[2018] JMSC Civ 167

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV 03747

BETWEEN	**KEVIN BROOKS**	**CLAIMANT**
AND	**CHRISTOPHER EDWARDS**	**DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 05486 OF

BETWEEN	**DAHLIA BYFIELD**	**CLAIMANT**
AND	**CHRISTOPHER EDWARDS**	**DEFENDANT**

IN OPEN COURT

Mr. Richard Reitzin instructed by Messrs. Reitzin and Hernandez for the Claimants.

Mr. Kuamu Gordon instructed by Samuda and Johnson for the Defendant.

Negligence - Motor vehicle collision - Personal injuries - Damages to motor vehicle - whether the defendant is liable - Whether the claimants are contributory negligent. Assessment of Damages - Special damages - Whether loss of earning - Loss of future earnings should be strictly proven - Loss of earning capacity - Whether multiplicand/multiplier approach is appropriate - Pain and suffering and loss of amenities.

HEARD: 7th November, 2018 and 20th December, 2018

THOMAS, J.

INTRODUCTION

[1] These claims are brought in negligence in relation to a motor vehicle accident which occurred on the 6th of November 2010 along constant Spring Road. The claimant Kevin Brooks was the driver of a motor cycle while the Claimant Dahlia Byfield was his pillion passenger. The defendant Christopher Edwards was the driver of a Toyota Corolla Motor Car Registered 2970FT. Two separate Claims were filed. However, by order of the Honourable Mrs. Justice Bertram Linton on the 24th of October 2016 it was ordered that the claims be tried together. Both claimants allege that they sustained injuries and incurred damages as a result of this motor vehicle accident. Additionally, they both allege that the accident occurred as a result of the defendant's negligence.

THE CASE FOR The Claimant Kevin Brooks Claim No. 2012 HCV 03747

The Particulars of Claim

[2] The Claimant Kevin Brooks in his particulars of Claim alleges that:

That he was riding his motor cycle in a northerly direction at approximately 8 p.m. along Constant Spring Road on the 6th November, 2010 with Dahlia Byfield as his pillion passenger. Near the intersection of Constant Spring and Hillman Road, the defendant Christopher Edwards who was driving in a southerly direction along Constant Spring Road brought his motor car to a halt behind a Toyota Coaster bus which had on its hazard light. After a short period of time the defendant drove round the bus on the wrong side of the road directly in the path of his motor cycle. He had no time or

space to avoid the collision. The collision was caused by the negligence of the defendant in about his care management and or control of the motor vehicle.

Particulars of Negligence

[3] He particularized the defendant's negligence as follows:

(i) Failing to keep proper look out.

(ii) Failing to wait behind a stationary bus until the roadway ahead was clear.

(iii) Attempting to go around a stationary bus whilst unaware of whether or not there was oncoming traffic.

(iv) Overtaking the bus without having a clear view of the road head.

(v) Failing to take into account adequately or at all the likelihood of oncoming traffic.

(vi) Driving on the incorrect side of the road.

(vii) Driving directly into the path of the oncoming motorcycle. (viii) Failing to drive so as to allow the motor cycle time and space to avoid a collision.

(ix) Failing by steering or the application of the brakes or other wise to stop, slow down, or in any other manner avoid the said accident.

Claim Nos. 2012 HCV 05486 The Case for The Claimant Dahlia Byfield

Particulars of Claim

[4] In her particulars of claim Ms. Byfield alleges that:

On the 6th November, 2010 about 8pm she was a pillion rider on a motor cycle driven by Mr. Kevin Books. The defendant Mr. Christopher Edwards was driving in a southerly direction along Constant Spring Road. Near the intersection with Charlton Road the defendant drove around a stationary bus. In doing so he went onto the wrong side of the road where he collided head on with the motorcycle which had been heading north along Constant Spring Road. The accident was caused by the negligence of the defendant in and about his care, management and or control of the motor vehicle.

Particulars of Negligence

[5] Ms. Byfield particulars of the defendant's negligence are as follows:

(i) Failing to keep proper look out.

(ii) Attempting to go around a stationary bus whilst unaware of whether or not there was oncoming traffic

(iii) Failing to take into account adequately or at all the likelihood of oncoming traffic

(iv) Driving on the incorrect side of the road, directly into the path of oncoming traffic.

(v) Failing to wait behind the bus until the roadway ahead was clear.

(vi) Driving at a speed that was excessive in the circumstances.

(vii) Failing by steering or the application of brakes or otherwise to stop, slow down or in any other manner avoid the said accident.

DEFENCE

[6] The Defendant in his defence filed one defence on the 15th August, 2013. He pleaded the following:

> On the 6th November, 2010 he was driving his motor vehicle registered 2970 PT along Constant Spring Road in the direction of Cross Road around 7pm. He admits that he was involved in a collision with a motorcyclist proceeding in the direction of Constant Spring. He admits that he came to a stop behind a bus from which passengers were disembarking at the material time. He further alleges that after looking past the stationary bus in the direction in which he was travelling he commenced passing the same as there was no motor vehicle travelling in the opposite direction in close proximity to the said motor bus. When he reached approximately half way past the stationary motor bus a motorcyclist proceeding in opposite direction commenced overtaking several motor vehicles and in the process rode in his path and attempted to ride between the stationary motor bus and the and his motor vehicle which resulted in the said collision. He denies all the allegations of negligence as stated in particulars of claim.

[7] He further asserts that Claimant Mr. Kevin Brooks was negligent in that he;

(i) Failed to keep proper look out.

(ii) Rode his motor cycle without due care and attention without having regard for other users of the said road.

(iii) Fail to maintain proper and effective control over the said motor cycle.

(iv) Rode the motor cycle at too fast a rate of speed in the circumstances.

(v) Overtook or attempted to overtake a line of traffic while proceeding in the opposite direction along the said road and collided in the defendant's motor vehicle which was proceeding along the said road.

(vi) Fail to stop, slow down or swerve or to take any or sufficient steps to avoid the collision with the defendant's said motor vehicle.

THE ISSUES

[8] The issues which arise for determination in these claims are the same as in any claim for negligence. These are:

(i) Did the defendant owe a duty of care to the claimants.

(ii) Did the defendant breach his duty of care to the claimants.

(iii) Was the collision caused by the defendant's breach of his duty of care.

(iv) Did the claimants suffer injuries and damages as result of the defendant's breach of his duty of care.

(v) Was the defendant solely responsible for the injuries to the claimants or did they fail to take reasonable steps to avoid or minimize injuries to themselves.

THE LAW

[9] In light of the fact that the principles of law affecting both claims are the same I will first discuss the general principles of law as it relates to both claims. I will then consider the different aspect of each claim separately as I apply these legal principles. The principles in relation to the law of negligence was laid down in the locus classicus of ***Donoghue v Stevenson*** [1932] UKHL 100. Lord Atkins in his judgment stated that:

> "*a reasonable care must be taken to avoid an act or omissions which a reasonable man can foresee may cause injury to a neighbour*".

He further stated that your neighbour is "anyone who is directly affected by your actions". This principle as it relates to the tort of negligence was also pronounced upon by Harris JA in the Court of Appeal of Jamaica in ***Glenford Anderson v. George Welch*** [2012] JMCA Civ.43. At paragraph 26 of the judgment she stated:

> *"It is well established by authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty ....."*

[10] As was stated in ***Donoghue v Stevenson*** (supra), the care that is to be taken is based on the foreseeability test. That is the standard of the ordinary reasonable man placed in the same circumstances as the defendant. Therefore, in cases involving persons who are road users the standard of care that is expected is that of the ordinary and reasonable road user. In the case of ***Esso Standard Oil SA Ltd & Another v. Ivan Tulloch*** (1991) 28 JLR at page 557 the court stated that:

> "*all users of the road owe a duty of care to other road users"*

[11] Therefore, there are three things that the Claimants must prove. These are:

(i) The defendant owed a duty of care to the claimants.

(ii) The defendant breached that duty.

(iii) The breach of that duty caused damage to the claimants.

[12] While I am aware of the fact that a breach of a statutory duty does not always translate into negligence, the breach of such duty can be used as evidence to support a claim of negligence. Therefore I will highlight the relevant statutory provisions governing the use of the road among road users.

Section 32 (1) of **the Road Traffic *Act*** imposes a general duty on all motorist to drive with due care and attention for all other road users. It states:

> *"if any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence"*

[13] However, **section 51** imposes specific duties on motorists with respect to overtaking. ***Subsection 1(c***) states:

> "*a motor vehicle shall not be driven alongside of, or overlapping so as to overtake other traffic proceeding in the same direction If by so doing it obstructs any traffic proceeding in the opposite direction"*

Subsection 1(g) states that a motor vehicle:

> *"shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead;" "overtaking" includes passing or intending to pass any other vehicle proceeding in the same direction."*

Section 51 (3) states:

> *"For the purposes of this section-*
>
> *(u) a motor vehicle obstructs other traffic if it causes risk of accidents thereto;*
>
> *(h) "traffic" includes bicycles, tricycles, motor vehicles, tram-cars, vehicles of every description, processions, bodies of troops and all animals being ridden, driven or led;" (check again.)*

[14] However ***section 51(2)*** cautions every driver that they have a duty to take necessary action to avoid an accident. It states:

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

Preliminary Considerations in Relation to Both Claim

[15] There is no issue on the facts of both claims, that both claimants and the defendant were road users. Therefore in accordance with the aforementioned authorities there is no dispute on the facts of both cases that the defendant owed a duty of care to the claimants in both claims. In this trial of both of these claims the defendant has not given evidence, neither was his witness statement or witness summary put in evidence by either side. I don't have the benefit of observing his demeanour. Additionally, the credibility of his version as pleaded in his defence could not be tested on cross examination. Therefore, despite the failure of the defence to call any witnesses the claimants must establish a prima facie case. (See. ***Wisnieswki (A Minor) v Central Manchester Health Authority*** [1998] EWCA Civ 596), The claimants' versions were challenged by the defendant through his counsel on cross examination. Consequently, I still bear in mind that, the burden of proof on a balance of probability still remain that of claimants. (See. ***Oscar Clarke v. The Attorney General of Jamaica*** [2016] JMSC Civ 65.) Therefore I must assess their evidence with a view to determine whether the claimants' versions were so discredited on cross examination to the extent that that they have failed to establish on a balance of probability that the accident was a result of the defendant's failure to pay due care and attention to them as road users, so as to ascribe total or substantial liability to the defendant .Therefore my analysis of the evidence in both claims will be guided by these legal principles.

The Evidence

On Claim No. 2012 HCV 03747

Kevin Brooks v. Christopher Edwards

[16] The sequence of events in relation to the motor vehicle collision as stated by Mr. Brooks his evidence in chief is as follows:

On the 6th of November 2010 he was riding his motor cycle up Constant Spring Road, near the intersection of Constant Spring and Hillman Road with Ms. Dahlia Byfield as his pillion passenger. He was riding at approximately 45 kmph. A Toyota coaster bus stopped on the opposite side of the road some distance ahead. It had not pulled close to the curb but was three (3) to four (4) feet from the curb. The defendant Mr. Christopher Edwards was driving his motor car in the opposite direction. Initially the defendant stopped behind a sedan that stopped directly behind the coaster bus. The sedan began to drive round the coaster bus. Mr. Edwards began to drive around the sedan completely on the wrong side of the road and into path of his motor cycle. He applied his brakes but it was too late. The defendant's car collided with his motor cycle. He was thrown over the defendant's vehicle on the ground. His motor cycle dropped close to him. The rear tyre of his bike dug out his foot. The defendant's motor car ended up in the gutter on the wrong side of the road He was transported in the defendant's motor car to the hospital. On the journey to the hospital the defendant said he was late for work that's why he was in a hurry.

[17] On cross examination Mr. Brooks testified that:

He does not know whether his motor bike is a race or a sports bike. He agrees it is a sports bike. He agrees it is a fast bike. He was not in a long line of traffic on Constant Spring Road. The road was approximately forty (40) feet wide where the accident occurred. He was in the lane heading towards Manor Park. He was closer to the left in the left lane. There is a gutter along the side where the road ends. He was about four (4) feet from the end of the left lane, the gutter. Before the collision the way ahead was clear as far as he could see. When he first saw the defendant's motor vehicle, he was

driving at the same speed as when he first saw the coaster bus, about on cross 45-50 km. When he first saw the defendant's motor car it was approximately thirty five (35) feet away from him. He agrees that the version in his particulars of claim is different from that in his evidence in chief. He agrees that he did not mention in his particulars of claim that the defendant drove around another car. The evidence in paragraph twelve (12) of his witness statement is the correct version. The first one in the particulars of claim is not true. When he signed the particulars of claim he did not know that the first statement was not true. The car was just pulling out. The version that is true is that the defendant stopped behind the car behind the coaster bus. The defendant was still thirty-five (35) feet away from him. The car that stopped behind the coaster bus was one quarter of (1/4) of thirty-five (35) feet from him. The car started to overtake the coaster bus. It never fully overtake the coaster bus. It was pulling out. It was moving but slightly. "Stop behind another motor vehicle" means slightly moving to him. When he first saw the defendant's motor vehicle it was stationary. His motor bike ended up between the defendant's motor car and the coaster bus when it was on the ground, not when it was riding. The bus drove off after. At no time did he drive between the coaster bus and the defendant's motor car. His bike came to rest in the middle of the road. When he saw the defendant's motor vehicle move off it was the same thirty five (35) feet away. He did not overtake a line of motor vehicles. He did not try to squeeze between the defendant's motor car and the coaster bus. He was not speeding at the time. He does not agree that the accident happened because he tried to squeeze between the coaster bus and the defendant's motor vehicle. When his bike came to rest it was in the middle of the road. He did not swerve at any time.

[18] On re-examination Mr. Brooks sates that when he signed the particulars of claim he did not intend to mislead the court.

Claim 2012 HCV 05486

Dahlia Byfield v. Christopher Edwards

The Evidence

[19] The claimant, Ms Byfield's evidence in chief is as follow:

On the sixth of November 2010 she was a pillion passenger on a motor cycle driven by Mr. Kevin Brooks going up Constant Spring Road above Mary Brown's Corner. One or two cars were ahead in their direction but a far distance ahead. There was a line of traffic coming down Constant Spring Road in the opposite direction. She saw a vehicle overtake and come way over to her side of the road. The vehicle over took a line of traffic going in the opposite direction. Just as they reached a point the vehicle came right at them and at hit them off the motor cycle. She does not remember going through the air. She only remembers being on the ground. Kevin Brooks' leg was turned out of the normal direction. Both she and Mr. Brooks were crying out in pain. She was able to help herself. She helped herself, got up, and hopped out of road to side walk. Her left knee was swollen with soft tissue fluid under it. Her right shoulder was hurting and her neck was burning. She received scrapes to her right elbow, forearm, wrist, inside and outside of her left foot, and left little toe. She and Mr. Brooks were driven to the hospital in the defendant's car. At the hospital she was still feeling pain in her elbow and knee but did not pay it any mind. For personal reasons she did not want to see the doctor. While at the hospital the

defendant told her that he was from Temple Hall. That he was on a rush going to work. That he was sorry for what happened, the accident.

[20] On cross examination Ms. Byfield's evidence is as follows:

She did not see Mr. Edwards overtake a stationary bus. She did not see him overtake a sedan. She did not see a stationary bus before the accident. She saw the defendant's motor vehicle before the accident. She saw it over taking a line of traffic. The defendant's motor vehicle was approximately twenty-five (25) feet away when she first saw it. She does not remember if there was a stationary bus. It is not true that the motor bike went between the defendant's motor vehicle and another motor vehicle. Mr. Brooks swerved before the collision to his left. His left foot was injured. His left foot hit on the defendant's motor car, on the left side of it

Did the Defendant Breach his Duty of Care to the Claimant Mr. Kevin Brooks.

Did the Claimant sustained injuries and suffered damage as a result?

Submissions

[21] Both counsel have made lengthy written submissions and have provided supporting authorities for which I am grateful. These have indeed provided useful assistance in my determination of the issues. However, in the interest of time and with due regard to the scholarly effort of both counsel I will not embark on verbatim re: statements of these submissions. I will summarize them as best a possible as they relate to the relevant issues which fall for the courts determination.

Submissions on behalf of the Defendant

[22] Mr. Gordon made the following submissions on behalf of the defendant:

(i) The claimants were completely discredited during cross examination. In the circumstances the Court cannot place any reliability on any of the versions of the collision given by the Claimants. (He places reliance on. The United Kingdom High Court judgment of ***Freemont (Denbigh) Ltd v Knight Frank I-LP [2014] EWHC 3347*** (***Ch)***).

(ii) Mr. Brooks' credibility suffered damage from the outset of his cross examination. When he was asked about the type of bike he was riding on the day in question there was an obvious reluctance on Mr. Brooks part to agree that he rode a bike that was capable of achieving high speeds.

(iii) Mr. Brooks' demeanour was poor and his credibility suffered irreparable damage when he was confronted about his different versions about how the collision occurred. Mr. Brooks accepted that the description in the particulars of claim was not true. This obviously shows that Mr. Brooks is prepared to communicate falsehoods to the Court. The two versions of the accident given by Mr. Brooks are fundamentally different from each other. In the version in the particulars of claim the defendant's vehicle overtook a stationary bus, whilst in the version in the witness statement the defendant's vehicle overtook another vehicle while this other vehicle was overtaking the stationary bus. The differences between the versions are striking and underscore Mr. Brooks' dishonesty. If the version given in the witness statement is true one must ask why didn't the particulars of claim contain this version since the version in the witness statement, emphasizes the claimant's egregious conduct of overtaking a vehicle while it was overtaking a stationary bus. If the accident did occur as described by the Claimant in his witness statement, then one would expect to see the particulars reflect that version. This level of

recklessness on the part of the Defendant would be a material feature of the case. It is quite unlikely that such a material feature, if it were true, would be excluded from the claimant's particulars. The particulars would have been prepared when the details of the accident would have been fresher in the mind of the claimant, than

the witness statement. The version given in the witness statement is a recent fabrication. The claimant appreciated that given the width of the material roadway (approximately 35 feet), and the speed he contends he was travelling (45 km per hour) and given the distance between him and the defendant's motor vehicle when it started its overtaking (35 feet away), it would be difficult to explain why there wasn't sufficient time and space to allow him to safely pass the defendant's motor vehicle while it was overtaking the bus. The claimant decided to insert an additional motor vehicle in his narrative and then have the defendant overtake this motor vehicle, while it was overtaking the bus

(iv) Miss Byfield's description of how Mr. Brooks received the injury to his leg also underscores another inconsistency between the evidence of both claimants. Mr. Brooks' witness statement strongly suggest that a head on collision occurred between Mr. Brooks' bike and the defendant's vehicle. In the medical report of Dr. Palmer of the 14th of June, 2013, he indicates that Mr. Brooks told him he was involved in a head-on collision. That could not be true in the light of how Mr. Brooks received the injury to his leg, according to Miss Byfield. According to Miss Byfield, the collision occurred when Mr. Brooks left leg struck the left side of the Defendant's motor vehicle. It appears that Mr. Brooks did in fact try to ride between the defendant's motor car and a stationary bus whilst the defendant was attempting to overtake the stationary bus.

(v) When all of the evidence is considered on a balance of probabilities it is more likely than not, that it was Mr. Brooks' reckless manoeuvring on the evening in question, which caused the collision. The evidence strongly suggests that it was Mr. Brooks who placed himself and Miss Byfield in danger. In the circumstances liability should not be attributed to the Defendant and an appropriate award ought to be

made in favour of the Defendant, with costs to be agreed or taxed if not agreed.

Submissions on behalf of the Claimant

[23] Mr. Reitzin made the following submissions on behalf of the claimant Mr. Brooks:

(i) There was no reluctance on the part of Mr. Brooks to answer the questions put to him.

(ii) The variance between Mr. Brooks evidence in his witness statement and particulars of claim should not be regarded as anything other than the result of an unfortunate omission. The versions are not diametrically opposed. They are not contradictory. Neither are they mutually exclusive. The version in the witness statement is fuller; it is more comprehensive. The question is did the defendant's vehicle overtake the stationary bus? The answer must be a resounding "Yes." The further information, not qualification, would be "……. while another vehicle was, itself, overtaking the stationary bus." Although Mr. Brooks said that the relevant passage in the particulars was "not true" the Court is asked to take a more sophisticated and nuanced view of the contents of the particulars of claim and the witness statement, and accept that the omission did not amount to any form of deliberate falsehood. ***Rule 8.9 (2)*** of the Civil Procedure Rules, 2002 requires the allegations in the particulars of claim to be a short as practicable.

(iii) Counsel for the defendant's submission to the effect that Mr. Brooks' witness statement on this point was a recent fabrication is made in clear breach of the rule in ***Browne v Dunn*** 1894 6 R. 67 in that that particular suggestion was never put to Mr. Brooks. If it had been, it

would have opened the door to Mr. Brooks to give evidence of prior consistent statements to rebut the suggestion. Counsel's submission that the alleged recent fabrication was essential to Mr. Brooks' narrative because given the width of the roadway (approx. 35 feet), his speed (45 kmph), and the distance at which the defendant's vehicle began overtaking (approx. 35 feet), "it would be difficult to explain why there wasn't sufficient time and space to allow him to safely pass the defendant's motor vehicle while it was overtaking the bus betrays a lack of mathematical precision. Even if the defendant's vehicle was barely moving, the time which Mr. Brooks had, in covering the 35 feet, was a second or less, given that he, Mr. Brooks, had applied his brakes on being confronted with the defendant's overtaking manoeuvre. This is consistent with Mr. Brooks' evidence, during his cross-examination that, he did not have time to swerve. It is also consistent with the evidence in witness statement that the defendant drove his vehicle completely onto the wrong side of the road and directly into the path of his motor cycle and that he applied his brakes but it was too late and the defendant's car collided with his motor cycle."

(iv) It is clear from his evidence given on cross-examination that, on balance, that Mr. Brooks had no real opportunity to avoid the collision, and could do nothing about it, other than to apply his brakes. It doesn't matter how much space he had, or did not have, for manoeuvering.

(v) Mr. Brooks did not merely see the defendant's vehicle overtake one vehicle. He saw it overtake two vehicles – the bus and the car. In the very short time that Miss Byfield had to observe the accident, it is natural that her observation, perception and recollection would be different from that of Mr. Brooks. Had their accounts been very closely similar or identical, that would have been indicative of collusion. Motor vehicle accidents are notoriously difficult to recount, especially where, as here, there was almost no time to make any observations and there was very great trauma following.

ANALYSIS

[24] I will commence by analysing Mr. Brooks demeanour and initial responses to questions on cross examination in relation to his motor bike**.** When asked if he was riding a Honda 600 RR? Mr. Brooks response was "Yes". When asked if it was a racing, sports bike wasn't it? His answer was I don't know" When asked if it has a 600 cc engine? his answer was "Yes" He also answered, "Yes" to whether it a sports bike? He also said, "Yes" to whether it was a fast bike. However, in light of the fact that no evidence has been presented that the bike is in fact a race bike, I do not find that his answers and demeanour from the commencement of the cross examination displayed a general lack of honesty. Therefore, I do not share the view of Mr. Gordon in relation to Mr. Brook's demeanour and his credibility. However I must state that I have noted and assessed certain apparent inconsistencies on the Claimant's Mr. Brooks case.

INCONSISTENCIES

[25] Mr. Brooks has admitted that the version in his particulars of claim differs from that in his evidence in chief. He agrees that he did not mention in his particulars of claim that the defendant drove around another car. He insists that the evidence in paragraph twelve (12) of his witness statement is the correct version. He also indicates that the first one in his particulars of claim is not true. The only explanation

he gave for this inconsistency is that when he signed the witness statement he did not know that the first statement is not true.

[26] However this court is well aware that the purpose of the pleadings is to outline in short form the claimant's case before the court. (See ***Rule 8.9 (2)*** *)*. The purpose of the witness statement is to expound in details what is alleged in the pleadings. Therefore details which are not necessarily found in the pleadings can be found in the witness statement. However if on the face of it the statement seems to introduce new facts for which no explanation is offered it becomes and remains a contradiction on the party's case. It may be a genuine oversight and omission. Perhaps it is a deliberate addition calculated to magnify liability on part of the defendant. However, the question to be resolved is whether the inconsistency is so material is nature that it destroys the root of the claimant's case. In order for me to resolve this issue I need to examine the gravamen of the Claimant's case.

[27] Mr. Brooks' case is that the collision occurred because the defendant was overtaking another motor vehicle and came on his side of the road. The bus is a common feature in both his particulars of claim and his statement. The difference is that the statement introduces the car. That is, that the defendant was over taking the car that was overtaking a bus. Therefore the only significant departure from the particulars of claim is the introduction of the car. The fact is, there is no denial on the defence as pleaded that the defendant was overtaking a bus. Therefore even if I were to find that the defendant was not overtaking a car, the fact is the defendant in his pleadings admitted that he was in the process of overtaking when the collision occurred. It is evident that in spite of the apparent inconsistency Mr. Brooks' evidence has not departed from this significant fact. Consequently, despite the presence of the afore-mentioned inconsistency. I don't believe it changes the claimant's case in any material way. I find that the root of claimant's case remains intact.

[28] Counsel for the defendant has also invited me examine the contradiction between the evidence of the claimant Kevin Brooks and the evidence of the claimant Dahlia Byfield on Claim No.2012 HCV 05486. I approach this with caution bearing in mind that the matters were not consolidated but ordered tried together. Therefore I must examine and determine each claim on his own merit. As far as I am able to compare I will say that there appears to be some differences in the accounts as to how Mr. Brooks sustained the injuries to his leg. However, they are consistent in their accounts as to how the collision occurred. Both Mr. Brooks and Ms. Byfield testify on each of their case that Mr. Brooks did not ride between the coaster bus

and the defendant's motor vehicle. Both also testify that the defendant drove his motor car on their side of the road. However Ms. Byfield states that Mr. Brooks' left foot was injured when his left foot hit on the defendant's motor car, on the left side of it. Mr. Brooks states that he was thrown over the defendant's vehicle on the ground. His motor cycle dropped close to him. The rear tyre of his bike dug out his foot. Ms Byfield states that Mr. Brooks swerved left just before the collision while Mr. Brooks said he did not swerve he only applied his brake.

[29] It is my view that Mr. Brooks as the driver of the motor cycle is better able to say what he did with the motor cycle. Ms Byfield may very well have misinterpreted the driver's action based on the impact she felt. In this regard I find Mr. Brooks truthful. Additionally, it is equally my view that Mr. Brooks is placed in a better position to speak to what particular object his body came in contact with. Ms Byfield states in her evidence in chief that she does not recall being thrown in the air. She recalls being on the ground. No evidence was elicited from her as to exactly where on the ground she fell. That is whether it was on the same side that Mr. Brooks fell. However I am not convinced that she was able to see all the details of what was happening to Mr. Brooks while she was on the ground. In the circumstances her primary concern and focus would have been her own well-being, bearing in mind and said she also suffered injuries and was feeling pain. Therefore her focus on Mr. Brooks some point must have been distracted and geared towards herself. I

find that it is likely that she would have missed some of the details of what was happening to Mr. Brooks while focusing on her own experiences and the impact of the accident.

[30] Additionally, when I examine the evidence as it relates to the nature of Mr. Brooks injuries I do not believe they could have been sustained in the manner, indicated by Ms. Byfield, or suggested by the defence. The act of squeezing generally takes place where there is limited space between two objects. The act normally involves slow movement, trying to edge one's way through the small space. Therefore I draw the inference that the defence is suggesting that there was limited space between the coaster bus and the defendant's motor car. Inevitably they would

have to be intimating that Mr. Brooks slowed the speed of the motor cycle in order to squeeze through this space. In fact, when one examines the severity of the injuries to Mr. Brooks it is highly improbable that these injuries could have occurred while he was "squeezing, or attempting to squeeze between the coaster bus and the defendant's motor car.

[31] In moving slowly, that is squeezing through, with his left leg impacting the closed left door of the defendant's motor vehicle one would not expect to see the type of injuries, in particular the injury to Mr. Brook's left thigh as described by Doctor Palmer. In his medical report dated the 14th June, 2016 Doctor Palmer states, that on presentation there was a large wound over the left thigh with bone visible. This evidence was not challenged so I accept it as the truth. It is my view that an impact causing this type of injury would have to be of a greater force than colliding with defendant's motor car while squeezing through the coaster bus and the defendant's motor car. In fact, on the version as suggested by the defendant there is nothing to explain the causation of the large wound to the left thigh. It is general knowledge in this area of law and medicine that a wound is a laceration caused by a sharp instrument. There is nothing on the evidence to indicate that the door of the defendant's motor car was open. Therefore if Mr. Brooks left leg did come in contact with the closed door of the defendant's motor car it would have come in

contact with a smooth surface. This scenario is inconsistent with the resulting injury previously described. Therefore Mr. Brooks account as to how he sustained his injuries is more probable.

[32] However**,** the uncontroverted evidence is that the accident occurred when the defendant was in the process of overtaking a stationary coaster bus. I accept Mr. Brooks evidence which was not challenged on cross examination that the defendant's motor vehicle ended up on Mr. Brooks' left side of the road in the gutter. Additionally, I accept the evidence of Mr. Brooks, which was elicited on cross examination, there being no evidence to the contrary that the gutter was at the left edge on the road. Therefore in light of this evidence I find that the defendant's motor vehicle ended up on the extreme left lane of the road. That is his extreme right. Consequently, I accept the evidence of Mr. Brooks that in order to overtake the bus the defendant Mr. Edwards came over on his side of the road. That side would be the properly designated lane for motorist travelling in the opposite direction. Whereas it was suggested to Mr. Brooks that the collision occurred because he tried to squeeze between the coaster bus and the defendant's motor car, it was never suggested to him that the defendant's motor vehicle did not come over in his left lane. Therefore I take this part of his evidence as being unchallenged. Additionally, despite fact that it was suggested to Mr. Brooks that he tried to squeezed between the defendant's motor car and the coaster bus it was never suggested to Mr. Brooks, that he was ever on the wrong side of the road.

[33] It is settled law that "negligence in every case must be, "an inference from proved facts". (See ***Garfield Segree and Jamaica Wells and Services Ltd. v National Irrigation Commission Ltd*** [2017] JMCA Civ 25 paragraph 57) Therefore I believe I am entitled to draw the following inference. If Brooks was overtaking a motor vehicle at the time of the collision that motor vehicle would either be ahead of him, or at least to his left at the time of or immediately before the collision. There is no disagreement among the parties that his motor bike ended up between the

defendant's motor vehicle and the coaster bus. It therefore suggests to me that if there was such a motor vehicle being overtaken by Mr. Brooks it would have had to be to the defendant's immediate right, while the motor bike was between the coaster bus and the defendant's motor car.

[34] Therefore the fact that the defendant's motor car ended up on his extreme right, had there been the presence of another motor vehicle being overtaken by Mr Brooks I would expect some kind of impact or collision between the defendant's motor car and that motor vehicle. There is no evidence or suggestion that such an impact occurred. Therefore I reject the version that Brooks was overtaking a line of motor vehicle prior to, or at time of the collision. It is my view that the claimant Mr. Kevin Brooks would have had to be at the head of any other motor vehicle travelling in the left lane at the time of impact.

[35] Additionally, I find that the fact that Mr. Brooks' motor bike ended up between the coaster bus and the defendant's motor car in the middle of the road is no indication that he drove in the path of the defendant's motor car. The fact is, the defendant's motor vehicle, being a car, is, a lager motor vehicle than the claimant's bike. This larger motor vehicle ended up on the extreme left, that is the claimant's correct side of the road. There is no evidence to suggest that the defendant served to his right. It is unlikely that an impact with a smaller motor vehicle such as a motor bike could have pushed the defendant's motor car to his extreme right. There is no suggestion that the claimant's motor bike pushed the defendant's car to his extreme right. Consequently, the only inference I can draw is that the defendant deliberately drove his vehicle on his extreme right of the road into the path of the claimant's motor cycle. Evidently, it is more likely that on impact the defendant's motor vehicle had the capacity to throw the claimant's bike from its original position.

[36] It is Mr. Brooks' evidence that he was thrown over the defendant's vehicle on the ground. His motor bike was revving and the tyre dug out his foot. I accept his evidence that the collision caused him and his bike to be thrown over the

defendant's motor vehicle. I accept his evidence that he fell and his motor cycle dropped on the ground close to him. I accept his evidence that his motor cycle at that point was revving up and spinning around. I accept his evidence that the rear tyre dug out his thigh. I accept his evidence that as result of the collision his left leg was broken. I accept his evidence that he felt pain as a result of the injuries he sustained.

[37] It is the established law that in Jamaica that on a dual carriage lane, motorists are required to drive in the left lane. Those traffic, properly positioned in the left lane would have the primary right of way with regards to the use of that lane. Therefore Mr. Brooks would have the primary right of way with regards to the use of the left lane travelling on Constant Spring Road towards Manor Park at the time of the accident. Therefore once the defendant intended to venture in the lane, primarily designated for traffic going in the opposite direction, a duty is imposed on the defendant both by common law and statute to ensure that it was safe to do so.

[38] Having regard to what is stated in his defence, the inference I draw is that Mr. Edward's paramount concern was with motor vehicle travelling in close proximity to the bus. There is no evidence from which I can make a determination as to what he meant by close proximity. That is whether it is, vehicles in the immediate vicinity of the bus or a few feet away. However he had a duty to the claimants as well as other road users to avoid a collision. It was therefore his duty to ensure, not only that he could safely start but also complete his overtaking (that is the passing of the bus). Therefore, his concern should not have been limited to motor vehicles in close proximity but all other motor vehicle in opposite direction noting their distance and speed before venturing to overtake.

[39] In the case of the ***Wilsher v Essex Area Health*** **Authority**; [1988] A.C. 1074 (H.L.), at p.1090 it is stated that:

> *"The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. "*

[40] Therefore in relation to the issue of causation I find that if the defendant had not entered the lane designated for traffic coming in the opposite direction, that is the lane to his right, at a time when there was oncoming traffic the accident would not have occurred. Therefore, the blame and responsibility for the accident is that of the defendant. I find that the accident occurred as result of the defendant not ensuring that the way was clear before venturing into the right lane. His concern and attention should not have been limited to traffic in close proximity to the bus. He should have been paying attention to all motor vehicles approaching him from the opposite direction even if they were not at a close distance, paying attention to the speed they were travelling in order to ensure he could overtake safely.

FINDING ON LIABILITY

[41] On the issue of liability, having assessed the demeanour of the claimant Mr. Kevin Brooks and taking into consideration all the evidence, I find Mr. Brooks to be credible regarding the material aspects of his case. I find as a fact that the accident occurred while the defendant was in the process of overtaking a parked motor bus. I find that in the process of overtaking he drove his motor car on the wrong side of the road. I find that he overtook without paying due care and attention to other road users and without ensuring the way ahead was clear and sufficiently safe. I find that by his failure to discharge his duty he collided in the claimant's motor bike. I find that the claimant Mr. Brooks sustained injuries and suffered damage as a result. I find that the defendant Mr. Christopher Edwards is liable for damages in negligence for the injuries sustained and damages incurred by the claimant Mr. Kevin Brooks.

CONTRIBUTORY NEGLIGENCE

THE LAW

[42] Section 3(1) of the Law Reform (Contributory Negligence) Act (Jamaica.), reads:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damages….."

[43] ***Section 32 of the Road Traffic Ac***t imposes duty on every motorist to take action to avoid accidents. This is so even where the accident he or she is taking action to avoid is as result of another motorist breaching the Road traffic law. Breach of this provision does not automatically translate into negligence but such as breach can be used as evidence to establish contributory negligence.

[44] A claimant will be found guilty of contributory negligence if there is evidence that he did not act as a reasonable and prudent man in circumstances where he ought reasonable to have foreseen that if he did not act as a reasonable and prudent man, he might hurt himself, taking into account the possibility of others being careless. (See Denning, L.J. in: ***Jones v Livox Quarries Ltd***. - [1992] 2 Q.B. 608, at 615), Where the defendant raises contributory negligence the burden of proof on a balance of probability rests on him (see ***Caswell v Powell Duffryn Associated Collieries Ltd***. [1940] A.C. 1).

[45] Therefore in order to establish contributory negligence the defendant must prove on a balance of probability that the claimant is partially to be blamed for his own injuries. That is, that he failed to take actions that he could reasonably have taken, acting as a wise and prudent road user to avoid injury to himself. The failure of the defendant to give evidence at the trial does not automatically result in him failing on this issue. Where he participates in the trial through his attorney at law by cross examination of the claimants the court must examine the evidence to see whether there is admission on the part of the claimants either by direct evidence or inescapable inference of contributory negligence. Once the Claimant is found to be contributory negligent, the award in damages should be reduced based on his percentage of contribution as determined by the court.

SUBMISSIONS

By Mr. Gordon for the Defendant

[46] Mr. Gordon made the following submissions on this issue.

If the court accepts Mr. Brook's evidence that:

(i) the roadway was approximately 35 feet wide;

(ii) there were no vehicles on his side of the roadway;

(iii) immediately prior to the collision his bike was positioned approximately 4 feet from the edge of the road way to his left;

(iv) immediately prior to the collision he was travelling at approximately 45 km per hour; the Defendant's motor vehicle was stationary before it commenced overtaking; and

(vi) when he first saw the Defendant's motor vehicle overtaking it was approximately 35 feet away;

(a) Then, Mr. Brooks could have avoided the accident by either, swerving, slowing down or stopping.

(b) If the Defendant's vehicle when it commenced overtaking was as far away as 35 feet then Mr. Brooks could have swerved or safely pass the defendant's vehicle as the road was wide enough to allow for this.

(c) The fact that the Defendant's vehicle moved from a stationary position immediately prior to the collision means that it is very likely that it was travelling slowly prior to the collision. If the Court accepts that the defendant's motor vehicle was as far as 35 feet, and accepts Mr. Brooks speed of travel, then Mr. Brooks

was afforded sufficient time and opportunity to avoid the collision.

(d) Therefore, the fact that the collision occurred, is indicative of the failure on the part of Mr. Brooks to discharge his statutory duty to avoid the collision. An apportionment for contributory negligence ought to be made which reflects Mr. Brooks' contribution to the collision of at least 85% of the liability.

[47] Mr. Reitzin submits on behalf of the claimant, (based on his mathematical calculation, the speed Mr. Brooks was travelling and the distance between the motor vehicles) that:

> On the speed and distance upon which counsel for the defendant, himself, relies, and which he invites this Honourable Court to accept, Mr. Brooks had in the order of only one second to both think and to take action to avoid the collision. Accordingly, the assertions made by counsel for the defendant are utterly untenable"

ANALYSIS

[48] The fact that the burden of establishing contributory negligence rest on the defendant, I will examine the options that were available to the claimant as suggested by the defence. I will conduct this examination in light of the proven facts. I will commence with the positions of the motor vehicles prior to the collision. Mr. Brooks' motor bike was on his left side of the road 4 feet from a gutter that is at the edge of the road. The Toyota coaster bus was to the right of Mr. Brooks.

Mr Edward's vehicle was approaching Mr. Brooks in his left lane. It is in fact Mr. Brooks' evidence that he saw the defendant, Mr. Edward's motor vehicle overtaking from a distance of 35 feet. He also said that he did not swerve his motor cycle. I have accepted these assertions as evidence of fact. The issue for me to

determine at this juncture is whether by swerving his motor cycle as suggested by Mr. Gordon the claimant could have avoided the collision. However when one examines the evidence as it relates to the description of the locus and the position of the vehicles at the time of the accident, to swerve to the right would put Mr. Brooks in danger of colliding with the bus. In light of the fact that he was 4 feet from the gutter to swerve to the left could have caused him to, ended up in gutter, the very place where the defendant's motor vehicle came to rest. Essentially, the defendant's motor vehicle would still be in his path. Therefore, in my view there is no evidence to establish that by swerving to the right or to the left the claimant could have avoided a collision.

[49] Mr. Gordon suggested that Mr. Brooks could have stopped in order to avoid the collision. Mr. Brooks' evidence is that he applied his brake before the collision. I have accepted his evidence that he did. It is common knowledge that the purpose of brakes on any motor vehicle is to slow the speed or ultimately bring it to a stop. Therefore I infer that Mr. Brooks applied his brakes in an attempt to stop. There is no evidence that he did not apply his brakes the moment he saw the defendant's motor vehicle overtaking. In pronouncing upon this issue it is not only the speed of the claimant Mr. Brooks that is relevant but also that of the defendant Mr. Edwards. Whereas the evidence was elicited that Mr. Brooks was travelling at a moderate speed, the avoidance of the accident would also depend on whether or not the defendant was driving at a high speed while overtaking. No evidence of defendant's speed was elicited. Mr. Gordon has invited me to infer from the evidence that there was a distance of 35 feet between the claimant's and the defendant's motor vehicle when the defendant commence his overtaking, that the defendant was overtaking slowly. However, I take the view that such an inference without more would be unreasonable. Additionally, Mr. Brooks' evidence is that the coaster bus was three (3) to four (4) feet from the curb. There is no evidence as to the width of the coaster bus or the defendant's motor vehicle. There is no evidence as to what distance the in terms of width Mr. Edward's car was from the coaster while passing it. Consequently, there is no material before me on which I

can conclude that the road would have been wide enough for Mr. Edwards to pass safely even with Mr. Brooks stopping his motor cycle.

[50] It is my view that braking in an attempt to stop was the only prudent choice available to the claimant Mr. Book's in order to try to avoid the collision. He has established that despite taking this action he was unable to avoid the collision. I find that Mr. Brooks did all that he could do to avoid injury to himself. Therefore I find that the defendant Mr. Christopher Edwards is solely responsible for the collision and the resulting injuries and damages to the claimant, Mr. Kevin Brooks.

Claim No. 2012 HCV 05486; Determination on the question of Liability

Submissions

Mr. Gordon on behalf of the Defendant

[51] The following submissions were made by Mr. Gordon on behalf of the defendant:

(i) Miss Byfield has issues with credibility and as such the court cannot rely on her version as to how the accident occurred. Her account of the accident differs from that of Mr. Brooks. She doesn't recall seeing a stationary bus. When she first saw the defendant's motor vehicle it was overtaking a line of vehicles. This is in contradiction with Mr. Brooks' version. Mr. Brooks said that the defendant's motor vehicle was stationary when he first saw it, and irrespective of which of Mr. Brooks' version is considered, he only saw it overtake one vehicle.

(ii) Miss Byfield's evidence is that immediately prior to the collision Mr. Brooks had swerved to his left. However, Mr. Brooks said that he didn't swerve prior to the collision as he didn't have time to do that.

(iii) Miss Byfield indicated that Mr. Brooks received the injury to his left leg because his leg hit the left side of the defendant's vehicle. It is important to note that this could only occur if Mr. Brooks' bike was to the left of the defendant's motor vehicle. Mr. Brooks denied that he had ridden between the defendant's motor vehicle and the stationary bus. Miss Byfield said that Mr. Brooks did not ride between the defendant's vehicle and another vehicle. However Mr. Brooks could only have been injured in the manner expressed by Miss Byfield, if he had in fact ridden to the left of the defendant's vehicle, if the Court accepts that the defendant was in the process of overtaking another vehicle at the material time of the collision.

Mr. Reitzin, on behalf of The Claimant

[52] Mr. Reitzin submits on behalf of the claimant that:

(i) Mr. Brooks did not merely see the defendant's vehicle overtake one vehicle. He saw it overtake two vehicles, the bus and the car. In the very short time that Miss Byfield had to observe the accident, it is natural that her observation, perception and recollection would be different from that of Mr. Brooks. Had their accounts been very closely similar or identical, that would have been indicative of collusion. Motor vehicle accidents are notoriously difficult to recount, especially where, as here, there was almost no time to make any observations and there was very great trauma following.

(ii) Miss Byfield's perception of Mr. Brooks' swerve to the left is explained on the abovementioned basis. If the Court considers it necessary to find as a fact that Miss Byfield was correct in her observation that Mr. Brooks swerved to the left,

it would amount to evidence that he tried, at the very last moment, to avoid a collision. It is quite possible that what Miss Byfield perceived as a swerve to the left was in fact a slight initial steering to the left. The accident occurred very shortly indeed after the defendant's vehicle began to move. The defendant's motor vehicle ended up in the gutter on the wrong side of the road. Mr Brooks was not cross examined on this evidence at all. Accordingly, the defendant's vehicle must have been moving to its right across the balance of the sought-bound lane and all the way across the north-bound

lane. Therefore, the defendant's vehicle must have been at some (even relatively slight) angle (diagonally) across the road - thereby exposing (at least partially) the left side of his vehicle to the oncoming motorcycle.

(iii) There is no evidence before this Court that Mr. Brooks rode between the defendant's vehicle and another vehicle (whether car or bus). Mr. Brooks denied that he did so and was not moved on the point in cross-examination. Miss Byfield denied that he did so and was not moved on cross-examination. Mr. Brooks had virtually no time at all to ride or attempt to ride between any vehicles, as has been established The defendant's submission that Mr. Brooks could only have been injured in the manner expressed by Miss Byfield if he had in fact ridden to the left of the defendant's vehicle simply cannot be supported. Similarly, the submission that Mr. Brooks rode between the defendant's vehicle and another vehicle has no support in the evidence. Any such finding would be against the evidence and against the weight of the evidence. Given that Miss Byfield was the pillion passenger and that she did

> not see the whole of how the accident occurred and that there was virtually no time for her to observe anything, the evidence of the rider, himself, would be more reliable than that of Miss Byfield.

ANALYSIS

[53] I will first address some of the points raised by Mr. Gordon in his submissions. I do not share the view that it is an inescapable inference that Mr. Brooks could only have been injured in the manner expressed by Miss Byfield, if he had in fact ridden to the left of the defendant's vehicle and rode between the Defendant's motor vehicle and the coaster bus. It is common knowledge that in, many head on collisions people and vehicles are, involuntarily pushed and thrown in different and opposite directions. It was in fact indicated in Doctor Webb's report that Ms. Bayfield stated that the accident was a head on collision. There is no evidence that she has or is currently re-siling from that position. She rejected the suggestion that Mr. Brooks rode between the coaster bus and the defendant, Mr. Edwards' motor car. Miss Byfield did in fact indicate that Mr. Brooks received the injury to his left leg because his leg hit the left side of the defendant's motor vehicle. As I have already found on Mr. Brooks' case, based on the nature and gravity of his injuries, I do not believe they were caused by his leg hitting in the left door of the defendant's motor car. However in rejecting this aspect of Ms. Byfield's evidence, I am still obligated to examine her case in totality to decide whether or not her credibility has been completely eroded.

[54] Having assessed Ms. Byfield's demeanour and her evidence I do not believe that there was any deliberate intention on her part to lie. The plain fact is, different witnesses will have different recollection of an incident. One witness may pay keen attention to one set of details while another may not. Whereas it is expected that a driver, being the person manoeuvring the vehicle will keep his eyes on the road at all times, there is no such expectation in relation to a passenger. Therefore it is not unusual that a passenger will shift his or her attention not being able to recall

or pay careful attention to specific details. In the "agony of the moment" (see ***Sayers v. Harlow*** [1958]1W.L.R.623, applied in ***Neil Lewis V Astley Baker*** [2014] JMSC Civ. 623 which I apply in a slightly different context) it is possible that Ms. Byfield was not able to focus on all that was happening to Mr. Brooks while being concerned with herself and her own injuries. For this she cannot be faulted

[55] It is Ms. Byfield's evidence that she saw a vehicle overtake a line of vehicles come way over to their side of the road. She was not asked what she meant by a line of vehicles. That is how many motor vehicles were in the line. Different persons can ascribe different meanings to the same expression. There is no evidence before me that Ms. Byfield herself is or ever was a motorist. The meaning a motorist attaches to an expression with regards to use of the road does not always accord

with the meaning that a non-motorist may attach to the same expression. For example, a line of persons waiting to be attended to by a teller in a bank is still described by users of the service as a line though it may only contain two persons. While it is reasonable for me to conclude that by the use of the expression "a line" Ms. Byfield means more than one motor vehicle, it would not be safe for me to conclude that by a line the witness means more than two, that answer not being elicited from her. I have found on Mr. Brooks' case that the defendant overtook two motor vehicles. That is the sedan and the coaster. Therefore I find that there is no glaring inconsistency between this portion of Ms. Byfield's evidence and that of Mr.. Brooks on **Claim No. 2012 HCV03747**.

[56] Mr. Gordon also took issue with the fact that Ms. Byfield's evidence differs from that of Mr Brooks in that on cross examination she said Mr. Brooks swerved to the left just before the collision while Mr. Brooks' case is that he did not swerve at all. I find that as the driver of the motor vehicle Mr. Brooks is in a better position to say what he did. Additionally, I am acutely aware that without any intention to lie a passenger who feels the impact of an action by a driver of a motor vehicle, depending on where they are positioned, on or in that vehicle, may misinterpret the actions of the driver. However, I am not convinced that the rider, Mr. Brooks

swerved to the left. Therefore for the reason outlined this aspect of Ms. Byfield's evidence is rejected. This being the case, I must now determine on the evidence what is in fact material to her case. On her case the primary concern of this court is not with Mr. Brooks injuries but her injuries and how they were sustained. That is the issue I must resolve is that of causation. First and foremost, what caused the collision and consequently, what caused her injuries.

[57] Ms. Byfield insists that Mr. Brooks did not ride between the defendant's motor car and the coaster bus. There was no challenge to her evidence that the defendant's motor vehicle came all the way over on her side of the road. Regardless of the fact that it was put to her that Mr. Brooks rode between the defendant's motor car and the coaster bus, it was never suggested to her that the collision did not occur on her side of the road. Therefore the unchallenged and inescapable inference is that

the impact occurred on the motorcyclist's correct side of the road. That is that the Defendant drove on the incorrect side of the road. Therefore the notion that accident could only occur because the motor cyclist Mr. Brooks attempted to drive between the coaster and the defendant's motor car is not sustainable on the evidence. Even if I were to find that he did so, which I do not so find, he would still be on his correct side of the road. Therefore I would have to view his doing so as an attempt to avoid the accident that is a head on collision. This is in light of the fact that at the point of impact, the claimant's driver was on his correct side of the road.

[58] Additionally, it is the evidence of Ms. Byfield that while she was at the hospital the defendant spoke to her. She said he told her that he was on a rush going to work. She was not challenged on this bit of evidence. Therefore, I accept it as true. Consequently I find that in his rush the defendant did not wait until road was sufficiently clear to commence overtaking.

FINDING ON LIABILITY

[59] Despite the fact that the evidence of Ms. Byfield differs in some aspect from the account given by the claimant Mr Brooks in **Claim No. 2012 HCV 037447**, having assessed her demeanour and all the evidence I find her to be truthful in the material aspects of her case. I accept her evidence that she was pillion rider on a motor cycle driven by Mr. Brooks. As a pillion rider she was a road user to whom the defendant as a motorist owed a duty of care. I accept her evidence that in the process of overtaking other motor vehicles the defendant drove his motor car all the way over on the side of the road on which she was travelling. I accept her evidence that the defendant's motor vehicle came all the way over to the motor cyclist side and hit them. I accept her evidence that she sustained injuries as a result of the collision. I find that when the collision occurred the motor cyclist was on his correct side of the road. I find that the cause of the collision was because the defendant overtook motor vehicles proceeding in same direction without ensure it was safe to do so. I find that on a balance of probability, the defendant is

liable in negligence to pay damages to the claimant Ms Byfield for injuries she sustained and expenses she incurred as a result of the collision.

CONTRIBUTORY NEGLIGENCE

[60] Ms Byfield stated that Mr. Brooks swerved to the left just before the collision. I found that she may have misinterpreted the action, of braking as swerving due to the effect she may have felt as the pillion rider. On her case I find that the relevant issue is that the driver of the motor vehicle on which she was travelling did take action to avoid the collision but without success. Based on the evidence there is nothing she herself could have done to avoid the accident. Therefore I find that on balance on probability there is no evidence whether direct or by inference vesting contributory negligence in the claimant Ms. Byfield or her driver Mr. Brooks. Therefore Mr. Edwards is solely liable in damages to Ms. Byfield arising from the collision.

Assessment of Damages

Claim No. 2012 HCV 03747, Kevin Brooks v Christopher Edwards

Special Damages

[61] Special Damages as proven by documentary evidence are as follows:

(i)	Medical Report Expenses	$ 27,800.00
(ii)	Hospital Expenses	$ 214,942.00
(iii)	x-Rays	$ 2,950.00
(iv)	Pharmaceutical Expenses	$ 15,436.30
(v)	Physiotherapy Expenses	$ 12,000.00
(vi)	General Expenses	$ 4,500.00
(vii)	Lab expenses	$ 2,000.00
	Total	$297,628.30

Loss of Earnings/Loss of Future Earnings

[62] Mr. Brooks also claims Loss of Earnings and Loss of Future Earnings.

The Evidence

[63] Mr. Brooks has given the following evidence with regards to his educational background:

> He was educated at Porus Basic School, Porus Primary School, Porus Comprehensive and Porus High School. He obtained 2 SSC subjects, that is Maths and English. He has no other formal education.

[64] In relation to his profession and employment he states the following:

> At the time of the accident he was a plumber. He was working as a plumber at three (3) different construction sites. As a result of his

injuries he lost two (2) of those contracts. He only kept one of those contracts because the head contractor was a friend. When he went back to work he only had one construction site to look after.

[65] He further states that:

> The first contract was for apartments at Stilwell Road for the laying of PVC pipes for water supply and drainage. The contract price was for $30,000 per unit. He was doing six units. He was only supplying labour to that job. He had two (2) labourers earning $2000 per day plus one plumber earning $4,000 per day plus himself. He worked three (3) days per week on average. He was spending $24,000 per week on average. He earned $66, 000 from that job alone. No records were kept at all. With this kind of work no documents are brought into existence and no records are kept.

[66] The second job was at the corner of Liguanea and Paddington Terrace. He was installing plumbing fixtures, including toilets, face basin, kitchen zinc, wash tub, bath and shower enclosure, water heaters, water pumps and tanks. That job was for $65,000 per unit. He only supplied labour. He had two (2) labourers earning $2,000 per day and one plumber earning $4,000 per day. He worked on that job as well. He did about two (2) units per fortnight. He worked on average two (2) days per week. His expenses went up to $16,00 per week netting, $49,000 per week. Because of the accident he lost those contract, losing $115,00 per week. He was not able to resume work until two (2) years later.

[67] He also indicates that:

> When he went back to work he only he had one construction site to look after. That contact was for $700,00. He was earning $35,000 per week. His loss dropped from $115,000 per week to $85,000 per week. Prior to that he earned $45,000 to $200,000 per week. He was always working, fifty-two (52) weeks per year, seven (7) days

per week, even Christmas, New Year's Day and public holidays. As a result of his injuries, he cannot stoop down to ground level. He cannot carry things like toilet and basin and baths and pipes and tools. He does not have the range of motion that he had prior to the accident. Even after all his medical treatments, he is less and less able to move his body. He continues to have pain. Due to his current disability he now earns 75% of what he was earning prior to the accident. He now earns on average $90,000 per week.

[68] In his response to cross examination questions by Mr. Gordon, Mr. Brooks indicates

that:

He was working on two (2) apartment complex at the time. The one at Liguanea was being built by North American Holdings. They closed about two (2) to three (3) years ago. He has not gone to them in order to show to the court what his income was. It is the same scenario with Still Well. They have no records. He did not check if they had records. He did not go to them and ask them for records. He did not go to them for any evidence of his salary

[69] On re-examination, Mr. Brooks states that:

He did not go to North American Holdings because it did not occur to him that he could go back to them. They normally pay him by cash, that is bank notes.

SUBMISSIONS

Mr. Gordon on behalf of the Defendant

[70] Mr Gordon's submissions on behalf of the Defendant are as follows:

(i) Mr. Brooks' claim for loss of earnings should be rejected for several reasons. The amount is inflated. Mr. Brooks contends that even though he

was a plumber of the age of 29 years old, in the year 2010, he was earning $286,000 net per week, an approximate disposable annual income of almost $15 million. This is absurd. This amount is shocking for the year 2018 much less eight years ago when $15 million would have had a greater value than it does now. It is unclear whether the claimant himself was earning this amount, or whether he earned this amount in conjunction with others. His evidence failed to clarify this.

(ii) Mr. Brooks has produced not even one shred of documentary evidence substantiating this exorbitant income, even though he could have obtained same from his former employers. The Claimant has not discharged the evidential burden to prove that he is, or was, at the material time a plumber. Mr. Brooks has already shown that he is not a truthful person. The evidence about his earnings should be rejected as being untruthful.

(iii) The claim for loss of earning capacity should also be rejected in the light of Mr. Brooks' failure to provide the court with any credible evidence of his occupation and earnings. None of the doctors who saw Mr. Brooks have said that he would be unable to perform work as a plumber. In those circumstances, there is no basis for this claim. **Mr. Reitzin on behalf of the Claimant**

[71] Mr. Reitzen submits that:

(i) Mr. Brooks should receive an award of $7,830,000 for loss of earning up to the date of assessment. On the basis of the multipler/ multiplicand approach and using a multiplier of 11.5 Mr. Brooks should receive an award of $17,940.00 for loss of earning capacity.

(iii) The submission made by counsel for the defendant that Mr. Brooks contended that he was earning $286,000.00 per week net appears to be a most unfortunate misinterpretation or misrepresentation of the evidence. Mr. Brooks' witness statement says nothing of the sort

and he gave no evidence to that effect. His statement makes it clear that prior to the accident, from one job Mr. Brooks was earning $66,000.00 net per week while from the other job he was earning $49,000.00 net per week – a total of $115,000.00 net per week. In his witness statement, Mr. Brooks stated that prior to the accident, he was able to earn $45,000.00 to $200,000.00 per week. He said on average he earned $120,000.00 per week.

(iii) Counsel for the defendant did not cross-examine Mr. Brooks on the quantum of his earnings. The evidence was crystal clear. Mr. Brooks' witness statement make it abundantly clear that he worked with labourers whom he paid. Furthermore, the figures as to how much he paid the labourers and how much he retained for himself are clearly set out.

(iv) Mr. Brooks could not have obtained documentary evidence from his former employers. He was not an employee; he was a clearly a submission-contractor. There is not a scintilla of evidence before the court that any such documents existed. Mr. Brooks said in his witness statement "With this kind of work, no documents are ever brought into existence and no records are ever kept." It was never suggested to Mr. Brooks that any such documents existed.

(v) As to the submission that Mr. Brooks did not discharge the evidential burden to prove that he was a plumber, counsel for the defendant never put to Mr. Brooks that he was not a plumber. (Quoting from the case of Dalton ***Wilson v Raymond Reid SCCA No. 14/2005***):

> "*There was not even a hint of a suggestion that he was not speaking the truth in this regard. Generally, where the court is to be asked to be disbelieve a witness, the witness should be crossexamined in that regard. Failure to cross-examine the witness on some material part of his evidence or at all may be*

treated as acceptance of the truth of that part or the whole of his evidence"

(vi) In response to counsel's submissions that none of the doctors have said that Mr. Brooks would be unable to perform the work of a plumber, Mr. Reitzin submits that:

(a) Dr. Wayne Palmer, Consultant Orthopaedic Surgeon said that Mr. Brooks' prognosis at 25 February, 2013 was –

(i) unlikely to fully recover function of the left knee;

(ii) likely to develop post osteo-traumatic osteoarthritis (cartilage loss to the knee);

(iii) likely to have chronic pains; and

(iv) will be unable to do activities requiring deep knee bending.

(vii) In Mr. Brooks' witness statement he said that he cannot manage the long hours and the physical nature of the work; that he cannot stoop down, he cannot get down to ground level and he cannot carry things like toilets and basins and baths and pipes and tools. Counsel for the defendant failed to put a single question to Mr. Brooks on these averments on cross-examination. Accordingly, counsel for the defendant is precluded from making this kind of submission to the court.

Analysis

Loss of Earning /Loss of Future Earning

[72] In the case of **Fairley v. John Thompson Ltd**. [1973] 2 Lloyd's Report 40, Lord Denning explains that:

> "It *is important to realize the difference between an award for loss of future earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earning is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.*"

[73] Premised on the above mentioned authority, loss of earnings and loss of future earnings must be treated as special damages. Therefore, Loss of earning must be specifically proven unless there are special circumstances presented on the evidence that will allow the court to deviate from this general principle

[74] Therefore in order for me to determine both the actual loss of earnings, and loss of future earnings of Mr. Brooks, he must furnish the court with evidence as to his earnings up until the time when it was reduced or completely lost as result of his injuries arising from the collision. That is, he must provide this court with reliable evidence of his income prior to the accident, and if he is presently employed evidence of his current income. Insufficient evidence on his part will negatively impact his ability to recover damages under this head.

[75] In relation to loss of future earnings or loss of earning capacity the multiplier /multiplicand approach is only useful where the court has reliable evidence of the claimant's income as previously outlined. This information is of vital importance, due to the fact that in order to determine the multiplicand the court must first arrive at a decision as to what the pattern of earning of the claimant would most likely have had, had it not been for the injuries arising from the negligent act of the defendant. Essentially the multiplicand is really a reflexion of the claimant's annual loss of earnings. (see ***Leesmith v Evans*** – [2008] EWHC 134).

[76] The burden of proof rest on the claimant to establish to the satisfaction of this court on a balance of probability that prior to the accident he was in fact earning an income. He must produce evidence of the quantum of that income. Further, he must demonstrate that as a result of the collision and injuries sustained either that, that income has been reduced and the amount by which it has been reduced or

that he has ceased to earn an income. Therefore he must provide satisfactory evidence to the court of his actual loss of income. In essence it is the evidence of the actual loss that is used to determine the loss of future earnings

[77] I will now proceed to examine the evidence of Mr. Brooks in order to determine whether or not he has successfully discharged this obligation. Mr. Brooks indicates in in evidence that prior to the time of the accident, his profession was a plumber. He has also indicated that currently he is still working in his chosen field as a plumber. He further indicates that before the accident he was earning an average income, of $120,000 per week. His current earning on average is $90,000 per week. He also states that he kept no records of his earnings.

[78] While I agree with Mr. Reitzin that Mr. Brooks was not cross examined about his profession as a plumber, I do not agree with Mr. Reitzin that he was not cross examined on the quantum of his earnings. On cross examination by Mr. Gordon he stated that he was working on two (2) apartment complexes at the time. One at Liguanea, which was being built by North American Holdings. He said that they closed about two (2) to three (3) years ago. In his response he states that he has

not gone to them in order to show what his income is. He also stated that it is the same scenario in relation to Still Well. “They have no records.” However having said they have no records he said further that; he did not check whether or not they had records; he did not go to them and ask them for records nor for any evidence of salary. On re-examination by his own attorney-at-law he states that he did not go to North American Holdings because it did not occur to him that he could go back to them. They normally pay him by cash.

[79] Therefore I find that Mr. Brooks has produced no evidence that these companies for whom he alleges that he worked had no records of him performing work for them as an independent contractor. On the contrary, the fact that they did not fall within the informal sector of the society but were in fact companies, I would expect them to maintain records in order to comply with their obligations under the

Companies Act to file annual returns. Additionally, there is no evidence from Mr. Brooks that he could not have been furnished with documentary evidence from these companies. His evidence is that the companies closed two to three years ago. However his Claim form and Particulars of Claim were filed on the 4th July 2012. In the Particulars of Claim that he signed on the 3rd of July 2012 he included in the particulars a claim for loss of earnings; an average earning per week and the figure he was claiming for his actual loss per week. Therefore as far back as 3rd July, 2012 Mr. Brooks would have recognized, based on his claim, that he would have required the necessary evidence to prove this element of his claim under the head of special damages. He has cited no impediment to obtaining this evidence. He just did not think about it.

[80] Bearing in mind that he has the burden of proof on a balance of probability to prove each aspect of his case, and Mr. Gordon having cross examined him on this aspect of his evidence is an indication that the defence is not inclined to accept the evidence of Mr. Brooks on this issue. Contrary to Mr. Reitzin's submission, that for me amounts "to a hint of a suggestion that he was not speaking the truth ". (per Smith J.A in ***Dalton Wilson v Raymond Reid*** SCCA No. 14/2005, who applied, ***Markem Corporation and Anor. v Zipher Limited*** [2005] EWCA Civ.

267 following ***Browne v Dunn*** [1894] 6 R. 67). Apart from his mere say so, Mr. Brooks has not produced one iota of supporting evidence to substantiate this aspect of his claim.

[81] I am cognizant of the fact that, the courts have come to accept that, in appropriate circumstances the rule that special damages must be strictly proven should not be rigidly applied. This was the position taken by the court in the case of ***Desmond Walters v Carline Mitchell***,(1992) 29. JLR 173). It was approved in the case of ***(Abbas (Kamran) v Carter (Sheron***) [2016] JMCA Civ 4.In the latter case paragraph 54 and 55 of the judgment reads:

> "*This court has come to recognise the difficulty involved in the presentation of exact figures for loss of earnings for certain categories of workers. Wolfe JA (Ag), as he then was, made certain observations in* ***Desmond Walters v Carline Mitchell*** *which remain relevant. He said:*
>
> *"**Without attempting to lay down any general principles as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organised corporation may well be what Bowen L.J. referred to as 'the vainest pedantry'**."*

[82] However for the reasons previously outlined, I do not believe the circumstances of the instant case can fit in the category of those cases highlighted in the aforementioned authorities. Additionally, the evidence of Mr. Brooks is that he was able to retain one of the contracts because the head contractor was a friend. He stated that when he went back to work he only had one construction site to look after. However, he has not sought to produce any supporting evidence from his friend, the head contractor. He has proffered no excuse or difficulty for his failure to do so. It is my considered view that the head contractor would have been an appropriate witness to speak to Mr. Brooks' earnings before and after the accident. This is in light of the fact that; he would have been the person who sub contracted Mr. Brooks. He could speak to the terms of their agreement, including the agreed and actual payment under the subcontract. Yet no such evidence has been produced.

[83] Mr. Brooks' testimony is that he is currently employed. However no supporting evidence has been adduced to establish his current income. Even if no salary slip is generated from his present Job arrangement, he could at least have presented supporting evidence in the form of witness statement from the head contractor. I also consider the fact that Mr. Brooks indicates that the labour which he provided under his previous contracts included a plumber whose earning was $4,000 per day. There is no evidence of any specialized or formal training in the area of plumbing with regards to Mr. Brooks. Additionally, I have no evidence as to his years of experience in the area from which I could infer that his skill level would

place him above the pay grade of that other plumber. Therefore, while I agree that there is no evidence challenging the skill or profession of Mr. Brooks as a plumber, I find that he has failed to present sufficient evidence on which this court can rely, in order to accurately determine to his pre and post-accident earnings.

[84] I find that the claimant has failed to provide satisfactory evidence on which this court can arrive at a determination in his favour for loss of actual earnings and loss of future earnings. Therefore he has failed to establish that he is entitled to any award under for these items in his claim Consequently I make no award under these head.

GENERAL DAMAGES

LOSS OF EARNING CAPACITY/HANDICAP ON THE LABOUR MARKET

[85] An award for handicap on the labour market, or loss of earning capacity is generally awarded where; at the time of trial, if the claimant is employed; there is a risk that he may lose this employment at some time in the future and then; as a result of the disability arising for injuries sustained due the defendant's negligence; he may be placed at a disadvantage of getting any other job or another job where he is equally paid. This principle was stated by Browne LJ in the English Court of Appeal of ***Moeliker v A Reyrolle & Co Ltd*** [1977] 1 All ER 9. At page 16, the learned Judge of appeal also indicated that:

> "*what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market*"

[86] However, the claimant's employment status at the time of trial is not a bar to recovery (See ***Patrick Thompson and Anor V Dean Thompson and Ors.*** [2013] JMCA Civ. 42). The first step in approaching an assessment of awards under this head is to determine whether the claimant is currently employed and whether there is a risk that he may lose this employment at some time in the future.

Whether the claimant presently employed: Whether there is a risk that he may lose this employment at some time in the future

[87] The claimant Mr. Brooks states that he is presently employed. There is no challenged to his present employment status. I accept that evidence. The other question is whether there is a risk that he may lose his employment in the future. I find that based on the nature of his current professional employment as an independent contractor, at some point, it is expected that the present contract will come to an end. Therefore I find that there is a risk that the claimant Mr. Brooks will lose this employment sometime in the future.

Whether as result of the disability arising from the injuries sustained the Claimant may be placed at a disadvantage of getting any other job or another job where he is equally paid.

[88] I must now determine whether as result of the disability arising from his injuries the claimant may be placed at a disadvantage of getting any other job or another job where he is equally paid. I will first examine the nature of his injuries and the effect of his disability on his ability to function in his profession as a plumber.

[89] In his report dated the 14th of April 2014 Doctor Wayne Palmer reported on his examination of Mr. Brooks which he conducted on the 3rd of April 2014. He stated that Mr. Brooks was diagnosed with; *extension contracture of his left knee and Loss of ankle dorsiflexion*. His prognosis is stated as follows;

(i) Limitation of knee flexion likely to limit ability to sit on low seat and close compartment such as back seat of some cars.

(ii) Loss of ankle dorsiflexion which would make activity such as running and riding a bicycle difficult.

[90] He stated that on April 3, 2014 Mr. Brooks complained of stiffness to his left knee; difficulty ascending and descending stairs or ladder; occasional pain to his ankle

and hip in the mornings. He noted that he was ambulant with normal gait . Doctor Palmer describe Mr. Brooks' disability as at the 3rd of April 2014 as follows:

(i) 7% of lower extremity due to ankle dorsiflexion

(ii) 10% of lower extremity due to knee dorsiflexion

(iii) Combined lower extremity impairment 0f 17% (iv) Class 2 moderate impairment 7% of the whole person **[91]** Mr. Brooks indicates the following in his evidence:

He cannot stoop down. He cannot get down to ground level. He cannot carry things like toilets, basins, baths, pipes and tools. He does have the range of motion that he had prior to the accident. Even after all medical treatment he is less and less able to move his body. He continues to have pain.

[92] Mr. Gordon in his submission invites the court to take notice of the fact that Mr. Brooks had had no difficulty sitting in the witness box or walking. However I note that Doctor Palmer's report on the limitation on knee flexion relates to low seat, such as a car seat. I am also aware of the fact that activities involving the installation of baths, toilets and pipes require bending to or very close to ground level. The fact is the seat in the witness box is not low and is nowhere close to ground level

[93] Therefore I accept Doctor Palmer's prognosis in relation to Mr. Brooks' injuries and the resulting disability. I accept that there is a limitation on Mr. Brooks' ability to sit on low seats, to run and ride bicycles. It is clear from the doctor's evidence that

the injuries, specifically the "Limitation of knee flexion" is likely to affect the Mr. Brook's ability to bend the affected knee. Therefore Doctor Palmer's evidence is not inconsistent with that of Mr. Brooks, that he is unable to stoop down to ground level.

[94] Whereas, there is nothing in the medical report that specifically addresses Mr.

Brooks' inability to carry things like toilets, basins, baths and pipes and tools, he was not cross examined on this portion of his evidence. It is general knowledge that the installation of these items are essential to the job of a plumber. This activity would inevitable require the bending of the knee to ground/floor level as most of these items are usually installed on the floor or in the ground. Therefore, I find that Mr. Brooks has presented sufficient evidence which this court accepts that the injuries, have, and will in the future place a limit on his ability to work in his chosen profession.

[95] However based on his evidence he is likely to be reemployed when his present contract comes to an end. He states that he returned to work two (2) years after the accident on an existing contract. Based on his evidence is an independent contractor. He also states that the company closed three (3) to four (4) years ago. Therefore , the inescapable inference is that his current job is with a new individual or entity. This amounts to actual evidence that he was able to obtain fresh employment after the termination of the contracts in relation to the apartments. It is on this basis that I form the impression that Mr. Brooks is likely to be reemployed when his present contract comes to an end.

[96] However in light of his current disability, and the nature of his job, which inevitably involves bending and stooping, I find that there is a resulting reduction in his ability to work as efficiently as his pre accident capacity. Additionally, taking into consideration, the nature of his injuries I am satisfied that should he become unemployed he will be less able to obtain fresh employment in his chosen profession at an equivalent pay. Consequently, the claimant has established that

he is entitled to an award for loss of earning capacity/ handicap on the labour market.

Determination of the appropriate Sum for Loss Earning Capacity

[97] There are two approaches that the court can take with regards to making an award for loss of earning capacity / handicap on the labour market. That is the applying the multiplicand/multiplier method or awarding a lump sum. The choice between the two approaches is not made arbitrarily but is dependent on the information that is available to the court. Where the court has some reliable data concerning income, remaining working life and so on the multiplier/multiplicand method may be used". (per Sykes J as he then was, in the case ***of Icilda Osbourne v George Barnes and Others*** (Claim No 2005 HCV 294, judgment delivered 17th February 2006),

[98] **"**If the claimant is working at the time of the trial and the risk of losing the job is low or remote then the lump sum method is more appropriate and the award should be low. If the claimant is working at the time of the trial and if there is a real serious risk of him losing the job and there is evidence that if the current job is lost there is a high probability that the claimant will have difficulty finding an equally paying or better paying job then the lump sum method may be appropriate depending on when the loss is seen as likely to occur. The size of the award may be influenced by the time at which the risk may materialize". (per Sykes J as he then was in **Archer *Ebanks v. Japther McClymouth*** Claim No. 2004 HCV R172 delivered March 8, 2007 digested in Khan (5)).

[99] In the case of Patrick ***Thompson and Anor v Dean Thompson and Ors*** [2013] JMCA Civ. 42, at paragraph 80, the court said:

"*once the judge decides that an award for loss of earning capacity is appropriate in a particular case, the choice of a suitable method of calculation is a matter for the court. Among the factors to be taken into account are the actual circumstances of the claimant, including the nature of his injuries. Although the claimant's employment status at the time of trial is not a bar to recovery, it may have an obvious effect on the kind of information that he is able to put before the court with regard to his income and employment prospects for the future. Where there is evidence to support its use, the multiplier/multiplicand method may promote greater uniformity in approaches to the assessment of damages for loss of earning*

capacity. This is hardly an exhaustive list and additional or different factors will obviously be of greater or lesser relevance in particular cases. Although the decided cases can offer important and helpful guidance as to the correct approach, the individual circumstances of each claimant must be taken into account"

[100] In the case of ***Jamaica*** (***Clarendon Alumina Works) v Lunette Dennie*** - [2014]

JMCA Civ. 29, the court stated at paragraph 60, that

"*a person claiming damage must be prepared to prove their damage. If the damage sustained is clear and substantial, but the assessment of the same is difficult, the court must do the best it can in the circumstances".*

This principle was restated in the case of **Garfield *Segree and Jamaica Wells and Services Ltd. and National Irrigation Commission Lt***d.- [2017] JMCA Civ. 25.'

[101] In light of the foregoing authorities, Mr. Brooks having failed to produce reliable data concerning his income the preferred approach that I must adopt in order to grant redress for his loss of earning capacity is to award a lump sum. That is a fair reasonable amount for loss of earning capacity/handicap on the labour market.

[102] I have already indicated that I am satisfied that the claimant will be unemployed sometime in the future, that is when his present contract comes to an end. The cases have indicated that an award may be influenced by the time at which the risk of the termination of his present job may materialize. However, I have no evidence as to when his present contract will end. Further I have no evidence on which I can essentially make an approximation as to how near the end is. Therefore, there is nothing before me on which I can find that the risk is imminent.

[103] Mr. Brooks says that he lost one job due to injuries. However, in spite of his disability he returned to one job two (2) years later. He is currently

> working in a different job. Therefore, in spite of his disability his risk of unemployment does not

seem to be very high. However, as I have already noted there is a reduction in his capacity to perform, which will evidently translate in a reduction in his earning capacity. I considered the fact that he states that he supplies labour. That is, he employs others, including a plumber to work. I also take into consideration the possibility of him directing the work while others perform the actual tasks. However, this will necessitate him employing others to do the actual manual task he would normally perform himself. The culmination of this would be a reduction in his income as he would have an increased number of persons to pay.

[104] While I am not conducting a precise mathematical calculation in making this award I take the afore-mentioned factors as also following factors into consideration: Mr. Brooks says he works seven (7) days per week, fifty-two (52) weeks per year based on his contract. I have no evidence of the duration of his present contract. I don't believe it is humanly possible for anyone to work seven (7) days per week fifty-two (52) weeks per year for any extended period of time without getting tired. In order to function in the society Mr. Brooks will have social and domestic matters to attended to where he must of necessity take time off from working. In the event that there was no collision, there would be times when in between contract he would not be earning an income. He states that the other plumber worked for $4000, per day. This rate at 6 days per week amount to $96 000 per month and $1,152,0000 per year. It is possible that Mr. Brooks may have been earning more than this plumber. I can't make a finding as to how much. Mr. Brooks' indication is that the reduction in his earning is 25% I believe a lump sum award of $3,000,000 is reasonable in all the circumstances.

Pain and suffering and loss of amenities

[105] In assessing, damages under this head I will examine the history as it relates Mr. Brooks injuries arising from the collision.

In his medical report dated the 3rd of June 20 12, Doctor Oreggio states that he examined Mr. Brooks on the 30th of May 2012. His findings are stated as follows:

(i) Mr. Brooks walked with a significant limp of the left lower limb and was unable to run.

(ii) A three-inch circular scar to the instep of the left foot.

(iii) Swelling and tenderness of the left knee and lower thigh with only 15 degrees of flexion at the joint.

(iv) Pain in the knee was aggravated by weight bearing.

(v) Mr. Brooks has suffered significant injury to his left lower limb with permanent disability. He still has specialist orthopaedic surgery to be done and physical therapy to assist rehabilitation. He will continue to need analgesic medication intermittently.

[106] Doctor Wayne Palmer stated in his first of two reports that he saw Mr. Brooks on the 25th of February 2013. The following injuries and treatment are described: On presentation at the hospital

(i) had pain in left lower limb and a large wound to left thigh with bone visible.

(ii) He was that informed that Mr Brooks had an open fracture to left femur. Had emergency surgery. Was brought back to the operating theatre 9.11 - fixation of bone augmented with plate and screw system. Skin grafting to dorsum of left foot. Discharged Nov. 24

(iii) Readmitted 23.12.10 for removal of external fixator and application of a blade plate system to left femoral fracture. Discharged 24.12. 10.

(iv) Follow up in the Plastic Surgery and Orthopaedic Out-patient Departments. On 27.7.11 he was discharged from Plastic Surgery Clinic when skin graft was fully healed.

(v) Several visits to Orthopaedic Out-patient Department and even though fracture healing he developed progressive stiffness to left knee. Allowed to walk on left lower limb 28.3. 11.

(vi) Eventually admitted 7.6 12 to release adhesions and quadricepsplasty to left knee.

(vii) Follow up last visit to Orthopaedic Out-patient Department was on the 18.3 13, and his last visit to Physiotherapy was on Nov 12.

Complaint on 25. 2.13.

 Unable to climb stairs or stoop down
Occasional pain to knee, hip and ankle.

Physical Examination

- Ambulant with slight limp
- Difficulty climbing and descending stairs

Scars

- 250----lateral distal thigh
- 16-----curved to anterior knee
- 5 x 4cm to dorsum of foot
- Multiple 0.5cm scars to lateral leg and thigh

Knee

- No swelling
- Decreased patella mobility
- Flexion 0 -70°
- No tenderness at fracture sight Laxity of ligaments

Radiographs

- Supracondylar fracture of left femur with intercondylar extension
- Supracondylar fracture of left femur fixed with blade plate and screws – partially healed.

Diagnosis

 Open supracondylar fracture of left femur fixed with plate and screws
 Extension contracture of the left knee Stiff left ankle.

Disability

-Still undergoing treatment has not reached maximal medical improvement. (partial disability rating cannot be given at this time).

-Due to severity of injuries unlikely to fully recover function of knee. Likely to develop post-traumatic osteoarthritis (cartilage loss to knee) and have chronic pains.

-Currently unable to kneel or stoop and will be unable to do activities requiring deep knee bending.

[107] In Medical Report of Doctor Wayne Palmer dated the 28th of April, 2014 he stated that he examined Mr. Brooks on the 3rd of April, 2014. He noted the following:

Stiffness to left Knee

Diff ascending /des stairs or ladders

Occasional pain ankle or hip in mornings

Physical Exam

Ambulant with normal gait

Left Knee Scars

Range of Motion 0-70

Patella mobile but some pain with patella movement

Left ankle

Dorsiflexion 0

Distal femoral fracture with callus across fracture site and metal plate and screws in place.

Osteophytes on the patella and narrowing of the patella-femoral joint

Diagnoses as having -

Healed open supracondylar fracture

Extension contracture of left knee

Loss of ankle dorsiflexion

Prognosis

Limitation of knee flexion likely to limit his **ability to sit on low seat** and close compartments such as back seat of some cars

Loss of ankle dorsiflexion which would make activities such **as running and riding bicycle difficult**.

Disability

7% of the lower extremity due to ankle dorsiflexion

10% 0f lower extremity due to knee flexion

Combined lower extremity impairment of 17%

Class two –moderate impairment 7%

of the whole person.

Cases relied on

[108] By Mr Reitzin for the claimant are:

(i) ***Terrence Lawrence v Ernest and Donald Young*** Suit No. C.L. 1984 /Y181and Harrisons p.201.

(ii) ***Paul Downer v Tyrone Chen*** Suit No. 1984/d 171& Harrison p. 157

(iii) **Barbara Roberts v Omar Parshad** Suit No. C.L. 1985 R/186&Harrison p. 195

He submits that the case of ***Paul Downer v Tyrone Chen (supra)*** *is most* comparable to injuries of the claimant Mr. Brooks.

[109] In that case the claimant suffered the following injuries:

(i) Injuries to right leg and *face;*

(ii) Missing incisor tooth;

(iii) loose soft tissue gum of right mandible;

(iii) Suture laceration to chin;

(iv) Swollen tender deformed right thigh;

(v) Commuted fracture of right femur;

(vi) *Alveola*r segmented *fracture of his mandible**;***

[110] In 1990 the claimant was assessed with 15% (Partial Permanent Disability) PPD of the right leg and6 % PPD of the whole Person. The award in general damages was S300,000, with a current updated value of $3,6668.92.

[111] It is submitted by Mr. Gordon for the defendant, the following cases offer better guidance:

(a) ***Stephen Spence v Joslyn Pryce*** (Unreported) Claim No. 2004 HCV 2899

In that case the claimant's injuries were as follows:

(i) cerebral concussion;

(ii) laceration to the scalp and left knee;

(iii) closed fractured right femur;

(iv) closed commuted fracture of the right patella;

(v) fracture to the 5th left metacarpal;

(vi) radial nerve palsy to right hand; and 8% disability of the whole person.

An award for General Damages in the sum of $1,000,000 was made. That sum now updates to $2,830,645.16.

(b) ***Percival Green v Michael Blackford & Ano***r - Harrisons Assessment of Damages for Personal Injuries Page 364.

In that case the claimant suffered the following injuries:

(i) fracture of right leg;

(ii) laceration of the right knee an

(iii) abrasions on both arms;

(iv) His knee was immobilized in a plaster of paris cylinder back slab. He remained in that state for 3 weeks.

In October 1991 the Claimant was awarded General Damages in the sum of $80,000.00. This amount updates to $1,920,895.52.

[112] Mr. Gordon expressed the view that the injuries ***in Percival Green*** **v. Michael Blackford & Anor** are closer to the injuries suffered by Mr. Brooks, but there was no PPD. He further asserts that the injuries in ***Stephen Spence v Joslyn Pryce*** (Supra) are far more severe as that claimant had multiple fractures whereas Mr. Brooks only suffered one fracture. He suggest that any award the court makes should fall below the amount in **Stephen *Spence v Joslyn Pryce*** but higher than the amount in ***Percival Green v . Michael Blackford & Anor***. He submits that an appropriate award for General Damages is the sum of $2,300,000.

[113] Mr. Retzin further submits that The factors to be taken into consideration in assessing general damages are as follows:

(i) the extent and nature of the injuries sustained;

(ii) the nature and gravity of the resulting physical disability;

(iii) the pain and suffering endured; and

(iv) the duration and effect upon the person's health of the pain and suffering (including discomfort and inconvenience) which the claimant is likely to suffer after the date of the award. (He

refers to the case of **Louis *Brown v Estella Walker*** (1970) 11 JLR 561)

[114] Referring, to the case of Stephen ***Spence v Joslyn Pryce***, he further submits that:

(i) There are differences in the nature and extent of the injuries, suffered by Mr. Brooks and Mr. Spence. Stephen Spence's main injuries were a closed fracture of his right femur (thigh bone) and a closed commuted fracture of his right patella (knee cap) as well as a fracture of his 5th metacarpal (the bone of the little finger between wrist and knuckle). By contrast, Mr. Brooks' main injuries were an open supracondylar fracture of his left femur with intercondylar extension, i.e. a fracture of his left thigh bone above the knee joint, exposing the bone through a large wound, through all layers of skin and muscle which extended into the knee joint; as well as a degloving injury to the dorsum of his left foot.

(ii) Stephen Spence appears to have recovered, at least to maximum medical Improvement, within 3 months and 3 weeks of the date of the accident. Mr. Brooks' last visit to the Orthopaedic Out-Patient Department was 2 years and 5 months post-accident.

(iii) Stephen Spence underwent one surgical procedure. Mr. Brooks underwent four (4) surgical procedures.

(iv) Dr. Grantel Dundas assessed Stephen Spence at 15 months postaccident as having "a **present** overall disability of 8% of the whole person," indicating that Dr. Dundas considered that Stephen Spence's disability would improve over time. Mr. Brooks' was assessed with a 7% whole person impairment.

(v) Nothing was said of Stephen Spence having a poor prognosis. However, Mr. Brooks' prognosis as at 25 February, 2013 was that he was unlikely to fully recover function of the left knee; was likely to develop post-traumatic osteoarthritis (cartilage loss to the knee); was likely to have chronic pains; and would be unable to do activities requiring deep knee bending. Radiographs at 18 November, 2013 revealed, inter alia, osteophytes (bony projections associated with the degeneration of cartilage at joints) on the patella and narrowing of patella-femoral joint. His prognosis as at 18 November, 2013 was that the limitation of knee flexion would be likely to limit his ability to sit on low seats and close compartments such as the back seat of some cars; and, further, that his loss of ankle dorsiflexion would make activities such as running and riding a bicycle difficult.

(vi) On each and every relevant criterion (save for the minor, temporary difference in whole person impairment) Mr. Brooks' case was more far more serious than was Stephen Spence's**.**

[115] In relation to the case of ***Percival Green v Michael Blackford & Anor***, he posits that, it is not reliable for reasons stated in the Court of Appeal Judgment of ***Patrick Thompson & Ors. v Dean Thompson & Ors***. [2013] JMCA Civ. 42**, where** the court compared ***Percival Green v. Michael Blackford & Anor*** with ***Donald Hartley v Norman o/c Leslie Monelal o/c Dazzie*** (Suit No CL 1994 H 185 - Khan, volume 5, page 258). There the court found that the two cases produced an anomaly; where, the plaintiff, with a 10% whole person permanent impairment, in **Green v Blackford** was compensated in 1991 by an award worth $953,000.00

and the plaintiff in Hartley v Norman in 1997 with no permanent impairment was compensated with an award worth $1,600,000.00.

ANALYSIS

[116] I am well acquainted with the principle stated in Louis ***Brown v Estella Walke***r (1970) 11 JLR 561 and the factors that are to be taken into consideration in assessing general damages. These factors as outlined in Mr. Reitzin's submission are:

(i) the extent and nature of the injuries sustained;

(ii) the nature and gravity of the resulting physical disability;

(iii) the pain and suffering endured; and

(iv) the duration and effect upon the person's health of the pain and suffering (including discomfort and inconvenience) which the claimant is likely to suffer after the date of the award.

[117] I am of the view that, with the exception to the factor listed at paragraph (iii), the PPD should be a reflection of all the factors outlined above. One would expect to find a direct correlation between the seriousness of the injuries and the PPD rating. Additionally, to my mind, the extent and nature of the injuries sustained and the nature and gravity of the resulting physical disability will determine the existence of any PPD and the rate. That is, a more serious injury would result in a higher PPD rating in relation to the whole person than a less serious injury. One would also expect that a more serious injury with a higher PPD rating would lend to greater discomfort and inconvenience to the claimant after the date of the award, than that which would occur and with a less serious injury.

[118] However in relation to the factor listed at paragraph (iii) one claimant may have a higher PPD than another, but suffer less pain, because of unconsciousness for an

extended period. This is also possible where the claimant with the higher PPD receives immediate medical attention and corrective surgery; while the person with a lower PPD remained conscious all the time; had prolonged delay in getting medical attention and corrective surgery; or had to do multiple corrective surgeries. In any event, the PPD must be a significant factor that is taken into consideration

in the assessment and award of damages. The approach of the court should be, to avoid as best as possible any great disparity in awards as it relates to PPDs.

[119] In the case of ***Richard Sinclair V Vivolyn Taylor*** [2012] JMCA Civ 30 Phillips JA at paragraph 31 noted that;

> "*although one must pay attention to the specific injuries suffered and treatment administered in each case, nonetheless, the percentage PPD is a good guide for making an award and for making comparisons in order to arrive at some uniformity in awards*"

[120] In light of the foregoing discussion I do not believe I should place much reliance on **Percival *Green v Michael Blackford & Anor***(Supra). Despite the apparent similarities with some of the injuries suffered by Mr. Brooks, as Mr. Gordon correctly pointed out, there was no Partial Permanent Disability to the Claimant that case. I form the view that the cases of ***Stephen Spence v Joslyn Pryce(supra)*** and ***Paul Downer v Tyrone Chen(supra)*** offer better guide.

[121] The case of ***Stephen Spence v Joslyn Pryce*** was decided in 2004. The PPD in that case was 8%. The case of **Paul *Downer v Tyrone Chen*** was decided in 1997. The PPD in that case was 6% While I recognize the fact that numerically the injuries in both cases are more than those associated with the claimant in the instant case I am directed by ***Richard Sinclair v. Vivolyn Taylor*** *(Supra)* to use the PPD as a guide. Therefore, the starting point for the assessment must the PPD in spite of the numerical differences in injuries between the claimants in comparable cases. Where the PPD is same I should be swayed to; a not

necessarily significant; lower or higher award depending on the variances in terms of the injuries. However when comparing the PPD if there appears to be apparent disparities in awards I have to do the best I can. In the instant case the claimant's PPD is one (I) percent above the PPD in the case of Paul ***Downner v Tyrone Chen***. The updated award in that case is $3, 6668.92. In the case of ***Stephen Spence v Joslyn Pryce*** , the PPD is one percent higher than that of the claimant

in the instant case . The updated award in that case is $2,830,645.16. Therefore there is an apparent disparity in awards between the two (2) cases.

[122] I note also, that the case of ***Paul Downer v Tyrone Chen*** belongs to the era referred to in case of ***Patrick Thompson & Ors. v Dean Thompson & Ors*** (supra) There Morrison, JA (as he then was) in considering the award in two cases stated that they;

> ***"produce something of an anomaly. Where, plaintiff, with a 10% whole person permanent impairment, was properly compensated in 1991 by an award worth $953,000.00 in Green v Blackford, then it is possible that an award worth $1,600,000.00 to the plaintiff, with no discernible permanent impairment, in Hartley v Norman in 1997 could well have been an erroneously high estimate. But, of course, the explanation of the disparity could equally be the opposite. It regrettably seems to me that, useful as they have proved to be to the profession and the judiciary over the last many years, the sometimes quite exiguous reports of previous - particularly the older - awards upon which reliance has to be placed in these matters do not always contain the level of detailed information about each case that would enable the court to make meaningful distinctions between particular cases."***

[123] Therefore, taking into consideration all the evidence; the points raised by Mr. Gordon and Mr Reitzen; and relying on the guidance of the authorities; using the PPD as the starting point; I believe the case of ***Stephen Spence v Joslyn Pryce*** is most useful to the assessment of damages for pain and suffering in the instant case. I recognize that the PPD for Mr. Brooks is 1% less than that in the afore mentioned case. However, while recognizing the resulting disability in ***Stephen***

Spence might be higher, than that of Mr. Brooks the pain and suffering for Mr. Brooks would be higher than that of ***Stephen Spence***. This is in light of the fact that Stephen Spence underwent one surgical procedure while Mr. Brooks underwent four (4) surgical procedures. Additionally, the recovery period for Mr. Brooks is much longer than that of Mr. Spence. The recovery period for Mr. Brooks is 2 years. The recovery period for Mr. Spence was approximately four months.

[124] Consequently, the inescapable inference is that the pain and suffering for Mr. Brooks was more prolonged than that of Mr. Spence. Therefore, taking all these factors and authorities into consideration while using the PPD as my guide I don't believe that Mr. Brooks award should be significantly less than the award in the Spence case. It is my view that an award of 2.75 million dollars is fair and reasonable in all the circumstances.

ORDERS

Liability

[125] Judgment is for the Claimant Mr Brooks.

[126] Damages are assessed and awarded as follows:

Special Damages

$297,628.30

Interest on Special Damages from date of accident at rate of 3% per annum to date of judgment.

General Damages

Loss of Earning /Capacity or Handicap on Labour Market $3,000,000

Pain and suffering, loss of amenities $2,750,000 Interest on General Damages from date of service of the claim.

Date of judgment at the rate of 3% per annum.

Cost to the Claimant to be agreed or taxed.

Claim No. 2012 HCV 05486

Assessment of Damages

Special Damages

[127] I find that Ms. Byfield has proven special damages to the sum of $19,500. Mr. Gordon did not take any issue with this sum

General Damages

[128] As part of her claim for general damages Ms. Byfield relies on two report of Doctor Charmaine Webb. In her report dated the 15th of November 2010 Dr. Webb's states that she examined Ms. Byfield on the 11th of November 2010. She describes the injuries to Ms. Byfield as follows:

(i) 10cm by 3cm healed abrasion - extensor surface right forearm (ii) 0.5cm healed abrasion - right wrist ulnar area.

(iii) 1cm healed abrasion to left toe.

(iv) 25cm diameter abrasion - instep left foot.

(v) Pain and swelling **left knee** with limitation of flexion.

(vi) Pain on movement of right shoulder and neck.

(vii) Muscular spasm of shoulder and neck.

[129] In her report dated the 30th of April 2018, Doctor Webb stated that she again examined Ms. Byfield on the 23rd of April 2018. She further stated that Ms. Byfield made the following complaints:

(i) Continuing pain in **right knee** which would swell at times. The last time it had become swollen was about two weeks prior to her visit to me.

(iii) Whenever she stands or walk a short distance she would experience swelling that would settle in the morning.

(iii) Occasional pain in right thigh.

[130] On examination she made the following observations.

(i) On examination of the **right knee** there was full range of motion. There was mild swelling and minimal crepitus .

(ii) No limp or on ambulation, passive movement did not create pain.

She concludes, that Miss Byfield developed osteoarthritis in her **right knee** as a result of the injury in 2010.

Submissions

By Mr. Gordon

[131] The following submissions were made by Mr. Gordon:

(i) He believes that the evidence about the Miss Byfield's injuries is unclear. First, no explanation has been given as to why Miss Byfiled, having attended the hospital on the evening in question, elected not to receive professional medical treatment, despite her view at the time that her injuries were serious. Further, Miss Byfield waited five days before seeing Dr. Webb for the first time. This makes no sense and since no

explanation was proffered. One can only conclude that Miss Byfield's injuries were not as serious as she now makes them out to be.

(ii) There is some ambiguity with respect to the main injury allegedly suffered by Miss Byfield. (He refers to the two medical reports of Dr.

Charmian Webb dated the 15th of November, 2010 and the 30th of April, 2018 respectively).

(iii) In her first report Dr. Webb speaks about an injury to Miss Byfield's left knee. However, in the latter report Dr. Webb refers to an injury to Miss Byfield's right knee. It is unclear which of Miss Byfield's knees is injured.

(iii) Doctor Webb has concluded that Miss Byfield developed osteoarthritis in her knee as a result of the injury sustained in 2010 when it does not appear that she has orthopaedics training or qualifications. There is no reference to an x-ray and/or MRI.

(iv) There is no examination of the knee which was not injured in 2010 to see whether the osteoarthritis was also present in the next knee. If osteoarthritis was found in both knees, then this could have developed as a result of aging.

(v) Dr. Webb's saw Miss Byfield on only two occasions, and the time period between both occasions is in excess of seven (7) years. In the circumstances, Dr. Webb's assessments of the Claimant's injuries are unreliable.

[132] Mr. Retzin made the following submissions**:**

(i) The court is asked to accept that the reference to the right knee in Doctor Webb's second report is an error. Doctor Webb's first report is more likely to be correct as to which knee was injured.

(iii) Whether Miss Byfield's left knee or right knee was the one which was injured appears to be of little or no consequence.

(iv) Doctor Webb's second medical report was served under **S. 31E of the Evidence Act**, well in time before the trial. No counter-notice requiring Dr. Webb's attendance was ever served. Counsel for the defendant elected not to cross-examine her in (breach of the rule in ***Browne v Dunn***.)

(v) In her first report, Dr. Webb foreshadowed the possibility of Miss Byfield experiencing chronic pain and swelling in the knee, so Dr.
Webb's second report is consistent with and confirmatory of that prognosis.

(vi) The defendant's attorneys failed to file any defence compliant with ***rule 10.6(2)(b)*** of the **Civil Procedure Rules** which require the defendant to set out in the defence the nature of any dispute where any part of the medical report is disputed.

(vii) At the pre-trial review held on 1 October, 2018, counsel for the defendant consented to both of Dr. Webb's reports being put in evidence.

ANALYSIS

[133] I will examine the two reports of Doctor Webb in details in order to decide whether or not Mr. Gordon's submission that no reliance should be placed on them are justified. In the report dated the 30th of April 2018, Doctor Webb indicated that she first examined Ms. Byfield on the 11th November, 2010. She states that Ms Byfield sustained injuries to her right wrist right, forearm, left foot, right shoulder and neck as well as **right knee**. Doctor Webb then made the following reference: "Please note previous report dated the 15th November, 2010 prepared by Doctor Webb".

[134] In the report dated the 15th November, 2010; it is stated that Ms Byfield sustained the following injuries:

> "10cm by 3cm healed abrasion extensor surface right forearm; 0.5 healed abrasion - right wrist ulnar area;1cm healed abrasion to left little toe,3cm linear abrasion dorso-lateral aspect of left foot; 0.25cm diameter abrasion - instep left foot; pain and swelling of **left knee** (my emphasis) with limitation of flexion; pain on movement of right shoulder and neck". "The Shoulder and neck injury are due to muscular spasm but will settle fully. There is current partial disability with respect to the knee. The full extent of the injury is difficult to ascertain so early after the injury".

[135] In the report of the 30th of April 2018, the doctor further states that on 23rd April Ms. Byfield complained of: "*continuing pain in the **right knee** ((my emphasis) which would swell at times- whenever she stands or walk a short distance she would experience swelling that would settle in the morning,- occasional pain in the right thigh*". The report further indicates that, "On examination of the **right knee** (my emphasis) there was full range of motion. *There was* mild swelling and minimal crepitus. *There was no limp or on ambulation, passive movement did not create pain*". Doctor Webb concluded that Miss Byfield "*developed osteoarthritis in her **right knee** (my emphasis) as a result of the injury in 2010*".

[136] There in an obvious difference between the two reports as it relates to the knee injury of Ms. Byfield. The earlier report refers to her left knee while the later report refers to her right knee. The issue that the court must resolve is whether the inconsistency in these two reports can be reconciled. I take into consideration the fact that in her report of 30th April, 2018 Doctor Webb makes reference to her report of the 15th of November 2010, where she detailed her first examination of the claimant. In that report there was no mention of any injury to, or examination of, the **right knee**. The expectation with regards to the second examination is that the doctor would conduct a follow up examination and assessment with regards to the injuries she previously observed and examined. She would have had the benefit of previous records, with the information contained in the first report for reference.

[137] In her report dated the 15th of November 2010, on examination of Ms Byfield, Doctor Webb found that she had "*Painful swelling to the **left knee** (my emphasis) with limitation of flexion* ". In that report Doctor Webb further stated:

> *"*Of her injuries, the her (sic) knee is the only one that creates some concern. Whereas there is unlikely to be any bony injury to the knee, soft tissue/ tendon injury cannot be excluded. As such, the long term effects of this injury are difficult to predict at this time Ms Byfield's may resolve spontaneously and totally; or it may continue in a state of chronic pain and swelling"

[138] As it related to PPD, the doctor stated "..*there is a currently partial disability with respect to the knee. The full extent of the injury is difficult to ascertain so early after the injury*". Therefore I find that from her first examination of Ms Byfield in 2010 Doctor Webb had concerns in relation to the injury to Ms. Byfield's left knee. The injury and complaint mentioned in the first report as it relates to left knee is consistent with complaint of claimant in her evidence. The second doctor's report is only inconsistent with Ms. Byfield's evidence to the extent that it refers to the right knee and not the left. I can only conclude that the reference to right knee in the second report by the doctor is due to inadvertence.

[139] Additionally, when the court makes an order for a witness to be treated as an expert, the other party has the right within twenty-eight (28) days after being served with the expert report to put written questions to expert (***See Rule 32.8***). There is no evidence that any questions were put to Doctor Webb seeking clarification in relation to the differences in the reports. No questions were put to the claimant Ms. By field on this issue. Therefore I find no intention on the part of Doctor Webb or Ms. Byfield to deceive court in relation to the injury to her left knee.

[140] I do not accept the proposition as stated by Mr. Gordon that, Ms. Byfield's election not to receive professional, medical treatment, on the evening of the collision, is an indication that her injuries were not as serious as she claims. In her evidence

she states that she felt pain but did not pay it any mind. While this does impact the assessment with regards to the severity of her pain, it is not conclusive with regards to the ultimate assessment of the nature of her injuries. She may have formed the view at the time that her injuries were not serious, depending on the intensity of the pain she was feeling at the time. In that regard where an expectation that the pain will subside is not realized, it is then, that one begins to realize that the injury is more serious than was originally believed. I make this comparison with exercise where one does not begin to feel muscle and joint pains until days after. However counsel did not even cross examine the claimant on the issue.

[141] Therefore the evidence of Ms. Byfield with regards to her injuries, with exception of the numbness in her hand remains unchallenged. The evidence of Doctor Webb as contained in both reports also remains unchallenged. Therefore, I find that as a result of the collision Ms. Byfield did suffered the injuries contained in the report of doctor Webb dated 15th of November 2010. Additionally, I find that the injuries continue to affect the claimant as outlined in her evidence in conjunction with the report of Doctor Webb dated the 30th of April 2018, with the exception that, any reference to the right knee in that report is taken as reference to the left knee. Consequently, I find that Ms. Byfield continues to suffer from the following:

(i) Osteoarthritis in the left knee;

(ii) Daily pain in left knee;

(iii) Swelling in left knee;

(iv) Pain in left knee on kneeling or standing;

(v) Pain and swelling in left knee on walking for short distances; (vi) Pain in left knee during periods of cold weather.

CASES RELIED ON

[142] Mr. Reitzin relies on ***Garfield Scott V Dovovan Cheddisingh & Phillip Campbell*** Suit No. C.L. 1995 S 217; Khan Vol4. P214. The injuries in that case are listed as follows:

(i) Headaches;

(ii) Contusion to Right shoulder and hip,

(iii) Punctured wound to left forearm

(iv) Swollen, painful and tender knee,

Left with painful lower right hip when lifting objects

The updated award is $1,746,697. 04

[143] However Mr. Gordon is of the view that the case relied on by the Claimant's Attorneys is unhelpful as it speaks to far more severe injuries. He believes the following cases are more useful:

(a) ***Gilbert McLeod v Keith Lemard*** (Khans Volume 4, Page 205) in which case the claimant suffered the following injuries:

(i) pain and tenderness to right side of chest;

(ii) multiple scattered abrasions to right thigh, knee and leg;

(iii) 4cm laceration to right side of forehead;

(iv) 5cm laceration to right foot;

(v) loss of consciousness;

He was hospitalized for two days.

In March, 1996 the Claimant received an award of $100,000.00 which updates to $660,677.61.

(b) ***Delroy Williams v Adina Daley*** - (Harrisons Assessment of Damages for Personal Injuries, Page 213 -) where the claimant suffered the following injuries:

(i) multiple bruises and abrasions;

(ii) swelling and pain to the right ankle;

(iii) permanent disability of 5% of the function of the right lower limb.

In March 1992 the Claimant was awarded $40,000.00. This amount updates to $695,675.67.

[144] Mr. Gordon submits that:

(i) The injuries indicated in the cases above are far more serious than the injuries suffered by Miss Byfield. In the **Delroy *Williams case*** the claimant had a disability assessment.

(ii) There is no disability assessment for Miss Bayfield.

(iii) An appropriate award for General Damages for Miss Byfield would be $400,000."

[145] Mr. Reitzin.'s reply to Mr. Gordon's submissions are as follows:

(i) In relation to the ***Gilbert McLeod*** case, the injury to the knee was not the principal injury. Although there were abrasions to the knee, the knee was not swollen and there was no osteoarthritis as there is in the Dahlia Byfield case. Gilbert McLeod is not a useful guide.

(ii) The ***Delroy Williams*** case, suffers from the same defects as does the ***Percival Green*** case as expressed by our Court of Appeal in. [2013] JMCA Civ 42.

ANALYSIS

[146] In **Gilbert McLeod v Keith Lemard**, in March, 1996 the claimant with no PPD was given an award which updates to ($660,677.61. In comparison, the claimant in ***Delroy Williams v Adina Daley*** the claimant who was diagnosed with 5% PPD, In March 1992 the updated award in the Delroy Williams case is a $695,675.67. That is only 34,998.06 more than the claimant in the Gilbert McLeod case who had zero PPD. Therefore I am convinced that the Delroy Williams case fall in the category of older cases, creating "*an anomaly*" referred to in the dicta of Morrison JA in the case of ***Patrick Thompson & Ors. v Dean Thompson & Ors***

[147] I am strengthened in this view when I examine the case of **Anthony *Gordon v Chris Meikle and Esrick Nathan*** Suit No. C.L 1997G 047. In this case the claimant was diagnosed with the following injuries:

(i) Cervical strain

(ii) Contusion to left knee

(iii) Lumbosacral Strain

[148] He was assessed as having a PPD of 5 % of the whole person. In July 1998 he was awarded $220,000 for general damages. That award updates to $1,170,725.66. When one compares this award with the award in the ***Delroy Williams*** case, the award in the **Delroy Williams** case, appears to be extremely low. When I examine the authority of ***Garfield Scott V Dovovan Cheddisingh & Phillip Campbell,*** it is my view that the injuries in that case are more comparable with the injuries of the claimant in the instant case. The resulting osteoarthritis of the claimant in the instant case is comparable with the thigh injury in the ***Cheddisingh and Phillips*** case where it is said that the claimant was "left with painful lower right hip when lifting objects". However it is also my view that the injuries in the above mentioned case are more serious than those of Ms. Byfield, in that the claimant suffered a punctured wound to left forearm while Ms. Byfield suffered no punctured wound. Therefore that award would have to be reduced. In

light of all circumstances I believe an award of $900,000 to Ms Byfield for pain and suffering is appropriate.

[149] Mr. Gordon submits that the cost Ms. Byfield should recover should be the amount that would have been awarded in the Parish Court. He suggests that her claim could have been brought in the Parish Court. In support of this position he relies on ***S.131 (1) of the Judicature Parish Court Act*** which read:

> "*If any action or suit is commenced in the Supreme court for any cause for which an action might be instituted in any court and the Plaintiff:*
>
> *(i) In an action founded on contract or tort, recovers a sum less than eight hundred and Fifty thousand dollars, the Plaintiff shall not recover no more cost than he would have been entitled to had he brought this action or suit in a Court unless in any such action, suit or proceedings a Judge of the Supreme Court certifies that there was sufficient reason for bringing this action suit or proceedings in the Supreme Court".*

[150] In addressing this issue I must also examine the ***The Judicature (Resident Magistrates) Act (Increase in Jurisdiction) Order, 2013.*** By virtue of this Resolution, there was an increase of the jurisdiction of the Parish Court in relation to cases of this nature. The jurisdiction was increased from two hundred and fifty thousand dollars to one million dollars. The order was signed into law on the 15th of January, 2013. The Claim form of Ms. Byfield was filed on the 4th of October 2012. Therefore at the time of the filing of the claim form she could not have claimed an award of more than $250,000 in the Parish court. Prior to the amendment subsection 1 (a) of the, Judicature ***Parish Court Act*** read $150,000 instead of $850,000. Therefore I hold that Ms. Byfield's Claim was properly filed in this court. ***S.131(1) of The Judicature Parish Court Act*** does not apply.

ORDERS

On Claim No. 2012 HCV 03747, Kevin Brooks v. Christopher Edwards

[151] With respect to liability: Judgement for the Claimant.

Damages are awarded as follows:

Special Damages

Total $297,628.30

Interest on Special Damages from date of accident at rate of 3% per annum to date of judgment.

General Damages

Loss of Earning /Capacity or Handicap on Labour Market $3,000,0000

Pain and suffering, loss of amenities $2,750,000

Interest on General Damages from date of service of the claim to date of judgment at the rate of 3% per annum.

Cost to the Claimant to be agreed or taxed.

Claim No. 2012 HCV 05486 - Dahlia Byfield v. Cristopher Edwards

[152] With Respect to Liability: Judgement for the Claimant

Damages are awarded as follows:

Special Damages

Special Damages to the sum of $19,500 Interest on Special Damages from date of accident at rate of 3% per annum to date of judgment.

General Damages Loss of Amenities and Pain and Suffering $ 900,000

Interest at rate 0f 3% from the date of service of the claim to date of judgment

Cost to the Claimant to be agreed or taxed.