered 12 June 1989 where Campbell JA stated as follow:

> *"Personal injury awards should be reasonable and assessed with moderation and that as far as possible comparable injuries should be compensated by comparable awards"*

[66] The current trend of awards for whiplash injuries in recent decisions of this Court suggests a range of between $900,000.00 (See unreported decision in **2012 HCV 02211 Amanda Braham v Donaldson**) to $1,000,000.00 (see **2011 HCV 03997 Green v Harris Myrie**), for a mild to moderate whiplash injury which is resolved within a period of about 3 to 4 months. Whiplash injuries are usually accompanied by the other minor injuries such as abrasions, contusions and pain of varying duration to other areas of the body, especially where the whiplash or soft tissue injury is as a result of a motor vehicle accident. As a consequence there are many combinations of injuries which have manifested themselves in the various claimants appearing in these courts. This in part accounts for the variance in awards between the cases submitted on behalf of the Claimant and those advanced on behalf of the Defendant.

[67] Having considered all the cases to which I have been referred by both counsel and taking into account the recent awards made by this Court in particular during the last year for soft tissue/mild whiplash injuries, I am of the view that the sum of $1,000,000.00 would be an appropriate award for the Claimant's general damages for pain and suffering and loss of amenities.

[68] As it relates to special damages, I note Counsel for the Claimant's reliance on **Carlton Greer v Alston's Engineering Sales and Service Ltd Privy Council**

Appeal No. 61 of 2003 from the Court of Appeal of Trinidad and Tobago, in support of the submission that although special damages are to strictly proven in the absence of such evidence in certain circumstances it is open to the Court to consider an award of nominal damages. In this case there is no evidence of the Claimant's need for or reliance on extra help and no damages will be awarded under this particular head.

[69] In assessing the Claimant's loss of income, I am also guided by cases such as **Desmond Walters v Carlene Mitchell (1992) 29 JLR 173** and **Central Soya Jamaica Limited v Junior Freeman (1985) 22 JLR** where in the latter, Rowe, P opined at page 158 as follows:

> *"In casual work cases it is always difficult for the legal advisors to obtain and present an exact figure for loss of earnings and although the loss falls to be to be dealt with under special damages the court has to use its own experience in these matters to arrive at what is proved on the evidence."*

[70] The Claimant is not a casual worker but he has explained that he did not issue receipts to his private clients and I accept this. Notwithstanding the lack of supporting evidence in the form of receipts, I accept the Claimant's evidence as to his monthly income given the informal nature of the arrangements he has with his clients, the fact that payments were in cash and no receipts utilised. I accept that he earned an average $24,000.00 per week and I will allow loss of earnings for three months in the sum of $288,000.00.

[71] The Claimant has not produced any documentary evidence to support the excess being claimed.

[72] I will also allow the claim for loss of use for 18 days at $2,500.00 per day totalling $45,000.00, as a reasonable sum in all the circumstances, the Honda having been found by the assessor to be a total loss. The cost of the assessor's report at $5,500.00 and cost of the police report at $1,000.00 are also allowed although no receipt has been provided. As it relates to the transportation expenses I will award what I consider to be a reasonable sum of $10,000.00 having regard to

the award for loss of use and the Claimant's evidence of the trips he made as well as the Court's finding that the visits to the physiotherapist were not proved on a balance of probabilities.

[73] The claim in the amount of $34,400.00 for the medical report and visits to Dr. George Lawson, $42,000.00 for the medical report and visits to Dr. Cheeks and $3,800.00 for Kingston Radiology and Imaging Services Limited were agreed by the parties and accordingly allowed.

[74] The total award for Special damages is therefore $504,200.00

The Counterclaim

[75] Considering the Court's findings as to how the accident occurred, the Court awards judgment to the Defendant on the Counterclaim. However I find that the Defendant in failing to apply his brakes on seeing the leftward movement of the Honda failed to take proper care in the circumstances for his own safety. Having examined all the facts in the round I assess the contributory negligence of the Defendant at 50%. I find the special damages on the counterclaim proved in the amount of $42,500.00 but the sum to be paid by the Claimant is to be adjusted accordingly.

For the reasons herein the Court makes the following orders:

(1) **JUDGMENT** is given for the Claimant on the claim:

(i) **SPECIAL DAMAGES** are awarded in the sum of $504,200.00 but having regard to the Court's finding of contributory negligence the Defendant is to pay the sum of $252,100.00 with interest awarded at 3% per annum from 15 September 2008 to the date of this judgment.

(ii) **GENERAL DAMAGES** are awarded in the sum of $1,000,000.00 but having regard to the Court's finding of contributory negligence the

Defendant is to pay the sum of $500,000.00 with Interest at 3% per annum from 20th September 2010.

(2) Half costs of the claim awarded to the Claimant to be taxed if not agreed.

(3) **JUDGMENT** to the Defendant on the counterclaim with special damages awarded in the sum of $42,500.00 but having regard to the Court's finding of contributory negligence the Claimant is to pay the sum of $21,250.00 with interest at 3% per annum from 15 September 2008 to the date of this judgment.

(4) No order as to costs on the counterclaim.