



[2017] JMSC Civ 122

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2007 HCV 04614

BETWEEN	MARTIA KING	CLAIMANT
AND	MATTHEW HIBBERT	1st DEFENDANT
AND	ROHAN GRANT	2nd DEFENDANT

IN OPEN COURT

Mrs. Marion Rose-Green and Miss Colleen Franklin instructed by Marion Rose-Green and Co., Attorneys-at-Law for the claimant

Mr. Leslie Campbell and Miss Channa Ormsby, Attorneys-at-Law instructed by Campbell and Campbell for the defendants.

Heard: 28th July 2014, 29th July 2014 and 6th September 2017.

Civil Law - Negligence - Motor Vehicle Collision - Contributory Negligence - Whether the Claimant was Contributorily Negligent - Defence - Self Preservation - Whether Damages should be Awarded in the Circumstances.

CAMPBELL J;

[1] This claim arises out of a motor vehicle accident which occurred on the 22nd January 2007 in August Town, Saint Andrew. The claimant, Ms. Martia King, was a paying passenger in a motor vehicle registered PB6650 owned by the 1st defendant and driven by the 2nd defendant. The claim is in negligence against the

defendants, jointly and severally to recover loss, damages and incurred expenses.

- [2] The claimant, a Registered Nurse resides at Thorpe Corner, Saint James, Barbados. In 2007, she was then a student on the Mona Campus of the University of the West Indies and resided at 49 Bouganvillia Avenue, Mona Heights, Kingston 6 in the parish of Saint Andrew.
- [3] The 1st defendant, Mr. Matthew Hibbert, is the owner of the motor vehicle, a registered hackney carriage which was being driven by the 2nd defendant. It was alleged that he was the servant and/or agent of the 1st defendant.
- [4] The claimant, alleges that the motor vehicle was so recklessly and negligently driven, managed and/controlled by the 2nd defendant that it got out of control and collided with a stationary motor vehicle parked along August Town Road in the parish of Saint Andrew.

The Claim - Particulars of Negligence

- [5] The detailed allegations are that, the 2nd defendant;
- i. drove at a speed which was excessive in all the circumstances;*
 - ii. failed to keep any or proper lookout along the roadway;*
 - iii. lost control of the motor vehicle that it collided with a parked motor vehicle;*
 - iv. failed to give adequate thought of the manoeuvre which he was performing;*
 - v. collided with another motor vehicle that was parked on the opposite side of the roadway;*
 - vi. failed to stop, to slow down, to swerve or so to manage and/or control the said motor vehicle as to avoid same from getting out of control to prevent the collision;*
 - vii. collided with another vehicle which was parked along the roadway;*

viii. failed to stop, slow down, to swerve or in any other way so as to manage or control the said motor vehicle as to avoid same from getting out of control and colliding into a parked motor vehicle along the roadway.

The Defence

[6] The defendants in their Amended Defence filed 2nd October 2013 and oral evidence in court asserts that the collision was caused and/or substantially contributed by the negligence of the claimant. The particulars of the negligence of the claimant are set out as follows;

- i. holding on to the gear lever and steering wheel of the vehicle while it was still in motion;*
- ii. attempting to take control of the vehicle from the 2nd defendant;*
- iii. causing the 2nd defendant to lose control of the vehicle;*
- iv. failing to give any or any adequate thought to what she was doing;*
- v. acting in a reckless and dangerous manner.*

The Claimant's Submissions

[7] The claimant alleges that on the day of the accident, she was a passenger in a motor vehicle proceeding from Half-Way Tree to Papine. The vehicle was a route taxi, driven by 2nd defendant. That she was in the front passenger seat, and there were three (3) persons in the rear seat. Upon reaching the traffic lights at Sovereign Shopping Centre at Old Hope Road, a marked police vehicle stopped alongside the motor vehicle. A police officer in that vehicle told the 2nd defendant that when the traffic light changed he was to pull over to the side of the road.

[8] In flagrant disregard of those instructions, the 2nd defendant sped off. A chase ensued during which the 2nd defendant, at times, drove on the sidewalk at a fast speed. The police car was in pursuit, with its siren wailing and signalling the driver to stop. The claimant and the other passengers pleaded with the driver to stop. The driver disregarded their entreaties and continued to drive recklessly

and carelessly. He diverted from the route to Papine, onto the Mona Road, to the August Town community where he circled twice as the police was giving chase.

- [9] The vehicle on its diverted route passed two (2) entrances to the claimant's destination, the University of the West Indies. She was fearful that the motor vehicle would crash or that the police would shoot at it. Being fearful for her life, she attempted to slow the motor vehicle or to bring it to a stop, by putting it into second gear; but her attempt failed. The driver had released the clutch, so the gear shift did not move. He then drove a few metres at a rapid speed, the motor vehicle got out of control and collided into another vehicle which was parked along the roadway.
- [10] Counsel for the claimant contended that Ms. King was placed in a situation of peril as she was carried away against her own will. The driver was driving in a reckless and careless manner. As such, she was obliged to take actions for her self-preservation. This, according to Counsel, is akin to the **Rescuer's case**. Mr. Grant had a duty to Ms. King, to use reasonable skill and care to ensure she was safe during the period of the carriage. This is not a duty anyone can really dispute. This duty was breached; Miss King was in danger and her actions were not unusual.
- [11] The claimant has reasonable grounds for her actions. She was in fear of her life. The driver admitted he fought the claimant's hand off the gear shift, which she eventually let go. This is not in dispute. However, the claimant denies holding on to the hand brake. If she did the natural reaction is that the car would have spun around, but it did not, it collided with another motor vehicle. Coupled with that, when Ms. King tried to gear down, the 2nd defendant had already released the clutch; hence she was unable to cause the accident. There cannot be any question of contributory negligence. The 2nd defendant cannot create a situation, where innocent and decent people make an attempt for self-preservation. (See; **Jones v Boyce** [1816] 1 Stark 493).

- [12] It was submitted that the relevant principle was espoused by Lord Hellinborrow, in **Jones v Boyce**; “whether the claimant, was placed in a situation, which would require a prudent precaution for self-preservation? The case at hand is so glaring; there is no need to linger with the issue of liability. The demeanour of the 2nd defendant is not forthright. He makes up questions and gives ridiculous answers when shown the witness statement.
- [13] Counsel submitted on the question of general damages, that the claimant testified that immediately after the collision she felt pain in her chest, back, shoulder and left foot. She was taken to the University hospital. On arrival, she was unable to walk so she was carried to the Accident and Emergency Unit on a stretcher. She was admitted, that same day, 22nd January 2007, and was discharged on 26th January 2007. On 2nd February 2007, she was readmitted and surgery was performed on her left foot. Two surgical plates were implanted along with screws in her left foot. The screws and implants were removed at the Bay View Hospital in Barbados. The claimant did follow up treatments, including physical therapy at the University of the West Indies and at Sports and Physical Therapy Clinic in Barbados.
- [14] A total of three (3) medical reports were submitted from Dr. Wayne Palmer, Dr. Christopher Rose and Dr. Winston Seale. The injuries sustained by the claimant may be determined under the following heads;
1. Pain and suffering and loss of amenities; and
 2. Handicap on the labour market.
- [15] In assessing Pain and Suffering and Loss of Amenities; Counsel cited (1) **Peter Ankle v Florence Cox** reported at page 369 of Harrison’s Assessment of Damages for Personal Injuries; and (2) **Keniel Coombs (by mother and next friend Beverly Coombs) v Steadford Rodney** reported at page 63 of Khans

Volume 6. With updated awards of \$2,736,760.00 and \$2,741,125.00, respectively.

- [16] In relation to Handicap on the Labour Market; the claimant is at a risk, as a result of her injury, of being at a disadvantage in securing a similar paying job. She is currently employed within the nursing field as a Registered Nurse. However, based on the three (3) medical reports, it is clear that she lives and will continue to live with a disability which clearly places her at a disadvantage in her current field.
- [17] Counsel submitted special damages were agreed in the sum of \$JA 200,810.85 and \$BD 7036.97. The claimant claims interest of 3% per annum as at 22nd January 2007 to the date of trial and for general damages from 13th November 2007 to the date of trial, at 3% per annum.

The 2nd Defendant's Submissions

- [18] The 2nd defendant states that on the 22nd June 2007, at about 11.30 am, he was at a taxi stand in Half-Way-Tree when a group of four (4) students, chartered his taxi to go to the University of the West Indies, Mona. The claimant, sat in the front passenger seat and the others occupied the rear seat.
- [19] The 2nd defendant states that he stopped at the traffic lights at the intersection of Hope Road, Old Hope Road and Barbican Road. While there he saw a police car travelling in the opposite direction, along Hope Road. He then proceeded onto Mona Road, to avoid a build up in traffic. While travelling along Mona Road, he noticed the lights of a police vehicle, but some cars were behind him and they were tooting their horns. Mr. Grant, continued to drive, since he did not know whether he or another motor vehicle was being stopped or if the police was heading to an emergency.

- [20] The 2nd defendant states that he then travelled onto Hermitage Road with the intention to go around unto August Town Road to let off the passengers. While going around Goldsmith Villa Road the claimant asked to be let off. He replied by stating that he was taking her to the main gate, but she insisted that he stop to let her off. He did not stop. The claimant held onto the gear shift. According to the 2nd defendant, he tried to get the gear shift from her to slow down the motor vehicle. The claimant then held onto the hand brake and started pulling it up. That action on the part of the claimant, according to the 2nd defendant, caused, him to lose control of the vehicle, which was then was going at a fast speed. It went over a rise in the roadway (sleeping policeman), and collided with a motor vehicle parked on the left of the road before coming to a stop.
- [21] After the collision, the claimant remained in the front seat, whilst the 2nd defendant and the other passengers exited the motor vehicle. The said police car then came onto the scene. Mr. Grant was subsequently arrested by the police and charged for careless driving. He pleaded guilty to charges under the **Road Traffic Act**.
- [22] The defendants take issue with the claimant, on the issue of her contribution to the negligence. There are disputes as to what led to the accident and the degree of culpability, if any, that should be attributed to the parties. The crux of the defendants' case is that the claimant's actions in holding onto the gear shift, hand break and steering wheel of the vehicle while it was in motion, interfered with the 2nd defendant's control of the vehicle and was substantially responsible for the collision.
- [23] The issue of liability needs to be determined. It was further submitted, that the 2nd defendant's version in regard to the accident be accepted. It was also submitted that the claimant's evidence indicated that she was in great fear that the driver would crash the motor vehicle, motivating her to attempt to slow down the said motor vehicle. It is clear from the evidence of the claimant that when it

was observed that her desire would not be achieved by the handling of the gear shift, she took control of the hand brake and steering wheel.

- [24] Counsel submitted that the actions of the claimant in this regard, are not characteristics of someone who feared for her life. But that the claimant calculated the risks involved and took it, notwithstanding, and the possible outcome which amounts to recklessness. Also, it was submitted that by pulling onto the hand break it could actually lock the wheels of the car causing it to lose control and veer off the road. Counsel went on to submit that the court cannot disregard the fact of the claimant's interference, which she admitted, would have caused the 2nd defendant to become distracted. The 2nd defendant's attention would have been diverted away from driving, and any perceived danger that may be lurking ahead when he attempted to wrestle control of the device.
- [25] Consequently, the result of the collision should be attributed substantially to the claimant's involvement. Up to the point when the claimant first attempted to seize control of the motor vehicle, the 2nd defendant had control of the vehicle and had no challenge in doing so is a fact to be noted. Even if the claimant's evidence of speeding is accepted, the authorities are clear, that speeding in and of itself is not an indication of negligence and must be viewed from the surrounding circumstances.
- [26] Counsel for the 2nd defendant submitted that speeding by itself was not sufficient to ground negligence and relied on two (2) English authorities. In **Tribe v Jones** (1961) 105 Sol. J. 931, the English Court of Appeal held that a fast speed was not automatically dangerous and whether it was so could only be determined after all the surrounding factors are taken into consideration. In **Barna v Hudes Merchandising Corporation**. 1962 106 Sol Jo. 194, the court went further to hold that exceeding the speed limit was an offence but was not in itself negligence imposing civil liability. The English authorities have been adopted by the local courts and it has been consistently held that speed by itself does not

amount to negligence. (See; **Administrator-General (Administrator Estate Lousis Kelly dec'd) v Randolph Edwards** SCCA 20/90 [18.3.91]).

[27] It was submitted that on the facts of the case, speed was not the cause of the accident. The evidence did not provide any reason why the claimant would have thought it necessary to use such a dangerous tactic. At the minimum, even if fear fuelled her intention, her actions placed herself and others at peril. The claimant's attempts should be seen as contributing substantially or fully to the accident and not used to absolve liability. The court should accept the 2nd defendant as a witness of truth, finding that his version of events is more likely to have occurred. However, if the court is not in favour of the defendants' submission, alternatively, the court is urged to find that the claimant significantly contributed to the accident.

[28] On the question of damages, Counsel referred the court to the following cases as being instructive in assessing the quantum of general damages to be awarded, if the court found in favour of the claimant solely;

1) **Caswell Rodney v Audrey Binnie Palmer & Norman Spaulding** Claim No. HCV 1950 reported at pg. 60 Vol. 6 Khans.

2) **Godfrey McLean v AG** Suit No. C.L. 1992 M 341 reported at page 58 Vol. Khan's Personal Injury Awards Personal Injury Awards.

The Court made updated awards of \$1,644,807.00 and \$1,853,218.00 respectively.

[29] In the case of **Caswell Rodney**, the claimant suffered the following injuries;

- Fractured medial malleolus of right ankle.
- Slightly swollen and tender ankle but with full range of movement at the ankle joint.
- Pains at the extremes of movement.

- Walked with a slight limp.
- Healed obliques fracture of medial malleolus with irregularity of joint.
- Early onset of osteoarthritis.

Mr. Rodney was placed in plaster for eight (8) weeks, graduated to partial weight bearing after eight (8) weeks and full weight bearing after three (3) months. After one (1) year he was fully recovered and the prognosis of early arthritis determined. He was assessed as having a 10% PPD of the function of the right lower limb. General damages for pain and suffering and loss of amenities was awarded in March 2005 in the sum of \$650,000.00. The defendant's counsel submitted that using the current CPI for June 2014, the award of \$650,000.00 updates to \$1,644,807.00.

[30] In the case of **Godfrey McLean**, the claimant suffered the following injuries:

- Deformity of distal 1/3 of the right ankle.
- Oblique fracture of distal medial end of tibia with dislocation of the ankle.
- Laceration injury right wrist to elbow.

He underwent an open reduction screw fixation and bone grafting surgery and was placed on crutches and a plaster of Paris cast applied. The following findings and observations were made in relation to Mr. McLean's injuries:

- He had a well healed 6" incision scar on the medical aspect of the distal third of the right leg.
- Mild varus deformity which made him walk on the outer border of the foot.
- The ankle was stiff and leg $\frac{3}{4}$ " shorter.
- He walked with a limp.

[31] Mr. McLean was assessed as having a PPD of between 15% to 20% of the right lower limb. This is equivalent of the 9% PPD given to the claimant by Dr. Christopher Rose. General damages for pain and suffering and loss of amenities awarded in April 1998 in the sum of \$ 400,000.00 using the current CPI for June

2014 the award updates to \$1,853,218.88. It is submitted that in comparing the injuries of the claimants in both cases (Godfrey McLean and Caswell Rodney) to that of Ms. King, the following similarities can be gleaned;

- a. Each claimant suffered a fractured ankle.
- b. Both Mr. McLean and Ms. King had undergone open reduction and internal fixation of the fractures.
- c. All claimants had a cast applied and had to use crutches.
- d. They all walked with a limp, experienced swelling and tenderness over the site of the scar and for the most part symptoms had been resolved after one (1) year, though it is observed that the claimant, Ms. King had a slightly longer period of rehabilitation.

[32] Of differential note however, is the fact that Mr. McLean's leg was $\frac{3}{4}$ inch shorter and he suffered laceration injury from right of the wrist to elbow. It was submitted that even though Dr. Rose assessed, Ms. King's whole person impairment as 9%, that on the other hand, Dr. Winston A. Seale, Orthopaedic and Hand Surgeon in assessing Ms. King did not assign a disability rating, but notes in his report that '*a disability given to an ankle ankylosis combined with calcaneal fracture was given a 14% disability*'. Therefore, the observations of Dr. Seale in that regard was not to be weighed as the doctor assigning disability rating of 14% to Ms. King, but rather a general finding in relation to the types of fractures discussed. Thus, the rate of impairment of Dr. Rose should be preferred.

[33] However, if the court is minded to consider Dr. Seale's observation, the rating should be lowered, due to Ms. King's diagnosis of early arthritis to the knee (which is a component of PPD) since 1998, prior to the accident, which is not attributable or caused by the accident.

[34] Having evaluated the injuries suffered by Ms. King and the claimants in the cases outlined, Ms. King's injuries are more comparable to the claimant, Mr. Godfrey McLean, and as such, a sum of \$1,853,218.88 would be an appropriate award as

general damages. This amount should also be discounted based on the differential factors in the cases outlined.

- [35] In respect of handicap on the labour market, Counsel submitted that Ms. King was twenty-seven (27) years old and a student pursuing career in nursing at the time of the accident. An award for handicap on the labour market is made in cases where there is medical evidence that the claimant's injuries are such that there is a probability of a risk of loss of employment, and that the claimant would be disadvantaged in obtaining comparable employment (See; **Dawnett Walker v Hensley Pink** (SCCA 158/01). This is not the case with Ms. King who is gainfully employed as a nurse with no medical evidence to suggest that she is unable to carry out her duties, or will be, due to her injuries.

Discussion and Conclusion

- [36] There are many areas of the case presented by the claimant, with which the defendants are in agreement. It is common ground that the claimant was seated beside the driver in the front passenger seat. That the claimant was a paying passenger in that vehicle. That there were three (3) other passengers seated in the rear of the vehicle. Both sides agree, that at the time of boarding, the designated route was to Papine, via Old Hope Road. It is also agreed that whilst on the journey, in the vicinity of a traffic control lights, a marked police vehicle was seen. There is also no contest that proceeding from the traffic light there was a police car behind the vehicle signalling, by headlamps and siren. There is also agreement that the 2nd defendant's vehicle diverged from the scheduled route, onto Mona Road, in the absence of consultation with the passengers. The vehicle passed two (2) entrances to the UWI, the known destination of all the passengers. The vehicle then proceeded to the August Town area of St. Andrew, and circled twice in that community. The claimant requested to be let out of the vehicle, this request was denied by the 2nd defendant. The claimant attempted to

change the gears, by manoeuvring the gear stick. After the vehicle crashed, there were two (2) police cars on the scene.

[37] In relation to the contested evidence, the claimant testified that, on approaching the taxi stand in Half Way Tree, the 2nd defendant, had called out that he was plying the Papine route. She denied that she along with three (3) others had chartered the 2nd defendant's taxi to UWI. She claims that the police had driven alongside the vehicle, and had ordered the driver to pull over when the traffic light changed. The driver although testifying to having seen a police car at that location; testified that the police vehicle was headed in the opposite direction. The driver states, that he later saw, a police car behind him, with lights on, but in contrast to the claimant's evidence; "*but he did not know who the vehicle was chasing, and thought it was an emergency vehicle.*" The 2nd defendant although stating that the claimant had requested to be let out, said he told her that where she had asked to leave the car, that area was unsafe. The claimant's account, was of a police chase, with sirens wailing and lights flashing. The 2nd defendant insisted that the claimant tried to control the car by grabbing the steering wheel, which act, triggered his losing control of the car.

[38] The claim is that the 2nd defendant so recklessly and negligently drove managed and controlled the motor vehicle causing it to get out of control and collide with another motor vehicle. The 1st defendant in his defence admits the date and the location of the accident, and, "*that the 1st defendant will say that the said collision was caused and/or substantially contributed to by the negligence of the claimant.*" The negligence of the claimant was particularised, that the claimant held onto the gear lever and steering wheel of the vehicle while it was in motion, attempting to take control of the vehicle from the 2nd defendant. Based on the pleadings that both sides agreed on, I would have been prepared to find the 2nd defendant liable. This view was fortified based on my findings that the 2nd defendant was less than creditworthy, he was hesitant, and his responses in cross-examination were unconvincing and contrived. However, I found the

claimant to be reliable, wherever the 2nd defendant's evidence was in conflict with the claimant. I preferred the evidence of the claimant and reject the testimony of the 2nd defendant. I find for the claimant on the claim. The extent of the 2nd defendant's liability is a live issue before the court. The 2nd defendant contends that the claimant is contributorily negligent. He argues that it was the claimant's interference with the motor vehicle that caused or substantially caused the accident.

- [39] The burden of proof is on the 1st defendant to show that the claimant was in fact contributorily negligent. Lord Wright in **Caswell v Powell Duffryn Associated Collieries Ltd** [1940] AC 152 at 172 succinctly stated that;

“if the defendant's negligence or breach of duty is established as causing the damage, the onus is on the defendant to establish that the claimant's contributory negligence was a substantial or co-operating cause.”

- [40] The law in relation to contributory negligence, is well settled. Section 3(1) of the **Law Reform (Contributory Negligence) Act** explicitly states:

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

- [41] The essence of contributory negligence in law is not that the plaintiff's carelessness was a cause of the accident but rather that it contributed to his damage. In establishing a claim of contributory negligence, there is no requirement to demonstrate a duty owed by the injured to the party sued that has been breached, what is required is proof that the injured party did not take reasonable care of himself and contributed to his own injury. In **Lewis v Denye** [1939] 1 K.B. 540, Du Parcq L.J said at page 554;

“Contributory negligence means there has been some act or omission on the Claimant's part which has materially contributed to the damage caused, and is of such a nature that it may properly be described as negligence; for these purposes “negligence” is to be taken in the sense of careless conduct rather than

*in its technical meaning involving breach of duty of care and other concomitants of the tort. According to Lord Simon in **Nance v British Columbia Electric Ry** [1951] A.C. 601 at 611:*

*“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...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.** 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, were a man is part author of his own injury, he cannot call on the other party to compensate him in full.**”*

[42] I have indicated that, even if I accepted, the 2nd defendant’s version of the incident, I would find that he was liable for the incident. His actions in refusing to stop, or to pull over, to permit what according to his testimony was an emergency vehicle to overtake him, was in breach of the **Road Code**. He diverted from the agreed route, without the agreement of his passengers. All those admissions made in cross-examination are important in resolving the issue of contributory negligence. The actions of the claimant alleged by the 2nd defendant in manipulating the gear lever and pulling the hand brake up, were aimed at slowing the vehicle or bringing it to a halt. Further, the claimant interfered by holding onto the steering wheel of the vehicle. This she has denied. However, even if, the Court accepts the 2nd defendant on this point, and I don’t, I would consider she was a licensed driver of several years, with experience and she had afforded the 2nd defendant sufficient time for him to respond to the entreaties of his passengers. I find that his admitted refusal to stop the motor vehicle when requested by the claimant was an important factor, which would weigh heavily on the mind of any reasonable person, on whom those circumstances were thrust. It was not an unreasonable fear, that the police might open fire, on what they perceived to be a fleeing vehicle. The fact of being a relatively new resident to the island would not have lessened those fears.

[43] Did the claimant act in reasonable apprehension of danger? Was the method used to avoid the danger reasonable? According to **Antonon v Leane** (1989) 53 S.A.S.R. 60 (FC), the question is simply whether in all the circumstances the plaintiff acted reasonably. I find that the claimant acted in reasonable apprehension of danger. In the case of **Neil Lewis v Astley Baker** [2014] JMJC Civ. 1, Claim No. 2009 HCV 06486, Anderson K., J, stated it should be carefully noted that where the defendant's negligence has created a dilemma for the claimant, the defendant cannot escape full liability, if the claimant, in the agony of the moment tries to save himself by choosing a course of conduct which proves to be the wrong one, provided that the plaintiff acted in a reasonable apprehension of danger and the method by which he tried to avoid it was a reasonable one. Provided that these two conditions are satisfied, then the claimant would not be contributory negligent, as regards his loss and/or injury suffered. (See: **Jones v Boyce** [1816] 1 Stark 493 and **Sawyers v Harlow Urban District Council** [1958] 1 W.L.R. 623.) The defence of contributory negligence has not been proved. I find that the defendants were solely responsible for the damages as a result of their negligence.

[44] As a consequence, the claimant sustained;

- i. Pain in her chest;
- ii. Pain in her back;
- iii. Pain in her left foot and swollen left foot with tenderness to the lateral aspect;
- iv. Fracture of the left calcaneus and fracture of the left lateral malleolus with mild motion deficit;
- v. Comminuted fracture of the left calcaneus with depression of the medial and articular surfaces;
- vi. Recurrent swelling to the left ankle and foot
- vii. Pain in the left foot with weight bearing;
- viii. L-shaped scar 15cm to lateral aspect of ankle joint;

- ix. Ankle range of motion – 10 dorsiflexion;
 - x. Subtalar range of motion limited by pain
 - xi. 9% PPD by Dr. Rose
 - xii. 14% PPD by Dr. Seale.
- [45] The follow up report by Dr. Rose on the 28th August 2008 reveals that the claimant had complains of:
- i. Swelling of the foot at the end of the day;
 - ii. Increased pain at the end of the day;
 - iii. Inability to wear heels or closed up shoes due to widening of the heel as a result of the fracture;
 - iv. Difficulty finding shoes to accommodate the deformity of the foot; and
 - v. Inability to run and unable to walk along uneven terrain for long distances due to pains.

[46] On assessment it was revealed that the claimant has developed lower back pain due to abnormal gait. That there was no subtalar motion and her heel moves into varus when walking. Radiographs of the left ankle also convey that there has been loss of height on the medial aspect of the calcaneus with degenerative changes of the subtalar joint and loss of the Bohler's angle. It was also noted by Dr. Rose that due to the intra-articular fracture of the calcaneus, there is a probability of osteoarthritis developing in the subtalar.

Pain and Suffering and Loss of Amenities

[47] The claimant relied on the case of **Peter Ankle v Florence Cox** reported at page 369 of Harrison's Assessment of Damages for Personal Injuries. The claimant had a hole in his ankle burned from right to left. The claimant suffered the following injuries;

- i. Marked crepitus in the ankle joint,

- ii. A fracture and swelling of the ankle,
- iii. Traumatic arthritis developing,
- iv. PPD of 8% of the whole person.

[48] Mr. Ankle was awarded the sum of \$360,000.00 which updates to \$2,736,760.00 using the present CPI of 215.9. The injuries suffered by Ms. King are more severe. She suffered grave injury to her subtalar joint. The doctors' reports have all noted the limited movement or lack of movement in this joint. After seven (7) months of the accident, the claimant still complains about the pain and still has swelling of the foot at the end of the day. The injuries sustained have restricted Ms. King's life.

[49] The injuries have caused the claimant to lose important career opportunities and have altered her career choices. She was unable to complete her course of critical nursing for which she had previously been accepted. She has had to move from working within hospital nursing which was her chosen field to community nursing which would require less walking about but now requires Ms. King to undergo further training and bear additional costs so as to be qualified within this field.

[50] The second case is **Keniel Coombs (by mother and next friend Beverly Coombs) v Steadford Rodney** reported at page 63 of Khans Volume 6. In this case the claimant suffered the following injuries;

- i. A bimalleolar fracture of the right ankle;
- ii. Degenerative changes of the ankle joint with marked irregularity of the articular surface; and
- iii. PPD of 6% of the whole person.

Mr. Coombs was awarded the sum of \$1,036,200.00. This sum would be equivalent to \$2,741,125.00 using the CPI of 215.9. Both Mr. Coombs and Ms. King suffered multiple fractures to their ankle, did surgical fixation of their injuries,

had plates and screws implanted. Ms King was hospitalised for a period of nine days, whereas Mr. Coombs was released the same day. The doctor in the **Coombs case** assessed a 6% PPD, whilst in King's case Dr. Rose assessed a 9% PPD and Dr. Seale a 14% PPD.

[51] The claimant's injuries and suffering outweighs the experience of **Ankle** and **Coombs**. Based on the medical evidence; the three (3) medical reports, it is quite mitted that Ms. King be awarded the sum of \$3,500,000.000 for pain and suffering and loss of amenities.

[52] I agree with the 2nd defendant that, Dr. Seale was unable to identify a specific percentage whole person disability related to fracture of the calcaneum alone. He opined that according to the Guides to Evaluation of Permanent Impairment Vth Edition AMA Press, a disability of an ankle ankylosis combined with calcaneal fracture was given a 14% disability. I accept the findings of Dr. Rose, for the claimant, that the total whole person impairment is 9% of the whole person. I also accept the submissions of counsel for the claimant that an appropriate award for pain and suffering and loss of amenities would be \$3,500, 000.00.

Handicap on the Labour Market

[53] Ms. King is currently employed within the nursing field as a registered nurse. However, based on the three (3) medical reports, it is clear that she lives and will continue to live with a disability which clearly places her at a disadvantage in her current field. She is required to do a lot of walking, running and to cover a lot of ground on foot during the course of one day.

[54] Now she complains of having increased swelling and pain in her left foot at the end of the day. As stated in the medical reports she has degenerative changes in her ankle leading to osteoarthritis. This will greatly affect her employment opportunities as she will continuously be restricted in her field as to the type of work she will be able to embark on and will be unable to compete effectively with

others who do not have such disabilities. The claimant has had to change her planned course of employment within her field and is still disadvantaged as a result of this and should be compensated under this head of damages.

[55] In **Moeliker v A. Reyrolle and Co. Ltd.** [1977] 1 All E.R. 15, Lord Justice Browne, in highlighting the governing principle under this head of damage noted;

“This head of damages generally arises where a plaintiff is, at the time of the trial, in employment but there is a risk that he may lose his employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job.”

[56] Similarly, in **Monex Ltd. v Derrick Mitchell and Camille Grimes** SCCA 83/96, Justice Harrison sated;

“This head of damages arise where the victim;

Resumes his employment without any loss of earnings; or

Resumes his employment at a higher rate of earnings

But because of the injury he suffered such a disability that there exists the risk that in the event his present employment ceases and he has to seek alternative employment on the open labour market, he would be less able to vie because of his disability with the average worker not so affected.”

[57] Counsel for the claimant referred the court to the case of **Ruddard Myers v Electoral Office of Jamaica and Canute Miller**, Claim No. CL M 152 of 2001 where the claimant was awarded the sum of \$300,000.00 under this head of damages and had a PPD of 8%. Using the current CPI of 215.9, an update of that sum would be \$620,997.12. Based on the assessed PPD of 8% and 14%, it is submitted that the sum of \$900,000.00 would be a reasonable figure to compensate her.

[58] I am prepared to rely on the case of **Icilda Osbourne v George Barned, Metropolitan Management Transport Holdings Limited and Owen Clarke** Claim No. 2005HCV294 (delivered February 17, 2006). In this case, the claimant was a sixty (60) year old nurse who met in a motor vehicle accident. She suffered

a whiplash neck and back injuries. As a result of her injuries she was unable to fully carry out the functions of a nurse, such as lifting patients. The court awarded \$500,000 for handicap on the labour. The injuries, in the case at hand, are more severe and as such I accept the submissions of the claimant under this head of damages, and make an award of \$900,000.00.

[59] In relation to special damages, counsel for the 2nd defendant argued that the claim for airfare for the claimant's mother was not reasonable as she could have received assistance otherwise. As such, the court is urged not to give such an award. The claimant's rationale for the claim is that she had no relatives or close friends in Jamaica and could not manage without help. Her mother had to travel from Barbados on 14th February 2007 to care for her and incurred airfare in the sum of \$US388.00. In the circumstances, I accept the rationale of the claimant as being reasonable and make the respective award.

[60] Judgment for the claimant as follows:

General Damages

Pain and suffering and Loss of Amenities	\$3,500,000.00 with interest at 3% from date of service of the claim form (13 th November 2007) to the date of judgment.
Handicap on the Labour Market	\$900,000.00 (no interest)

Special Damages

Medical Expenses	\$JA 186,310.85
	\$BDS 7,276.97
Transportation	\$JA 5,250.00
	\$US 760.44

Airfare to and from Jamaica	\$BSD 1,209.50
Assistance (care)	\$US 388.00
Extended period for Rent	\$JA 34,000.00

(1st May 2007 to 30th June 2007)

Total award for Special Damages:

\$JA 225,560.85

\$BSD 8486.47

\$US 1,148.44

with interest at 3% from 22nd January 2007 to the date of judgment.

Costs to the claimant to be agreed or taxed.