



[2013] JMSC CIV. 117

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2010 HCV 04702**

<b>BETWEEN</b>	<b>JEHOIDA BUCHANAN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ADRIAN SMITH</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>PHYLLIS HINDS</b>	<b>2<sup>nd</sup> DEFENDANT</b>

**Mr. Shawn Kinghorn instructed by Kinghorn & Kinghorn for the Claimant.**

**Mr. Kwame Gordon instructed by Samuda & Johnson for the 2<sup>nd</sup> Defendant.**

**Heard : April 11, September 16, 2013**

**Negligence – motor vehicle collision – liability of parties- contributory  
Negligence – assessment of damages**

**McDONALD J.**

[1] Mr. Jehoida Buchanan a retired teacher and Minister of Religion has brought an action against the Defendants seeking to recover damages for personal injury and consequential loss.

He alleges that on December 17, 2007 he was in the process of crossing the Hellshire main road in the parish of St. Catherine when Adrian Smith the servant and or agent of the 2<sup>nd</sup> Defendant Phyllis Hinds so negligently drove and/or operated motor vehicle registered 8884DX that he caused it to come violently into collision with the him.

[2] The particulars of negligence of the first Defendant are:-

- (i) Failing to see the Claimant within sufficient time or at all
- (ii) Driving on the said road in a careless manner
- (iii) Driving at or into the Claimant
- (iv) Failing to apply his brakes within sufficient time or at all
- (v) Driving at too fast a rate of speed in all circumstances

- (vi) Failing to stop, slow down, swerve, or otherwise conduct the operation of the said motor vehicle so as to avoid the said collision.

At the commencement of the trial Mr. Kinghorn indicated to the court that the Claimant would not be proceeding against the first Defendant and that he would file a Notice of Discontinuance by the next day.

- [3] There is no dispute that Mr. Adrian Smith, a waiter the driver was at the material time the servant and or agent of Phyllis Hinds his mother. The burden is on the Claimant to prove that on a balance of probabilities the 2<sup>nd</sup> Defendant is liable to him in negligence for the injury, loss and damage suffered.
- [4] The Court has to determine which of the accounts put forward by the Claimant and the Defendant is more believable on a balance of probabilities. The credibility of the witnesses will therefore be of paramount importance in determining this matter.
- [5] In the Claimant's witness statement treated as his evidence-in-chief, he said that on the 17<sup>th</sup> December, 2007 at approximately 5:30 a.m., he was crossing the Hellshire Main Road in the vicinity of the JUTC Depot and the Texaco Gas Station in the parish of St. Catherine. He was standing along the main road waiting for the light to change from green to red. When it changed to red, he looked behind him, and then to his right hand side which was in the direction of Hellshire. He also looked to the left to ensure that no vehicle was coming from the direction of the JUTC bus depot. He then proceeded to cross the road as no vehicles were approaching from either direction, and at that period the vehicles that were turning from Braeton Main Road unto Hellshire Main Road should be at a stop.
- [6] He was more than half way across the road and whilst crossing the second lane, he felt a sudden burning into his right buttock. He fell in front of the car. When

he fell before the car he was actually sitting upwards facing the car and the car then continued to move forward, pushing him over and over. Eventually the car came to a stop. At that time, he was holding on to the front bumper with his feet under the car. The driver of the car Adrian Smith took him up, put him in the car and drove him to the gas station. He was taken by taxi to the Spanish Town Hospital accompanied by his wife and a friend who both arrived on the scene.

[7] In cross-examination the Claimant said there are stop lights at the intersection where Hellshire Main Road otherwise called Municipal Boulevard and the Braeton to Naggo Head roads meet. He could see the lights regulating the traffic heading in the direction of Hellshire as well as the lights regulating the Braeton to Naggo Head traffic. He said that before attempting to cross the Hellshire Main Road, the lights regulating the Hellshire Main Road/Municipal Boulevard traffic were on red, and the lights from Braeton to Naggo Head were on green.

[8] Defence Counsel put paragraph 3 of the Claimants witness statement to him which indicated the contrary. At paragraph 3 the Claimant stated inter alia that when he was standing on the Hellshire Main Road when the lights changed to red, he looked and proceeded to cross. At that point vehicles that were turning from Braeton Main Road unto Hellshire Main Road should be at a stop. Defence Counsel asked him why at a stop if they have the green. The Claimant responded by saying that Defence Counsel had left out the entire thing, he should start from the very start of it. He also strongly disagreed that when he was trying to cross, vehicles coming from Braeton to Naggo Head Road had the right of way turning unto Hellshire Main Road. He eventually agreed that Defence Counsel was not confused and agreed that what he had said earlier in cross examination that when the lights on Hellshire Road / Municipal Boulevard are on red, the lights on Braeton to Naggo Heard Road are on green was correct and ~~what he has said is exactly what happened.~~

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[9] He said that there is a paved concrete about 15 ft from the traffic light and he walked to the end of this paved concrete in order to cross the road, which is his regular practice. He never crosses the road in the exact corner of the four roads. He agreed with the suggestion it would have been more prudent for him to have crossed further down than fifteen feet, he said yes he could have gone to the bus depot. He agreed with the suggestion that he was crossing very close to an intersection. He said that there was no pedestrian crossing on the road where he was attempting to cross.

[10] Mr. Buchanan told the Court that he had completed crossing half the road when the motorcar struck him. He only felt when the car hit him, he did not see the car coming or hear it. He said that just before he attempted to cross the road the lights regulating Hellshire Main Road traffic were on red. He said that on that morning he was going to meet a bus at a place that was not a bus stop, but where the bus would stop and pick up persons, which was across the road from where he was, a little way down from the gas station. He denied that he was rushing to catch a bus and that he was running late that morning.

[11] It was suggested to the Claimant that it was not true when he said that Mr. Smith had told him that he was asleep behind the steering wheel.

He responded that Adrian Smith had told him so in the presence of both his children. He also stated that he did not tell the police that Adam Smith has told him so. Mr Buchanan told the Court that it was not dark at the time the accident occurred around 5:30 in the morning on the 17<sup>th</sup> December, 2007. He said light from the bus depot, gas station and a lot of bright street lights would have lit the area properly. The gas station was across the road from where he was that morning. The estimated distance of the gas station from where he was that morning is estimated at 75 feet as pointed out by him in Court and the JUTC bus depot was 100 feet as pointed out from where the accident occurred. The Claimant stated that Hellshire Main Road is 30 feet (estimate from the distance

pointed out in Court) and that he did not see the car coming or hear the car, he just felt when it hit him. This car was heading in the direction of the bus depot.

### **Defendant's Case**

[12] The 2<sup>nd</sup> Defendant has denied the particulars of negligence and by Defence filed on November 30, 2010 contends that the collision was either solely caused by the Claimant, or that the Claimant contributed to the collision. The particulars of negligence of the Claimant are that he :-

- (i) Failed to keep any proper lookout or to have any sufficient regard for his own safety when crossing the said road.
- (ii) Stepped and / or ran off the curb on the near side of the first Defendant into the path of the said motor vehicle registered at 8884DK.
- (iii) Stepped and / or ran into the said road in the path of the first Defendant without giving him any reasonable opportunity of avoiding the said collision.
- (iv) Failed to pay any significant heed to the presence of the said motor vehicle registered 8884 DK in the said road.
- (v) Crossed or attempted to cross the said road when it was unsafe and dangerous so to do.
- (vi) Failed to see the said motor vehicle registered 8884 DK in sufficient time or at all to avoid the said collision.

[13] Mr. Adrian Smith in his witness statement which was treated as his evidence-in-chief stated that on the 17<sup>th</sup> December, 2007 at approximately 5:20 am he was driving motor vehicle 8884 DK along the Braeton road, heading in an easterly direction. Due to the time of the year, it was dark so his headlights were on. The road surface was smooth and dry and he came to stop at the intersection with Municipal Boulevard and Hellshire Main Road which is a stoplight intersection. He was in the far left lane.

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- [14] He was going to the Texaco gas station which is at the corner of Braeton Road and Municipal Boulevard. When the light changed to green he proceeded to turn left at the intersection. This left turn took him onto Municipal Boulevard. After turning left, when he was approximately 15 feet away from the intersection a man suddenly stepped out into the roadway and into the path of the motor vehicle he was driving. This man emerged from the left hand side of the roadway.
- [15] Mr. Smith said that he was going less than 30 miles per hour when this man stepped out in the road. It happened so quickly that by the time he slammed on the brakes the car hit the man on his right leg causing him to end up on the bonnet of the car. When the car stopped he got out and helped the man to sit down by the side of the roadway. The man told him that he was running late and was rushing to catch the bus and was not paying attention to the traffic lights. He also said it is a good thing his daughters were not there with him that morning.
- [16] This man who he later learnt is the Claimant was dressed in dark clothes. He was bleeding from the side of his head and said his right leg was hurting him. The Claimant was taken by a passing motorcar to the Spanish Town Hospital accompanied by his wife.
- [17] Some inconsistencies exist in the Defendant's evidence-in-chief and that given in cross-examination. The Court has to determine whether or not they are serious or slight, material or immaterial and how do they affect the witnesses credit worthiness.
- [18] In cross-examination Mr. Smith said that he travelled on the Braeton main road and stopped at the intersection because of the red light. He turned onto Municipal Boulevard when the light turned green. Eight seconds passed from the time he turned to where the accident occurred. In these eight seconds he had travelled 5 feet at 8 mph. Later in his evidence he said that he travelled at 20 mph and not 8 mph and he knows the difference between a speed of 8 mph and

that of 20 mph. In his witness statement he said that he was not going more than 30 mph.

- [19] In his witness statement he said that after turning left when he was approximately 15 feet away from the intersection a man suddenly stepped out into the roadway and into the path of the motor car he was driving. In cross-examination he said that that was the truth. He also said that in his statement to the Insurance Company he had said that when he was 15 feet to 20 feet from the stoplight a man suddenly stepped into the pathway of the motor vehicle and that was the truth. In Court he pointed out about 5 feet as being the distance he had travelled along the Hellshire Road / Municipal Boulevard before the accident. Mr. Smith's evidence is clearly inconsistent with regard to speed and distance.
- [20] It is the evidence of Mr. Smith that at the time he collided with Mr. Buchanan, he was travelling 1 foot from the edge of the road. There was no soft shoulder on the left and he did not see any side walk. When he saw Mr. Buchanan step out in the path of his vehicle he was very close to the vehicle and that is why he bounced his right leg.
- [21] Interestingly later in cross-examination Mr. Smith was asked if when he drove along Municipal Boulevard that morning he saw Mr. Buchanan standing and then he saw him step out into the path of the vehicle in front of him. He replied that Mr. Buchanan appeared in front of the vehicle. He didn't see him standing "he just saw his right leg was in the path of the vehicle, he came over the front of the left light."
- [22] What he really saw of Mr. Buchanan was his right leg in the path of his vehicle. The first time he saw him was half a foot away, half foot from the left side of the front of his vehicle. ~~This evidence is clearly a material inconsistency which goes to the root of how the accident occurred and fundamentally affects his credibility.~~

[23] It is Mr. Smith's evidence that there were no street lights in the area the accident occurred the area was so dark that only the headlights of the motor vehicle assisted him in seeing where he was going. The JUTC depot along Municipal Boulevard was well lit and light from the depot illuminate parts of Municipal Boulevard but not where the accident occurred. He said that there are no street lights along Municipal Boulevard when one makes the left turn. He said that his headlights did not shine 15 feet ahead of him and he does not know if Mr. Buchanan was 15 feet from the intersection because he did not see him.

[24] Mr. Smith's account of the impact of the vehicle on Mr. Buchanan differs from that given by Mr. Buchanan. Mr. Smith said that when the left side of his vehicle at the front collided with the Claimants right leg, he leaned over the vehicle, his right side went on the bonnet of the vehicle and the right side of his head hit the wiper blade. He then fell back on his two arms in a sitting position on the ground. The windshield sustained a small crack when the Claimant's head hit the wiper blade.

[25] The first Defendant said that he did not sound the car horn when he made the turn from Braeton to Municipal Boulevard. It did not cross his mind that there were pedestrians there that time of morning. If it had so crossed his mind he would have sounded his horn.

#### The issue of liability

[26] Both common law and statute are applicable in determining the legal position of users of the road. It was established from as far back as the case of **Boss v Litton (1832) 5C + P 407** that "all persons, paralytic as well as others, have a right to walk on the road and are entitled to the exercise of reasonable care on the part of persons driving carriages upon it." This clearly establishes the duty of care to pedestrians.



Section 51 (2) of the Road Traffic Act 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."

[27] In the case of Nance v British Columbia Electric NY, their Lordships of the Judicial Committee of the Privy Council speaking through Viscount Simon at page 610 set out, inter, alia the duty of the pedestrian using the road to other road users as follows:-

"when two parties are moving in relation to one another as to involve risk of collision, each owes the other a duty to move with due care, and this is true whether they are both in control of the vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. When a man steps from the curb into the roadway he owes a duty to traffic which is approaching him with risk of collision to exercise due care."

Failing to see the Claimant within sufficient time or at all.

[28] It is the evidence of Mr. Smith in cross-examination that the first time he saw the Claimant was half of a foot away from his vehicle. He just appeared in front of the vehicle. He did not see him standing, and where the collision occurred was about five feet out of the intersection. He had travelled five feet along Municipal Boulevard and not fifteen feet.

[29] Mr. Smith said that he just saw the Claimant's right leg in the path of the vehicle. He came over front of the left light. When he collided with the Claimant, he was travelling one foot from the edge of the road. Mr. Smith recanted from his evidence-in-chief that after turning left when he approaching fifteen feet away from the intersection a man suddenly stepped out from the left hand side of the

roadway into the roadway and into the path of the motor vehicle he was driving. In my view this was a fundamental inconsistency.

[30] I accept the Claimant's evidence that the collision occurred when he was more than half way across the road and I find that the first Defendant failed to see the Claimant within sufficient time or at about which is tantamount to saying that he failed to keep a proper lookout. For the first Defendant not to have seen the Claimant along the Municipal Boulevard must mean that he was not keeping a proper lookout. Had he kept a proper he would have seen and fully recognized that the Claimant was in the process of crossing the road and would have been able to take some evasive action.

[31] There is no dispute that Municipal Boulevard is a straight road, and that the first Defendant's car lights were on at the material time. It is also Mr. Smith's evidence that he was travelling at a slow rate of speed either 8mph or 20 mph. I find that there was light from the gas station across the road opposite from where the Claimant started to cross the road and light from the bus depot and street lights which would properly have lit the area.

Driving on the road in a careless manner.

[32] I find that the Claimant drove without due care and attention when the vehicle he was driving collided with the Claimant when he had completed crossing half the road

Driving at too fast a rate in all the circumstances.

[33] It is the Claimants case that he did not see the car coming or hear the car, he just felt when it hit him and this was when he had completed half of the road. He said that he looked to ensure that no vehicles were coming (i.e. behind him, to his right side which is in the direction of Hellshire and to his left) to ensure that no

vehicles were coming from the direction of the JUTC bus depot before proceeding to cross the road. His evidence is that he saw no vehicles approaching from either direction. The Claimant is therefore not in a position to give the speed of the vehicle.

[34] However, when the evidence of Mr. Smith that he was travelling at 8mph and the distance that he travelled at are juxtaposed against the unchallenged medical evidence then certain questions arise. If the Defendant's vehicle was driving as slow as 8mph at the time of the collision how could the Claimant have received such serious injuries? If the vehicle, on Mr. Smith's evidence, collided primarily with the Claimant's right leg what explains the absence of any finding of injury to his right leg and how did the Claimant receive such serious injuries all over his body if as the first Defendant alleges, this was a low speed, low impact collision. I find that the nature and extent of the injuries suffered by the Claimant indicate that the first Defendant was driving at too fast a rate of speed in all the circumstances.

[35] I find that the first Defendant was negligent in the terms as stated in the Claimants' particulars of negligence and is liable in negligence as alleged. On a balance of probabilities I find that the substantial cause of the accident was the negligence of the first Defendant. Having seen and heard the witness I find the Claimant to be a witness of truth and who seems to me to be a more credible and reliable witness than the first Defendant, Mr. Smith.

Whether Claimant is contributorily negligent.

[36] The second Defendant has alleged negligence, or in the alternative, contributory negligence on the part of the Claimant. In **Nance v British Columbia Electric Railway Co Ltd (supra)** at page 610 Viscount Simon opined on behalf of the Board that:

'When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury.'

- [37] The Claimant had a duty of care to himself to cross the road with due diligence and care in order to avoid a collision. He had a duty to take reasonable care to protect himself from harm. The Claimant said that he was standing along the main road waiting for the lights to change from green to red, when it changed to red he looked behind him, to his right side and left. He proceeded to cross the road as no vehicles were approaching from either direction.
- [38] The Claimant was also aware having seen the lights change that when the lights on Municipal Boulevard were on red, the lights on Braeton to Naggo Head Road were on green, and there was a likelihood of vehicles turning from that road unto the Municipal Boulevard. The Claimant did not see or hear the car coming, he just felt when it hit him. There is no evidence that the Claimant, after he set off across the road looked again to see if any traffic was coming from the direction of Braeton. I find that this constituted a lack of care on his part.
- [39] He therefore failed to keep a proper lookout or to have any sufficient regard for his own safety when crossing the said road. There is no evidence that the Claimant looked again and did not see the vehicle, even if he had done so, he would not have been keeping a proper lookout as there was a collision.
- [40] I find that the Claimant contributed to the accident in a proportion of 20% and the first Defendant 80%.

#### Special Damages

Special damages were particularized as follows:-

- (i) Medical expenses (and cont) \$25,000.00
  - (ii) Transportation (and cont) \$ 5,000.00
- "\$34,000.00"

[41] Mr. Buchanan's evidence is that he expended \$32,000.00 for medical expenses. This amount is substantiated by receipts tendered as exhibits 5-8 in the sum of \$32,000.00. In his evidence- in- chief he claimed \$20,000.00 for transportation expenses. He stated that he did not have receipts for these expenses but each time he visited the Doctor he would spend approximately \$5,000.00 for taxi fare. He does not state how many times he did so; however there has been no challenge to the said transportation expense. The sum of \$5000.00 is allowed as pleaded. The Claimant has not amended his pleadings to increase the sum claimed from \$25,000.00 to \$32,000.00 the sum of \$25,000.00 is allowed.

[42] General Damages

The particulars of injuries listed in the Particulars of Claim are as follows:-

- (i) 1cm laceration to scalp
- (ii) swelling around ankle
- (iii) multiple trauma to right wrist, face, lower back and buttock
- (iv) strains
- (v) fracture of the fourth lumbar vertebra

(Take notice that further particulars of injury will be added once they become available and the pleadings herein amended accordingly)

No amendment was sought by the Claimant to the Particulars of Injuries.

On the issue of General Damages Mr. Kinghorn in his written submission made ~~reference to the medical report of Dr. Vijayendra Exhibit 1, Dr. Kadria Fairclough Stone- Exhibit 2, Dr. Rory Dixon Exhibit 3 and psychotherapist Shareel Anderson-Dixon Exhibit 4.~~

[43] The injuries sustained by the Claimant as evidenced by the medical evidence areas follows:

Exhibit 1

- Injury to lower back
- Tenderness over the L3 and L4 area
- Fracture of L4 vertebra

Exhibit 2

- 1cm laceration to the scalp
- Tenderness to the lumbar spine and right wrist with decreased range of motion
- Pains to the right thigh, buttock and wrist
- Swelling to the ankle
- Decreased flexion of the right wrist
- Fracture of 4<sup>th</sup> lumbar vertebra

Exhibit 3

- Diffuse tenderness over the dorsum of the right wrist particularly on extension of the wrist
- Tenderness on palpation over the radial aspect of the wrist
- Undisplaced fracture of the scaphoid bone
- Burst fracture of the L4 vertebra
- He was assessed as having fractures of the right wrist and lumbar spine

[43] The assessment of permanent impairments contained in Dr. Rory Dixon medical report April 21, 2010 reads:-

"Jehoida Buchanan sustained blunt trauma in the right buttock, fracture of the right wrist and fracture of the lumbar spine. He was incapacitated for at least four months and has been showing satisfactory improvement. It is anticipated that he will have recurrent low back pain requiring treatment with analgesic and pyhsiotherapy. He has been

encouraged to maintain an exercise program geared toward maintaining his core muscle strength. The fracture of the wrist was undisplaced and it is not anticipated that he would develop significant complications from this fracture. With respect to the injury to the back, his whole person impairment is about 6% whole person.

#### Exhibit 4

Pages 1 and 2 of the physiotherapy report of July 30, 2009 states a list of complaints made by the Claimant. However, several of these complaints have not been corroborated by the medical reports.

[44] The Claimant in his witness statement – stated that after the accident – he spent 3 weeks on bed rest. He also visited the Spanish Town Hospital because he had developed swelling in his feet and arthritis to the right section of his body which the Doctor referred to as ‘Ugly arthritis.’ He was advised not to drive again because it had slowed down his right foot. There is no finding of ugly arthritis in the medical reports or that he was given any advice about nor driving again.

[45] He said that the pain he was feeling was so severe he visited Dr. Ijah Thompson who referred him to the physiotherapist. He was also referred to Dr. Rory Dixon. The pain was so intense that he was unable to do simple things like lifting his children or lifting heavy load on his back.

[46] He said that although the pain is not as severe now it still affects him occasionally. It is painful at times when he tries to bend forward and this affects him on the job and causes him a lot of embarrassment, and because of the pain he refuses to travel in the back of a taxi or any motor vehicle as the front seat is more comfortable. Persons keep calling him “SHE” because they say that is only a woman drives at the front and a man should drive at the back.

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[47] On an examination of the Particulars of Injuries there are unpleaded injuries which are contained in the medical reports, the most significant of which is the Claimant's impairment of about 6% whole person. The particulars of injuries included multiple trauma to the right wrist, but no fracture of the right wrist. However, the most significant injury, fracture of the 4<sup>th</sup> Lumbar vertebra was pleaded. The Claimant has not amended his particulars of injuries.

[48] No orders in respect of the medical evidence were made at the Case Management Conference held on 19<sup>th</sup> July 2012. The Pre-trial review was set down for 22<sup>nd</sup> January 2013 and on that date adjourned to 28<sup>th</sup> February 2013 and further adjourned to 8<sup>th</sup> March 2013 when no orders were made concerning the medical evidence. At the date of trial no Pre-trial minute of order was on file. Rule 32.6 (1) of the CPR states that no party may call an expert witness or put in an expert witness report without the court's permission; and (2) the general rule is that the court's permission is to be given at a Case Management Conference. In keeping with the trial judge's management powers of the case, the court allowed the expert witnesses report to be put into evidence by consent at the trial. This evidence was needed to determine the real issues in the case. Also by admitting the reports, the court implicitly granted permission for the reports to be treated as produced by the experts. See case of **Cherry Dixon-Hall v Jamaica Grande Limited SCCA No 26 (2007 delivered November 21, 2008), dicta of Harris JA at paragraph 27.**

[49] Notice of Intention to tender in evidence hearsay statement made in a document dated 4<sup>th</sup> February 2013 and filed on 5<sup>th</sup> February 2013 was served on Samuda and Johnson on 5<sup>th</sup> February 2013. This Notice inter alia lists and attaches – the medical reports Exhibits- I, II, III and physiotherapy report Exhibit IV.

[50] At trial the Attorney's agreed that the said reports be put into evidence. These reports were unchallenged. There is an absence of amendment to the particulars of injuries and the Defence has raised no objection to the admission of the



reports; and certainly were not taken by surprise. It appears that the second Defendant had notice of the reports of Dr. Rory Dixon and Dr. Fairclough-Stone from 16<sup>th</sup> October 2010 when the Claim Form and Particulars of Claim were served. Notice to tender was served on the 5<sup>th</sup> February, 2013.

At the trial itself the Defence did not suggest that it was not open to the Claimant to advance these particulars of injuries. In fact Mr. Gordon submitted that if the Claimant succeeds at trial, General Damages of no more than \$1,800,000.00 should be awarded. First he said it was important for the court to make a proper assessment of the Claimant's injuries. In this regard he submitted that the court should place great emphasis on the medical report and pay little regard to the physiotherapy report.

- [51] I am satisfied that at the time of trial each side knew what constituted the medical evidence being relied on and that neither side was disadvantaged with respect to the presentation of their respective case.
- [52] I have looked at the case of Whalley v PF Developments and Anr (2013) EWCA CW 306 delivered on 14<sup>th</sup> February 2013 and found it instructive in that the court appears to be breaking away from a long line of precedent where Special Damages and Heads of Damages must be specifically pleaded.
- [53] This is in keeping with a sense of justice, reasonableness, logic and plain good sense rather than being strictly bound by precedent. Pleadings are important and define beforehand the issues to be determined, and ensure stability to the process. At the same time in the particular circumstances of this case, I find that the justice of the case compels me to consider the injuries contained in the medical reports.
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- [54] Mr. Kinghorn has urged the court to made an award of \$4,500,000.00 for pain and suffering and loss of amenities. He placed reliance on two cases in support

of this claim for General Damages. These cases were; Marie Jackson v Charlton & Harriott reported at page 167 of Khan's volume 5 and Dawnette Walker v Hensley Pink reported at page 114 Khan's volume 6.

[55] Jackson v Charlton & Harriot is not helpful in computing an award as injuries suffered bear no resemblance and are more serious than those suffered by the instant Claimant. In Jackson, the Claimant was diagnosed with a whiplash with sequelae and left sacro liliac contusion, lumber disc prolapsed.

[56] In Walker v Pink, the Claimant sustained injury to neck, right shoulder and upper back. The Claimant complained of constant pains and saw Dr. R. Cheeks and Dr. Chung. She was treated with steroid injection and wore a cervical collar for six months. She was away from work for one year and four months. In his report dated 13/8/99 Dr. Cheeks noted on examination there was:

1. Painful restriction of the left lateral rotation of the cervical spine and tender left paraspinal cervical musculature.
2. Some dimunition of pinprick sensation at the right thumb, index and middle fingers.
3. Marginally depressed right supinator jerk
4. Normal muscle tone, power and co-ordination in all 4 extremeties.

An MRI Scan of the cervical spine showed evidence of damage to the C3-4 cervical intervertebral disk, which was herniating (bulging) posteriorly and indenting the thecal sac. Dr. Cheeks suggested that the Claimant suffered soft tissue injury. It was his opinion that she was liable to bouts of neck and shoulder pain periodically. He assessed Partial Disability as 5% whole person. He gave as his reason for assessing 5% PPD the fact that should she sustain further injury she would be more vulnerable than a normal healthy person.

General Damages for pain and suffering and loss of amenities were awarded in the sum of \$220,000. On appear the award was - increased to \$650,000.00 on

June 12, 2003. Updated this amount values \$2,092,274.70 ((CPI) 199.6 May 2013).

[57] Mr. Gordon referred to the following cases:- **Leroy Robinson v James Bonfield and Conrad Young Khans volume 4 at page 99 and Barbara Brady v Barlig Investment Co. Ltd. Khans volume 5 at page 252.**

In Robinson case the Claimant suffered the following injuries:-

- (1) Multiple abrasion to left hand
- (2) Tender swelling to left elbow
- (3) Abrasions to eyebrows
- (4) Fracture of right wrist

There was no permanent disability

On the 23<sup>rd</sup> September 1996 he was awarded general damages of \$269,438. Updated this amount to \$1,191,149.15. I do not find Brady's case helpful in computing an award. In my view the case of **Rance v Jamaica Public Service Co. Ltd Suit No 1986/R 312 Harrison Assessment of Damages 2<sup>nd</sup> edition at page 374** offers some assistance. The Claimant suffered a wedge compression fracture to the 12<sup>th</sup> dorsal vertebra – early development of osteo – arthritis of the spine- pain as a result of having physical exertion. Permanent partial disability assessed at 5%. General Damages- pain and suffering and loss of amenities assessed on 11 December 1991 in the sum of \$100,000 updated this amounts to \$1,601,926.

[58] I find that an award of \$1,875,000.00 would be appropriate in the circumstances. In accordance with my findings on the liability ratio, the Claimant's General Damages will be reduced by 20%.

~~Interest at the rate of 3% p.a. from the date of service of the Claim Form 16<sup>th</sup> October 2010 to today's date~~

Special Damages in the sum of \$30,000.00 is reduced by 20%

Interest at the rate of 3% p.a. from 17<sup>th</sup> December 2007 to today's date. 80% of Claimant's cost to be paid by the 2<sup>nd</sup> Defendant to be agreed or taxed.