[2020] JMSC Civ 32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014 HCV 00803

BETWEEN	**TROY HENRY**	**CLAIMANT**
AND	**JAVETTE NIXON**	**DEFENDANT**

IN OPEN COURT

Mr. Charles E. Piper Q.C. and Ms. Petal Brown instructed by Charles E. Piper & Associates for Claimant.

Ms. Jody-Ann Gaff instructed by Vaccianna & Whittingham for the defendant.

Heard 27th, 28th, 31st May, 2019 and 14th February, 2020

Road Traffic Act- Negligence- Motor vehicle collision at intersection of main road and minor road- Car turning across a main road unto minor road- Duty of turning driver- Duty of the motorcyclist on correct side of the road-Motorcyclist not wearing helmet-Contributory negligence

HENRY-MCKENZIE, J (Ag)

[1] This is a claim in negligence which arises from a motor vehicle collision which took place on August 25, 2010 at about 10:30 pm at the intersection of Half Way Tree Road and Chelsea Avenue between the Claimant's motorcycle and the Defendant's motor vehicle. In the Claim Form dated February 17, 2014 and filed

on February 14, 2014, the Claimant Troy Henry claims against the Defendant Javette Nixon, damages for Negligence. He alleges that the Defendant so negligently drove, managed or controlled his motor vehicle so as to cause same to collide with his motor cycle, a consequence of which he suffered injury, loss and damage. The Claim Form is supported by Particulars of Claim, in which the Claimant details the particulars of Negligence, as he avers, the injuries he suffered, diagnosis, the treatment he received as also Special Damages.

THE CLAIMANT'S ACCOUNT

[2] The Claimant's witness statement dated the 29th June 2018 and filed that same day, along with his oral testimony elicited by way of amplification, constituted his evidence-in-chief.

[3] The Claimant alleged that he was travelling on Half Way Tree Road from the direction of Half Way Tree heading in the direction of Cross Roads on his CBR Honda 600 RR motorcycle, when on approaching the intersection of Half Way Tree Road and Chelsea Avenue, he saw the Defendant's vehicle at the intersection with its right indicator on, positioning to turn unto Chelsea Avenue. The Defendant's vehicle was on the opposite side of the road coming from the direction of Cross Roads. The Claimant indicated that he was about six car lengths away from the intersection when he saw the Defendant's vehicle. He was riding at a speed of 55 km/h as he approached the intersection. A bus and a car had already passed through the intersection. The traffic light was green in his favour. While going through the intersection, the Defendant's vehicle turned into his path and he collided into the front left section of this vehicle. He woke up in the Kingston Public Hospital suffering from serious injuries. He was discharged from the hospital on October 1, 2010. He admits that he was not wearing a helmet at the time of the collision. The extent of his injuries will be looked at when dealing with the assessment of damages**.**

[4] In cross-examination, the Claimant refuted the Defendant's allegations that he was given an indication to turn and highlighted that the bus that was alleged to have given such indication, had already gone through the intersection. The Claimant was adamant that the bus was not located in the right lane, but in the left lane as one faces Cross roads. In fact, according to the Claimant, there was no vehicle in the right lane.

[5] He insisted that he was not speeding. When questioned as to how he was able to judge the speed at which he was going, he indicated at first, that he was in a 50km/h zone and he was driving in 3rd gear, but then later on, credited this to his riding experience. He also insisted that he was travelling in the middle lane. He also indicated that when he saw the Defendant's vehicle turn, although he had full view of the vehicle, he did not attempt to brake or swerve. He also pointed out, that as he was going through the light, in a split second the Defendant's vehicle turned into his path. He vehemently denied that he was the cause of the collision.

THE DEFENDANT'S ACCOUNT

[6] The Defendant's witness statement dated the 26th June 2018 and filed on the12th day of February, 2019, stood as his evidence in chief, along with the evidence elicited in amplification.

[7] The Defendant's case is that he was coming from the direction of Crossroads. On reaching the intersection of Half Way Tree Road and Chelsea Avenue, he positioned his vehicle in the right lane with the right indicator on, showing his intention to turn unto Chelsea Avenue. The traffic light was on red, so he stopped his vehicle. When the light eventually changed to green he maintained his stationary position as the traffic had begun moving towards Cross Roads. A coaster bus which was in the right lane, stopped to give him way. So did a black pickup truck which was in the middle lane. The left lane had no traffic. Both

drivers signalled to him that he could proceed to make the turn. He started to make the turn and whilst so doing, he saw a motorcycle coming from behind the coaster bus at a fast speed. He attempted to continue to make the turn, but realised that the motorcyclist was not slowing down. The motor cyclist rode to the right of the coaster bus and went between the bus and the median. He stopped his vehicle, hoping that the motorcyclist would pass his vehicle on the left side, but he instead crashed into the front left hand side of his vehicle.

[8] The Defendant in cross-examination stated that he had only travelled less than a foot from his stationary position when he began his turn, but thereafter agreed with the suggestion by Queen's counsel, that the distance was more between one and two feet. He was inconsistent in his evidence as to whether he had stopped when he saw the claimant's bike coming towards him or whether he continued to make the turn. He was also inconsistent as to whether he had seen the Claimant's motorcycle before he started to make the turn. He denied that he was the cause of the collision and blamed it on the Claimant.

SUBMISSIONS ON LIABILITY

Claimant's Submissions

[9] Queen's Counsel Mr. Piper for the Claimant, summed up his submissions using the words of Morrison J in ***Matthew and Anor v The AG and Anor (2007) HCV04547, para 23& 24***.

> *"The rule of the road is a paradox quite for riding or driving along; if you go to the left you are sure to go right, if you go to the right you go wrong."*

[10] He argued that a motorist intending to make a right turn against oncoming traffic must wait until he is certain that he can safely make the turn before moving or attempting to move from a major road unto a minor road. He argued further, that if there was traffic lawfully proceeding along the major road which a motorist did

not see or saw at the last minute, he will be at fault for having obstructed traffic that has the right of way, which he submitted, the Defendant in fact did. This he stated was in breach of the *Road Traffic Act*, in particular, sections 32 (1) and 51,which impose a duty on motorists to drive with due care and attention and with reasonable consideration for other persons using the road and a duty to take such action as is necessary to avoid an accident.

[11] Queen's Counsel relied on the decision of ***Simpson v Peat (1952)*** 2Q.B 24 which speaks to the duty owed by motorists in situations where they are turning across traffic. This he submitted, requires caution and care which a reasonable and prudent driver ought to exercise. He further submitted that on the evidence, the Defendant is the cause of the collision and was therefore negligent. Despite taking this position, Queen's Counsel recognized that the Claimant failed to minimize his injuries by not wearing a protective helmet. He argued however, that that this will only require a reduction in damages at 5% of the whole.

Defendant's Submissions

[12] Counsel for the Defendant Miss Goff, on the other hand, argued that the duty to take reasonable care at both common law and statute is owed by road users, not only towards each other, but to themselves. The duty is not only on motorists turning across traffic as in the instant case, but on every user of the road, which includes the Claimant motorcyclist. In support of this argument, she cited the case of ***Pamela Thompson and others v Devon Barrows and others*** CL 2001/T143, para 11.

[13] She submitted that the evidence shows that various actions undertaken by the Claimant were significant factors resulting in the collision and the Claimant's injuries. She described these actions as:

i. Riding at an excessive speed and improper speed in all the circumstances

ii. Overtaking the coaster bus in an improper manner

iii. Failing to pay attention to the fact that other vehicles travelling ahead of him in his direction had stopped to allow the Defendant to turn

iv. Failing to stop, turn aside, brake or otherwise manage or control his said motorcycle so as to avoid the collision

v. Carelessly and recklessly colliding into the front bumper of the Defendant's vehicle.

[14] She therefore submitted that the Claimant was the cause of the collision and has asked the court to so find. In the alternative, that the Claimant negligently contributed to the collision occurring and that his injuries were of his own making. Should the court find contributory negligence on the part of the Claimant, she asked the court to apportion blame at 80% to the Claimant and 20% to the Defendant. This, owing to the Claimant's careless and reckless driving of the motorcycle at excessively high speed, which prevented him from taking the necessary steps to avoid the collision, and his failure to wear protective garments, when there was always a possibility of a collision on the road.

[15] Counsel for the Defendant had urged the court in her submissions to adopt the approach taken by the court in the cases of **Steve Thompson & another v Suites Hall** [2016] JMSC Civ. 105 and **Heron Scott v Huntley Manhertz** [2017] JMSC Civ. 148. Both cases however can be distinguished from the case at bar.

Issues

[16] The court has to decide the following issues:

i. Who was the proximate cause of the accident, was it the Claimant or the defendant or both?

ii. Was there contributory Negligence? If so, how is liability to be apportioned?

iii. The quantum of damages, if any, to be awarded to the claimant.

LAW

[17] A classic definition of Negligence is to be found in the case of **Blyth vs. Birmingham Waterworks** [1856] 156 ER 104.7 and in particular the dictum of Alderson, B, where he opined:

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do"*

It is well established, that for a claim in Negligence to succeed, the Claimant must prove on a balance of .probabilities:

(a) The existence of a duty of care, owed to the Claimant by the Defendant.

(b) A breach of that duty.

(c) Damage resulting from that breach.

[18] All users of the road owe a duty of care to other road users (see: **Esso Standard Oil SA Ltd and Anor vs. Ivan Tulloch** (1991)28 JLR 557)

[19] The case of **Bourhill v. Young** (1943) A.C. 92 emphasises that a driver must exercise reasonable care to avoid injury or damage to other users of the road. Reasonable care is the care which an ordinary skilful driver would have exercised under all the circumstances, and which includes avoidance of excessive speed, keeping a proper look out and observing traffic rules and signals.

[20] The dictum in the case of **Foskett v Mistry** (1984) R.T.R 1C.A 660 is worthy of mention, where it was stated that it is the duty of the driver or rider of a vehicle to keep a good look out. A driver who fails to notice in time that the actions of another person have created a potential danger is usually held to be negligent;

he must look out for other traffic which is or may be expected to be on the road, whether in front of him, behind him or alongside him, especially at crossroads, junctions and bends.

[21] The Road Traffic Act sets out the rules of the road. It provides guidance to persons in their use of the road and imposes certain duties on these users. The fundamental duty imposed under the Act is set out at section 32 and requires all drivers to exercise due care and attention in their use of the road and to have reasonable consideration for other road users. The rules of particular importance to this case, are sections 51 and 57 which speak to the duty of a driver not to obstruct traffic when turning or changing direction. Sections 51(1) and (2) and 57 of the Road Traffic Act provide:

> *"51 (1) The driver of a motor vehicle shall observe the following rules - a motor vehicle*
> *(d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;*
> *(e) proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road*
> *(f) proceeding from a place which is not a road into a road or from a road into a place which is not a road, shall not be driven so as to obstruct any traffic on the road."*
> *51(2) 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 a collision, 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."*
>
> *"57(1) The driver of a motor vehicle constructed to be steered on the right or off-side thereof, shall, before commencing to turn to, or*

change direction towards, the right, give the appropriate signal so as to indicate that direction."

[22] Section 51(3) describes a motor vehicle as obstructing traffic where the vehicle causes the risk of accidents.

[23] The common law duty to take reasonable care, must be read in conjunction with the statute. In **Jowayne Clarke and Anthony Clarke v. Daniel Jenkins Claim No. 2001/C211** delivered 15/10/2010 (pg.14) Thompson-James, J stated:

"A driver of a vehicle on the road owes a duty to take proper care and not to cause damage to other road users – whom he reasonably foresees is likely to be affected by his driving. In order to satisfy this duty, he should keep a proper look out, avoid excessive speed and observe traffic rules and regulations.

It is a question of fact in each case whether or not the driver had observed the above stated standard of care required of him."

ANALYSIS

[24] In this case, the undisputed evidence before the court is that the collision occurred on August 25, 2010 at about 10:30 in the night at the intersection of Half Way Tree Road and Chelsea Avenue. Further, that the intersection of Half Way Tree Road and Chelsea Avenue is regulated by traffic lights, however, there is no filter light at the intersection to regulate vehicles turning right unto Chelsea Avenue. Further, it is not disputed, that at the material time, the Claimant was riding a CBR Honda 600 RR motor cycle coming from the direction of Half Way Tree heading in the direction of Crossroads. Finally, that the Defendant was driving a Toyota Rav 4 motor vehicle coming from the direction of Crossroads heading in the direction of Half Way Tree.

[25] The accounts given by the Claimant and the Defendant differ in relation to other material aspects of the case however, for example, in which lane the claimant was travelling, whether the claimant was speeding, where the vehicles were positioned at the time of the collision and whether the defendant was moving or stationary at the time of the collision.

[26] There is no independent evidence, so the case turns substantially on the credibility of the parties. The court therefore has to be very scrupulous in its assessment of both versions.

[27] It is accepted by the court that before the collision, the Defendant was positioned in the right lane coming from Crossroads and that his indicator was on, giving clear indication of his intention to make the right turn unto Chelsea Avenue. The case turns however, on whether the Defendant had commenced his turn when it was unsafe to do so, thereby causing obstruction to the Claimant's motorcycle as he was in the process of traversing the intersection.

[28] The evidence of the Claimant is that before the collision, he was travelling at a speed of 55km/h in the middle lane proceeding through the traffic light, when the Defendant came into his path. The light of the motorcycle was on and there was no vehicle in front of him or in the right lane. On the Claimant's account, the Defendant ought to have had a clear unimpeded view of him, as the Defendant would have been facing the oncoming traffic. In those circumstances, I find that it is unlikely that the Defendant would have turned into his path causing the collision, as he would have been able to see the motorcycle approaching. I do not find the Claimant's account in this regard to be plausible.

[29] The Defendant's account is that he was signalled by the driver of the coaster bus and the pickup truck who were positioned in the right lane and the middle lane respectively, that he could make the turn and so he proceeded to turn. I accept this evidence.

[30] It is not clear on the Defendant's evidence however, whether he had seen the Claimant's motor cycle before he started to make the turn. In his evidence in chief he indicated:

> *"While taking the turn, I observed that a motor cycle which was being driven by the Claimant at the material time was approaching at a fast speed from behind the Coaster Bus. I attempted to continue the turn towards Chelsea Avenue, but realized that the motor cyclist was not slowing down, despite the other vehicles being stationary, but instead rode to the right of the Coaster Bus going between the bus and the median line, a space which did not allow for overtaking or vehicular traffic."*

[31] His answers to questions put to him on this point in cross-examination however, are worthy of note:

Q: You are telling the court that when the cycle came to the right of the bus you did not see it before you commence moving?

A: I did not tell the court that

Q So you did see him?

A: I did see him, yes.

Q: And despite seeing him you commenced to turn?

A: No, I did not

Q: When you saw him you remained stationary at the traffic light?

A: Upon seeing him I brought my vehicle to a stop yes

Q: Did you not commence making your turn when you saw Mr. Henry on the bike?

A: I had commenced making my turn when I saw Mr. Henry's bike

[32] The Defendant's evidence in relation to whether or not he had seen the Claimant's motor cycle before he commenced making the turn is at best conflicting. Also conflicting, is whether or not having seen the Claimant's motorcycle, he remained stationary or he proceeded to turn. I must mention at this juncture, that at times the Defendant seemed to be less than forthright in answering questions put to him in cross-examination and left the court with the distinct impression that he was being evasive. Be that as it may, I accept his account, that he did see the motorcycle when he commenced making the turn, but nonetheless continued to do so, although according to him, the motorcycle was approaching at fast rate of speed. I find that this was a dangerous and unsafe thing to do. The fact that he was given the signal to proceed across the intersection by two motorists, did not give him a lawful right of way. He still had a duty to ensure that the way was clear and that his vehicle could safely cross the intersection without obstructing the flow of traffic and without creating a situation which was a potential risk and danger to other users of the road. It was not enough for the Defendant to have thought that the Claimant would have been skillful enough to manoeuvre around his vehicle. He also had a duty to exercise the degree of care and attention which a reasonable and prudent driver would exercise in executing the turn.

[33] It is well established by statute and at common law that a driver has a duty to exercise reasonable care in his use of the road so as not to cause injury to fellow road users. A part of this duty is the requirement not to proceed from one road to the next if it may obstruct traffic. In ***Pratt v Bloom*** *(1958) Times, 21 October, Division Court, reported in* ***Bingham and Berryman's Personal Injury and Motor Claims Cases*** *12th edn. 85,* Streatfield J spoke on the duty of a driver when changing directions. He said as follows:

> *"The duty of a driver changing direction is (1) to signal and (2) to see that no one was incommoded by his change of direction and the duty is greater if he first gives a wrong signal and then changes it."*

[34] In the instant case, the Defendant who was making a right turn from a major road to a minor road across the intersection, ought to have waited until he was certain that he could safely make the turn, particularly in the circumstances whereby the traffic light was on green for the oncoming traffic, which would have afforded them a lawful right of way. This simple means that the Claimant who was on the correct side of the road and had the green light, would have had a right of way. I accept the Claimant's evidence that the Defendant came into his path "in a split second". I find therefore, that the Claimant in those circumstances was not able to respond to prevent the collision.

[35] To add to this, there was also an obligation on the Defendant "*to anticipate any act which is reasonably foreseeable, which the experience of a road user teaches that people do, albeit negligently"*. ***See***: ***Berrill v Road Haulage Executive*** [1952] 2 Lloyds Rep 490 digested in Bingham &Berrymans' paragraph 4.7. In ***Steve Thompson and Errol Ali (discontinued) v Guiles Hall*** *[2016] JMSC Civ 105, at para 61,* Dunbar-Green J had this to say on the road realities in Jamaican society:

> *"In using the roadway and keeping a proper lookout, it is foreseeable that a motorcycle can emerge from between traffic anytime and at some speed. This is a common feature on Jamaican roads. Therefore, the defendant should have been alert to the presence of the motorcycle bearing down on him, even in circumstances where his line of sight might have been blocked".*

[36] I adopt this view taken by my learned sister.

[37] I find in all the circumstances on a balance of probabilities, that the Defendant failed in his duty to exercise due care and attention on the road way, to keep a proper look out, move from one road to another without creating an obstruction to traffic and to safely manoeuvre his vehicle along the roadway and was therefore negligent. I find that the Defendant was the proximate cause of the collision.

CONTRIBUTORY NEGLIGENCE

[38] Section 3(1) of the Law Reform (Contributory Negligence) Act provides:

> *"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 damage …"*

[39] In the Privy Council decision of **Nance v British Colombia Electric Co. Ltd.** [1951] 2 All ER448. Their Lordships in reviewing the Court of Appeal's decision, posited:

> *"… 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 that 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 want of that care to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other to compensate him in full"*

[40] Their Lordships added however, that this is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the Defendant no duty to act carefully. Accordingly their Lordships said:

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

[41] The Claimant stated in evidence that he did not take any evasive action to avoid the collision. He did not apply his brake, slow down or swerve. This lends credence to his account that the Defendant within a split second turned across his path. However, he said he had observed the Claimant from six car lengths

away positioned to turn and indicating his desire so to do. He ought to have foreseen that the Defendant might suddenly make the turn into his path and therefore he should have exercised more caution and greater care as a reasonable, prudent man would, in approaching the intersection, which includes checking the speed at which he was travelling, which he says, is 55km/h. The physical evidence however, does not support the Claimant's contention that he was travelling at 55km/h. The fact that he was thrown from the motorcycle and hit the bonnet and windscreen of the Defendant's vehicle, the extent of the injuries he suffered and the fact that both vehicles were extensively damaged, suggest that he was travelling well above 55km/h and was speeding.

[42] Coupled with all of this, the Claimant was not wearing a protective helmet. Section 43D(1) of the Road Traffic Act stipulates:

> *"Every person shall, at all times while driving or riding on, a motor cycle, wear a protective helmet of the prescribed shape, quality, construction or standard"*

[43] The Claimant ought to have foreseen the risk and the danger of riding a motorcycle on a busy road, particularly at night, without a protective helmet, and in circumstances where he was exceeding the speed limit. On his evidence, he knew that it was the sensible thing to wear a helmet to minimize any harm to himself, in the event of a collision. I have taken note, that Dr. Sandra Bennett, Senior Resident Plastic Surgeon at the Kingston Public Hospital and the National Chest Hospital, in response to questions put to her by counsel, was of the view that a protective helmet most likely would have lessened the Claimant's facial injuries.

[44] In **Jones v Livox Quarries Ltd** [1952] 2QB 68 Lord Justice Denning opined:

> *"Although contributory negligence does not depend on a duty of care, it does depend on foreseeability … A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might hurt*

himself and in his reckonings he must take into account the possibility of others being careless"

[45] In the circumstances, the Claimant is partly to be blamed for the damages he suffered. I find that he is guilty of contributory negligence. I therefore find the Defendant 75% liable and the Claimant 25% liable.

Defendant's Conviction for Careless Driving

[46] Counsel for the Defendant has raised concerns that the Defendant's conviction in the Traffic Court for Careless Driving was improperly placed before the court on account of a wrong application of the **Peter Blake** principle and further, that the documents admitted as exhibit 17 (a)(b) and (c) constitute hearsay evidence.

[47] It must be emphasised however, that it was counsel for the Defendant who first put before the court evidence of the Defendant's conviction in the Traffic Court through the Defendant himself, in her conduct of his examination in chief, by way of amplification. It was in an attempt to discredit the Defendant and to put his credibility into question, that Queen's Counsel introduced the documents admitted as exhibit 17 (a)(b) and (c). Queen's Counsel had properly utilized the **Peter Blake** principle in relation to these documents and the principle was properly applied. He later made an application to have the document tendered. Both sides made submissions as to whether these documents would offend the hearsay rule. On consideration of the submissions, I ruled that the documents, been public documents, did not constitute hearsay evidence and did not offend the hearsay rule and therefore were admissible.

[48] I will say at this juncture, that I have not considered or taken into account the evidence pertaining to the Defendant's conviction in the Traffic Court. It has in no way shape or form, influenced my decision in this matter and is disregarded. The case is decided on the facts before me elicited during the trial. I make no adverse findings against the Defendant on account of this conviction.

ASSESSMENT OF DAMAGES

Special Damages

[49] The parties agreed $259,709.45 as medical expenses and I make that award. I also award the Claimant $18,500 for the Ambucare services provided from Kingston Public Hospital (KPH) to Winchester Medical Centre, as indicated in receipt dated August 31, 2010.

Transportation

[50] In relation to transportation for physiotherapy, the evidence indicates that the Claimant did two sets of physiotherapy, one at KPH and the other at National Chest Hospital. There is no documentary evidence to prove transportation costs, but there is evidence that the Claimant did in fact go to physiotherapy. Taken that he was seriously injured, I accept that the Claimant may not have been able to drive to these appointments and as such it is reasonable to expect that he would incur costs for transportation. He has exhibited appointment cards with numerous dates for physiotherapy. In his evidence however, he admitted to doing 18 days of physiotherapy at KPH at $1000 per day for transportation. He has also stated doing physiotherapy at National Chest Hospital, but he did not state the number of days. The appointment cards exhibited indicate a total of 34 sessions of physiotherapy, therefore an award of $34,000 is made for transportation to and from physiotherapy.

[51] In relation to transportation to work, the Claimant alleged in his examination-in-chief, that he took a cab to work for over 16 months. In cross-examination however, he stated that when he started to work in March 2012, he started driving to work. This contradicts his evidence-in-chief. There being no receipts to prove the Claimant's transportation costs to work and given the inconsistency in the Claimant's evidence, no award will be made under this head.

Loss of Earnings

[52] In relation to loss of earnings, the evidence is that the Claimant did not work from the date of the incident to March 2012. There is documentary evidence to support the fact that he received salary for August and September 2010. He did not receive any salary from October 2010 up to March 2012.The Claimant explains that he was not working for such a long period because he was not physically capable. The Claimant was discharged from the hospital on October 1, 2010. He was an outpatient for approximately six months at KPH which would bring him up to about April 2011. He was referred to National Chest Hospital on October 4, 2010 where he was also an outpatient. During that period, he had numerous surgeries both major and minor. On November 26, 2010 he did a release of ectropian (eyelids turned outwards) and corrected bulge to lip. The dressing was removed December 1, 2010. On December 7, 2010 he had minor surgery to forehead, from which the sutures were removed on December 10, 2010. On May 9, 2011 there was further release of ectropian. He was admitted on ward on May 9 -11, 2011. Finally, on November 21, 2011, he did his last release of ectropian. He was sent home post operation. On November 25, 2011 all dressings were removed from eyelid. On January 18, 2012 he was recommended not to do any more surgery in the near future.

[53] The Claimant would have required time to heal from his surgery done in November 2011. It is therefore reasonable in all the circumstances to award loss of earnings up to December 2011 to account for the recovery period. It was recommended in January 2012 that he was not to do any further surgery in the near future. This suggests that he was well enough to return to work then. He had a duty to mitigate his loss by returning to work as soon as he was physically able to do so. I will therefore award loss of earnings to cover the period October 2010 – December 2011, calculated as follows:

The claimant’s monthly gross salary is $60,000.00. Over the last eight months his average commission was $20,487.00 per month.

Salary for October to December 2010:	$180,000.00
Travelling for October to December 2010:	$18,000.00
Commission for October to December 2010:	$61,461.00
	$259,461.00

For January to December 2011:

Gross Salary would be -	$720,000.00
Travelling Allowance would be -	$72,000.00
Commission would be -	$245,844.00
	$1,037.844.00

Total taxable income for period October 2010 to December 2011 is $1,294,794.00.

Income tax in this jurisdiction is 25% and education tax is 2%, making a total of 27%.

At the tax rate, 27% of $1,294,794.00 is $349,594.38. This figure represents the amount to be deducted from the total taxable income for the period October 2010 to December 2011, that is $1,294,794.00 minus $349,594.38. This leaves $945,199.62 as net income for the period October 2010 to December 2011.

The earnings lost, by the Claimant after his tax deductions for the period is $945,199.62. An award in the sum of $945,199.62 is made for loss of earnings.

General Damages

i. Pain and Suffering and Loss of Amenities

[54] The Claimant injuries and treatment were detailed in numerous medical reports from KPH and National Chest Hospital.

[55] Dr. Christmas in his medical data (exhibit 3) found that on the day of the accident August 25, 2010, the claimant was presented with posterior neck pain, multiple abrasions to face, upper and lower limbs, swelling tenderness to right wrist and right side of pelvis and degloving injury to right side of scalp with eyelid involvement. He was diagnosed as having:

i. degloving injury to the face and scalp
ii. fracture of the distal right radius (wrist)
iii. fracture of the inferior ramus of right pubic spinal cord with compression at C5/C6 level (disc).

[56] In Dr. Trevor Golding's report, consultant Radiologist, (exhibit 2) the Claimant was diagnosed with a disc disease at C4-C5 and C5-C6 with cord compression and oedema at C5-C6.

[57] Dr. Sandra Bennett, Resident Plastic Surgeon had also been involved in the Claimant's medical treatment. In a report dated January 31, 2011, she reported that he was found to have the following injuries:

i. Long curvilinear scar to right fronto parietal scalp extending unto the central region of the forehead
ii. Severe ectropian of the right upper and lower lids
iii. Abrasion about the right cheek with sinking of the zygomatic (cheek) region
iv. Abrasion and scar to the nose
v. Scar to the upper left side of lip
vi. Large mucosa bulge to the lower left side of lip

[58] She indicated the Claimant having to undergo three different surgeries to release the ectropian to his eyelids. In doing these surgeries, the report shows that the doctors had to take skin graft from other areas of the body such as the posterior right and left ear and from the medial aspect of the left arm. He was also

referred to a Consultant Plastic Surgeon who diagnosed him with having right facial fractures and was referred to Facio Maxillary Surgeons who also agreed with this diagnosis, but found them to have been healed with no intervention by the FacioMaxillary Surgeon to be done. He however has severe disfigurement to the right side of his face.

[59] The Claimant had also described how the accident and the surgeries affected his life. He stated that he is still experiencing pain from the accident, dry eyes and sinus issues, which causes pain from his forehead to his nose. He also has problems swallowing at times and suffers constant pains to the back of his neck causing dizziness and him being off-balanced, requiring him to be careful when he moves. He described restrictions in the movement of his neck and his right wrist, only being able to move his neck about 75% up and down and 70% left and right. He says he is no longer as active as he once was, no longer being able to play basketball and football. He also testified having issues getting an erection and being in a state of depression. When asked about getting treatment for the symptoms, the Claimant indicated seeing Dr. Bennett, a Plastic Surgeon and being prescribed medication by another doctor by the name of June Frazer. He also saw Dr. Frazer for his erection issues. He has however produced no medical evidence of his alleged erectile dysfunction from Dr. Frazer. He has also not presented any medical evidence to verify his state of depression.

[60] Both counsel cited cases in support of their submissions, however I have chosen those closest to the injuries suffered by the Claimant. In the case of ***Janice Lockett (an infant by sister Desreen Burnside Peart as next friend) v Gladstone Williams &Bournville Briscoe*** *C.L. 1996 C 102, Khan Vol. 5, pg. 274* the Claimant was 10 years at the time of the accident. She sustained degloving injuries to the right leg, shoulder and fractured right tibia and right tibia plateau. She was hospitalized for over 3 months and underwent intensive wound excision and fixation of fractures to right leg. There was a skin grafting of her right leg wounds. She was left with permanent scarring and deformity of the lower limb due to extent of degloving injury. She was left with some leg

shortening and had a limp. She was awarded $1,200,000.00 in July 2000. When updated using the CPI for December 2019 it is equivalent to $5,904,000.00.

[61] In ***Kennesha Harris (infant by mother and next friend Beverley Harris) v Hall, McIntosh and Morgan,*** *Khan Vol. 4, pg. 77,* the Claimant was also an infant involved in an accident. Her injuries were abrasions over right thigh, lacerations over left eye and below right hip, laceration over left eye and extensive gloving injury over left leg from just below the knee to ankle. The infant was hospitalized for a little over 2 months and there was sustained gruesome scarring to the leg. In October 1992, she was awarded $400,000.00 in general damages for pain and suffering and loss of amenities. Updated this equates to $6,293,023.26.

[62] **Douglas Fairweather v. Joyce Eloise Campbell** (executive of state of Griffiths Campbell, deceased) suit no. CL1982 F059 khan vol.5 pg.14. The Plaintiff, a motorcyclist, was injured when he was hit by a reversing car. When the Plaintiff was examined he was found to have a small scar over the right and left upper cheek; a slight restriction of movement of the neck; a weak fist in the left upper limb; tenderness of the right knee; a slight tenderness over the fracture site and a limp. General damages were awarded on May 14, 1999 in the amount of $1,300,000.00 with the interest of 3%. This amount when updated is equivalent to $6,791,005.61.

[63] **In George Dawkins v. The Jamaica Railway Corporation** Khan vol 5 page 233, the Claimant, age 45 was involved in an accident on a railway and sustained the following injuries:

i. Unconsciousness
ii. Fracture of upper jaw with cranion maxillary disruption
iii. Fracture of the inferior orbital area (eye) on the left side of the face associated with severe nose bleed
iv. Fracture of the lower jaw
v. Lacerations and swelling of the tongue

vi. Lacerations above elbow and below the left eye and upper lips

He was hospitalized for six (6) weeks and left with facial scarring and deformity. The Court awarded general damages for pain and suffering and loss of amenities in the sum of $450,000.00 in January 1997. This updates to $2,233,173.54. This case I find, to be at the low end of the spectrum and does not offer a realistic guide and is not in keeping with the trend of awards in similar cases.

[64] In the cases cited, I find the injuries to be less grievous than in the case at bar. In this case, the claimant is left with severe disfigurement to the right side of his face, constant pain and dizziness, restriction in the movement of his neck and wrist which affect his ability to participate in games he once played.

[65] Having considered the nature and extent of the injuries suffered by the claimant, the cases cited and the trend of awards in similar cases, I am of the view that an award of $8,500,000.00 for pain and suffering is reasonable in all the circumstances.

ii. *Future Medical Expenses*

[66] The Claimant indicated that in 2015 when he consulted a private Facio Maxillary Surgeon, he was told that the cost for further surgery was $780,000.00. This evidence is hearsay in that there is no evidence to support this, neither is there proof of any such discussion with a Dr. Goves. To add to this, it was also recommended to the Claimant, that further surgical intervention in the near future was not necessary, as it was unlikely to provide significant improvement in his appearance. It was also mentioned that the Claimant's wounds would be assessed over the next couple of years and surgical intervention will be offered to improve his appearance where necessary, though, any further surgery that may be done, was not to be contemplated before one year after the last procedure. As such, whether the Claimant will have any further surgery is uncertain, so all of this considered, no award for future medical expenses will be made.

iii.Handicap on the Labour Market

[67] This head of damages was not pleaded so I make no award in relation to it. In any event, were I to consider it, it would not succeed as the evidence does not support the grant of an award under this head.

[68] I therefore make the following orders:

ORDERS

Judgment for the Claimant against the Defendant in the following terms:

Special Damages

Special damages in the sum of $1,259,102.84

Assessed as follows:

(a) Medical Express plus Police Report: (Agreed) -	$259,709.45	
(b) Insurance Payment for Prescription:	$1,693.77	
(c) Ambucare (Ambulance Service):	$18,500	
(d) Transportation Costs to Physiotherapy:	$34,000	
(e) Loss of Earnings:	$945,199.62	(October 2010 – December 2011)

Total - $1,259,102.84

Interest at 3% from August 25, 2010 to February 14, 2020. (Date of incident to date of judgment)

General Damages – (Pain and Suffering and Loss of Amenities)

General Damages are awarded in the sum of: $8,500,000

Interest on general damages at a rate of 3% from March 31, 2014 to February 14, 2020 (date of service of Claim Form to date of Judgment)

The sum of $5,000,000 is to be deducted from the award made (Pre-litigation payment from the Defendant's insurers)

(Defendant to pay 75% of the balance after deduction).

Costs

Costs to the Claimant to be taxed if not agreed (Defendant to pay 75% of the costs)

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Hon. G. Henry McKenzie, J (Ag)