[2022] JMSC Civ 131

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2009 HCV 02784**

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| **BETWEEN** | **RAPHAELETA ANTOINETTE LEWIS** | **CLAIMANT** |
| **AND** | **MARCIA CHAMBERS** | **1ST DEFENDANT** |
| **AND** | **JEFFREY GORDON** | **2ND DEFENDANT** |
| **AND** | **KEVIN LYN** | **3RD DEFENDANT** |
| **AND** | **ALLAN SPAULDING** | **4TH DEFENDANT** |

IN OPEN COURT

**Mrs Ingrid Clarke Bennett, Ms Kara Graham and Ms Renee Robinson instructed by Pollard Lee Clarke and Associates Attorneys-at-law for the Claimant**

**Mrs Suzette Campbell instructed by Burton Campbell and Associates Attorneys-at-law for the 3rd and 4th Defendants**

**The 1st and 2nd Defendants absent and unrepresented.**

**Heard: May 3, 2022, May 17, 2022 and July 28, 2022**

***Trial as between the Claimant and the 3rd and 4th Defendants – Assessment of Damages as between the Claimant and the 1st and 2nd Defendants - Road Traffic Accident – Road intersection controlled by Traffic Lights, Collision at Intersection, Presumption that lights are working properly - No Case Submission – Failure of***

***Defendant to certify Defence to be true – Contributory negligence as between Defendants***

**T. MOTT TULLOCH-REID, J**

**INTRODUCTION**

**[1]** The Claimant was a passenger in a motor vehicle owned by the 1st Defendant and driven by the 2nd Defendant. She alleges that the motor vehicle in which she was travelling had a collision with another motor vehicle which was owned by the 3rd Defendant and driven by the 4th Defendant. She sued the owners and drivers of the two motor vehicles that were involved in the collision. Paragraph 1 of the Particulars of Claim filed on June 1, 2009 reads as follows:

> *"On the 6th day of June 2003 the Claimant while a passenger was injured in a motor vehicle accident caused by the negligence of the 2nd and 4th Defendants who at all material times was acting as the servant and or agent of the 1st and 3rd Defendants respectively.*

**[2]** Paragraph 3 of the Particulars of Claim reads as follows:

> *"The 2nd and 4th Defendants so negligently drove 1990 Mitsubishi Galant registered 2059DS and 1999 Toyota Corolla registration number 1227DY registered as being owned by the 1st Defendant Marcia Chambers and 3rd Defendant Kevin Lyn respectively, so as to cause a collision resulting in the Claimant being flung from the rear passenger seat and being seriously injured."*

**[3]** The 1st and 2nd Defendants neither filed an Acknowledgment of Service nor a Defence and so Judgment in Default was entered against them. The 3rd and 4th Defendants filed a Defence to the claim. The Defence does not admit paragraph 1 of the Particulars of Claim. In paragraph 2 of the Defence, it was admitted that an accident did in fact happen at the stop light/intersection at Mandela Highway *en route* to Portmore, St Catherine. Paragraph 3 admits that the accident involved the two motor vehicles which

the Claimant described in her pleadings. The 4th Defendant did not certify the Defence to be true. It was only certified true by the 3rd Defendant.

**[4]** The Claimant's evidence is contained in her Witness Statement filed on December 3, 2021. The Claimant was not cross-examined and so closed her case. The Claimant having closed her case, Mrs Campbell indicated that she wished to make a no case submission on behalf of the 3rd and 4th Defendants.

**Failure of 4th Defendant to certify the Defence to be true**

**[5]** I reminded Mrs Campbell that the 4th Defendant had not certified the Defence to be true. Her response was that the failure of the 4th Defendant to certify the Defence to be true cannot be taken as an issue at this point in time as we are now at the trial. I do not agree with Mrs Campbell. The Court has a duty to manage the case at every stage of the proceedings. Even if the Claimant does not take the point, the Court can, in exercising its Case Management powers do so. The 4th Defendant has not only not certified the Defence to be true but he has offered no evidence for consideration by the Court. The 4th Defendant's attorneys-at-law did not make the certification on his behalf as is provided for by CPR 3.12(3). CPR 3.13 provides that

> *"The court may strike out any statement of case which has not been verified by a statement of truth."*

I believe in circumstances where the 4th Defendant has not certified the Defence to be true and has offered no evidence, that this is an appropriate case in which his statement of case should be struck out, and I so order.

**[6]** The 4th Defendant's statement of case having been struck out, that leaves the statement of case of the 3rd Defendant only. The 3rd Defendant is the owner of the Toyota Corolla Station Wagon. There is no evidence that he was at the scene of the accident and could therefore give evidence to aid his case. In fact, although he filed a Defence he did not present any evidence to the Court at trial.

**The No Case Submission**

**[7]** Having decided to proceed with the no case submission, Mrs Campbell then confirmed to the Court that she would not be calling any witnesses. The focus of her no case submission was that the Claimant had failed to prove that the 3rd and 4th Defendants owed her a duty of care, breached the duty and that as a result she suffered loss. Mrs Campbell submits that the Claimant must prove her case on a balance of probabilities and that she must make out a *prima facie* case of negligence but that she has failed to do so.

**[8]** Mrs Campbell stated that by not admitting the Claimant was a passenger and was injured the issue was joined between the Claimant and the 3rd and 4th Defendants. I will say that since the 4th Defendant did not sign the Defence, the issue was joined between the Claimant and the 3rd Defendant only. Even if the 4th Defendant had elected to give evidence, he could not have done so because he had failed to file a Defence that was certified to be true. Part 10.7 of the CPR provides that:

> *"The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission."*

**[9]** The 4th Defendant having failed to file a Defence which was certified true by him could not therefore rely on any allegation or factual argument which was not in the Defence. He in essence has no defence. The age of this claim is one which would have afforded the 4th Defendant ample opportunity to file a Defence which had the certificate of truth endorsed on it. With respect to the 3rd Defendant, I will say again that he elected not to give evidence and that even if he had elected to give evidence, that evidence would not have been helpful as there is no evidence before the court or allegations on the pleadings that he was present at the time the collision took place.

**Whether the Claimant was involved in the accident**

**[10]** Mrs Campbell also argued that while it is admitted that there was an accident, there is no admission that the Claimant was involved in the accident. The Claimant, Mrs Campbell said, does not say which vehicle she was in and does not provide enough evidence to suggest that she was involved in the accident. She said she was in a taxi but there was no vehicle involved in the accident, which could be identified as a taxi. The Claimant's evidence is lacking in putting her at the scene of the accident. She relied on the case of ***Beckford v Blackwood*** **[2013] JMSC Civ 162** in which the Court held that involvement in an accident is not a matter of quantum but of liability. Mrs Campbell went on to say that at paragraph 10 of the decision the Court asked if a Claimant has not proven her involvement in the accident how can there be a duty of care owed to her? She argued that that question is relevant to the issue before me.

**[11]** Mrs Campbell also raised the issue of *res ipsa loquitor* but I am not going to go into that because the issue does not arise on these facts.

**Response from Claimant's attorneys**

**[12]** Mrs Bennett argued that the 3rd and 4th Defendants admitted that the accident was caused by the negligence of the 2nd Defendant. This admission was in the pleadings, not in the evidence. The Defence is consistent with what the Claimant stated in relation the 2nd Defendant's negligence. The Claimant's evidence is that she was in the motor car trying to beat the amber light. She said there is enough evidence before me to infer that the Claimant was a passenger in the vehicle that was not being driven by the 4th Defendant. Mrs Bennett argued that road users have a duty of care to other road users. She admitted that even though the pleadings and the evidence do not say which of the two motor vehicles the Claimant was in, the evidence puts her there. Mrs Bennett also submitted that the Defence is deficient in that it fails to comply with CPR 10 which says that if the Defendant is going to say that the Claimant was not a passenger that must be stated. The Defendant's failure to so plead precludes him from now raising that as an issue in submissions made on his behalf.

**[13]** Mrs Bennett relied on the case of ***Dennis Chong v The Jamaica Observer*** **CLC 578 of 1995 heard February 12, 13, 14, 2007 by Mangatal J**. The case was sent to me through my clerk at the time, Mr Richard Williams. No submissions were made in relation to how the case should be used or the basis on which it was being submitted for consideration.

**Analysis**

**[14]** The Claimant's evidence of how the accident took place is contained in paragraph 3 of her witness statement. The vehicle in which she was travelling was operating as a taxi. The driver tried to beat the amber light. He did not clear the intersection and was hit by a station wagon. It is true that she has not indicated which vehicle she was in but that can be deduced from the other evidence given. At paragraph 5 of the witness statement, the Claimant says that the motor vehicles involved in the accident were the 1990 Mitsubishi Gallant with registration number 2059DS and 1999 Toyota Corolla Station Wagon registered at 1227DY. If the undisputed evidence is that the vehicle she was travelling in was hit by a station wagon and the only other car involved in the accident was the station wagon with registration numbers 1227DY, it is clear to me that she would have been travelling in the Mitsubishi Galant. I find on a balance of probabilities that the Claimant was affected by the accident. There is sufficient evidence before me to place her in one of the vehicles that was involved in the accident.

**[15]** There are two aspects of Mrs Campbell's submissions:

a. The Claimant has not provided any evidence which would support her involvement in the accident; and

b. The Claimant has not provided any evidence to prove that the 3rd and 4th Defendant was negligent and because of their negligence the Claimant suffered loss.

**[16]** I will say that if the Claimant was in the vehicle that had the amber, it means the other vehicle would have to have red unless it is shown that the traffic lights were not

working (see ***Godsmark v Knight Bros (Brighton) Limited*** **(1960) The Times 12 May as summarised in Bingham and Berryman's Personal Injury and Motor Claims Cases para 10.128)**. If the vehicle the Claimant was travelling in went through the red light and not the amber light, then the other vehicle would have had the green light and the right of way. I do not have any evidence from the 4th Defendant as to the colour light that was showing in his direction. Mrs Campbell said the Claimant did not say in her evidence, what colour light was showing in the direction of the 4th Defendant. I am not sure that the Claimant would be able to provide that information as she was not in the vehicle coming from that direction. The only evidence before the Court is that the Claimant was a passenger in a motor vehicle which was going through the amber light. In a situation where the Claimant says the vehicle in which she was a passenger broke the amber light and there is no evidence from the Defendants to indicate what colour light the 4th Defendant had or how the accident happened, it is probable that the accident happened in the manner in which the Claimant described it, and neither party obeyed the rules in the ***Road Traffic Act***. The end result is that the negligence of either or both of the 2nd Defendant and the 4th Defendant caused the Claimant who was a passenger in one of the motor vehicles which was involved in the accident, to be injured. Both drivers owed that passenger a duty of care and one or both of them breached the duty.

**[17]** Default Judgment has already been entered in favour of the Claimant against the 1st and 2nd Defendants and the 4th Defendant's Defence has been struck out. While there is no evidence before me from the 3rd Defendant (or from the 4th Defendant for that matter), I still have to consider the Claimant's evidence to ensure that her evidence has met the burden and standard of proof. In civil cases, this standard is on a balance of probabilities. I must ask myself, based on the evidence before me and having considered the submissions put forward by Mrs Campbell and Mrs Bennett,

a. *On a balance of probabilities was the Claimant a passenger in the 1st Defendant's car?*

b. *On a balance of probabilities was the Claimant injured in the accident that took place on the June 6, 2003 and which involved the 3rd Defendant's motor car?*

c. *On a balance of probabilities did the 3rd Defendant and his servant /agent owe the Claimant a duty of care, breach that duty and as a result of the breach cause the Claimant to sustain loss?*

**[18]** I believe that there is enough evidence before me to infer that the Claimant was a passenger in motor vehicle 2059DS, a Mitsubishi Gallant which was being operated as a taxi. The Gallant was operating illegally as a taxi as it did not carry the usual red plates. I mention this point here because Mrs Campbell had in her submissions noted that the Claimant's evidence is that she was travelling in a taxi. Mrs Campbell submitted that a taxi has a PP designation on the licence plate and since neither car had that designation, there was no way to infer that Ms Lewis was actually involved in the accident. I must admit it would have made everyone's life easier if the Claimant's attorneys-at-law had followed the guidelines of pleading their client's case but that strict failure does not disallow me from being able to draw from the evidence and make general inferences (without entering into the realm of speculation) which would help me to conclude on a balance of probabilities that the Claimant was a passenger in the 1st Defendant's motor car, bearing registration number 2059DS.

**[19]** There is an admission on the 3rd Defendant's part that there was an accident involving motor vehicles bearing registration numbers 2059DS and 1227DY, the latter owned by the 3rd Defendant. The 3rd Defendant's pleadings blames the 2nd Defendant for the accident and states in the pleadings that the 2nd Defendant disobeyed the traffic light which was showing red to him. The evidence of the Claimant is that the light was on amber not red. The 2nd Defendant was trying to beat the light she says and by doing so failed to clear the intersection and was hit by a station wagon which was owned by the 3rd Defendant. I accept this evidence and do so especially in light of the absence of evidence from the 3rd Defendant to counter it. The Claimant's evidence was also not

tested on cross-examination. I have no reason to disbelieve the Claimant's version of how events unfolded that led to the collision.

**[20]** I therefore find that on a balance of probabilities the Claimant was injured in a motor vehicle accident involving the 3rd Defendant's motor vehicle and that she was injured and suffered loss and damage. I also find that the parameters for a claim in negligence have been made and that the Claimant was owed a duty of care which was breached. Does the 3rd Defendant have a case to answer as it relates to the Claimant? I find that he does. Even if I had not struck out the 4th Defendant's case, I would have also have found that he had a case to answer as it relates to the Claimant and that he too owed a duty of care to her and breached that duty.

**Submissions on the issue of liability**

**Defendant's submissions**

**[21]** Mrs Campbell argued that liability has to be guided by the evidence before the Court. Since the Claimant was the only one to give evidence, that evidence must be examined with precision as it is her evidence which will determine how liability is to be apportioned. Mrs Campbell said there is not one iota of evidence against the 3rd and 4th Defendants. There is no evidence that the 3rd and 4th Defendants were negligent, there is no evidence which vehicle was travelling at a fast speed, there is no evidence that the 4th Defendant should have seen the vehicle the Claimant was travelling in, there is no evidence to indicate what the visibility was like not was there any evidence that the driver of the vehicle she was in took reasonable steps to avoid the accident. There is therefore no basis on which the Court could make a decision that the 3rd and 4th Defendants were liable. There is no evidence as to what the 3rd and 4th Defendants did wrong, there is only evidence as to what the 1st and 2nd Defendants did wrong. The 2nd Defendant in operating the 1st Defendant's motor vehicle "tried to beat the amber light." He failed to clear the intersection and was hit by the station wagon.

**[22]** An amber light, says Mrs Campbell, is not an indication for the driver to stop. It is an indication for the driver to prepare to stop. She invites the Court to pay attention to

the fact that the 2nd Defendant was trying to beat the amber light. He was trying to do something which the Claimant believed to be illegal, negligent or wrong. She did not say the amber light was on all the time but it must have changed at some point because he was trying to beat the light. He did not have enough time to clear the intersection because he failed to clear the intersection before the accident happened. She is casting the blame on the 2nd Defendant because she is saying he failed to obey the light and tried to beat the light resulting in him going into the intersection and not doing it in time and a collision occurred. That, said Mrs Campbell, is the totality of the Claimant's evidence before the Court and it is that evidence which the Court must base its decision on.

**[23]** Mrs Campbell acknowledged that the presumption is that the lights are always working unless the contrary is proved. If one side has a certain light, it is assumed that the other side has a different light. If we assume that it is a 2-way intersection if amber is in operation the other side has to be on red. The Claimant did not say that the vehicle coming from the other direction had broken the light. Whatever was done negligently or incorrectly was not done by the 4th Defendant but by the 2nd Defendant. There is no evidence that the 3rd and 4th Defendants did something wrong or that they failed to do something which they ought reasonably to have done.

**The Claimant's response**

**[24]** Mrs Bennett relied on the unfiled submissions which was delivered to the Court on May 17, 2022. She asked that certain sections be deleted and that was done. Mrs Bennett argues that there is adequate evidence to find liability on the part of the 4th Defendant. There is no duty to stop on the amber light. The duty is to slow down. From the evidence, the fact that the 2nd Defendant was trying to beat the amber light means that he was speeding. Speeding through the amber light to avoid the red light is not the correct thing to do. If the 2nd Defendant had the amber light, then the red light would be showing to the motorist coming from the other direction. To proceed into the intersection and collide with a vehicle in the intersection would mean that the person (in this case the 4th Defendant) broke the red light.

**[25]** Mrs Bennett submitted that the Claimant was flung from the motor vehicle and this would suggest that the collision was a significant one. She submitted further that the Court can come to that conclusion on a balance of probabilities. Although the Claimant did not state in evidence that the 4th Defendant did not keep a proper look out, the fact of the collision is *prima facie* evidence that the 4th Defendant did not keep a proper look out. The evidence is that the 4th Defendant collided into the motor vehicle the Claimant was in and that is sufficient evidence for the Court to hang its decision on liability. She says it is also enough evidence for the Court to glean that the 4th Defendant did not keep a proper look out.

**Analysis on the issue of liability**

**[26]** The issue of liability has been resolved as between the Claimant and the 1st, 2nd and 4th Defendants because Default Judgment was entered against the 1st and 2nd Defendants and the 4th Defendant's Defence was struck out. The 3rd Defendant cannot speak to how the accident took place and that has left him in a precarious position. I find that the 2nd and 4th Defendants were both negligent in the operation of their respective vehicles and that the 1st and 3rd Defendants, being the owners of their respective motor vehicles are vicariously liable for the actions of their respective servant/agent.

**[27]** My decision as stated in paragraph 26 above has as its basis sections 57(2) and 57(3) of the ***Road Traffic Act, 2018*** ("RTA") which read as follows:

> 57(2) *"Notwithstanding anything contained in this section, it shall be the duty of a driver or operator of a vehicle to take such action as may be necessary to avoid a collision, and the breach by a driver of any vehicle of any provisions of this section shall not exonerate the driver of any other vehicle from the duty imposed on him by this section."*
>
> 57(3) "*Notwithstanding anything contained in this section, a person shall drive or operate a vehicle with due regard to the safety of any person or property."*

The statute is clear. It says that even if the motorist is right, he is to take whatever steps he can to avoid the collision and he must operate his vehicle in such a way that he takes into consideration the safety of other users of the road.

**[28]** I highlight this section of the statute for the sole purpose of responding to Mrs Campbell's submissions concerning the fact that the 2nd Defendant was trying to beat the amber light and had not given evidence as to whether the amber light was on at all times as it must have changed at some point because she (the Claimant) said the 4th Defendant was trying to beat it. Let us say just by way example that the vehicle the Claimant was in met upon an amber light that changed to red before he got into the intersection or even cleared it. If that is so, the 4th Defendant would then have a green light and should proceed through the green light. However, sections 57(2) and (3) of the **RTA** seems to say that even though the 4th Defendant should proceed through green, he cannot do so if it is not safe as he has a ***duty to take such action as may be necessary to avoid a collision*** and he must ***operate his vehicle with due regard to the safety of any person***. When the 4th Defendant ventured into the intersection when it was not safe to do so, he breached that duty he had and pursuant to section 57(2) the breach of any provision of the RTA by a driver ***does not exonerate the driver of any other vehicle from the duty imposed on him*** by the section. It means that since the 2nd Defendant was doing something that could jeopardize the safety of other road users, the 4th Defendant should take steps to prevent the collision, not take steps to make the situation more dangerous.

**[29]** Mrs Bennett relied on several cases in her submissions to support the position that all users of the roadway owe a duty of care to other road users (**Esso Standard Oil SA Ltd and Stuart Marston v Iva Tulloch 28 JLR 557)**. Although I have not quoted extensively from any of the cases, I can assure counsel that they have been read. The case of **Joseph Eva, Ltd v Reeves [March 26, 1938] All E.R. Annotated Vol 2, 115** where the court held that the Respondent did not owe a duty of care to traffic entering the intersection in disobedience to the traffic light beyond a duty that if in fact he saw such traffic, he ought to take all reasonable steps to avoid a collision also provided some assistance.

**[30]** In the case of **Hay or Bourhill v James Young [1943] AC 92**, the House of Lords adopted the decision of Lord Jamieson who said

> *"… the duty of a driver is to use proper care not to cause injury to persons on the highway… it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take care."*

Thompson-James J in the case of **Theron Scott v Huntley Manhertz [2017] JMSC Civ 148** said at paragraph 47 of the judgment quoting from **Bourhill v Young [1943] AC 92** that reasonable care connotes

> *"an avoidance of excessive speed, keeping a good look out, observing traffic rules and signals" and so on.*

She went on to say that what is reasonable depended on the circumstances of each case and was a question of degree. In the case at bar, I would say that reasonable care required both the 2nd and 4th Defendants to keep a good look out and observing traffic rules and signals. On the evidence before me, neither of them did and as result of their combined negligence, there was a collision which resulted in the Claimant sustaining personal injuries and suffering loss and damage.

**Percentage liability as between Defendants**

**[31]** I must now ask myself the question, to what extent are the defendants liable to the Claimant? The 2nd Defendant tried to beat the amber light. The 4th Defendant entered the intersection when it was not safe to do so. The 4th Defendant has produced no evidence to say that he took reasonable steps to avoid the collision. Mrs Bennett has argued that the 2nd Defendant should be held 30% blameworthy and the 4th Defendant 70% blameworthy. Mrs Campbell argues that the 1st and 2nd Defendants are to be held wholly liable.

**Analysis on issue of contribution as between Defendants**

**[32]** Mrs Bennett relies on the **Theron Scott case** referred to above. In that case the Claimant rode his motor cycle through an intersection and while in the process of doing so there was a collision between his motor cycle and the motor vehicle which was being operated by the Defendant. In discussing the issue of contributory negligence, Thompson-James J referred to Havers J in the case of **Lang v London Transport Executive [1959] WLR PS 1168 @ 1176** who said

> *"If the possibility of the damage emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of damage emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions (***Fardon v Har Court Rivington 1932 146 LT 391, 392***)"*

The only evidence before me is that both vehicles collided into each other at the intersection. I am of the view that there was a possibility of damage emerging if both vehicles entered the intersection at a time when it would be unsafe to do so – when the 2nd Defendant should have been preparing to stop instead of charging through the amber and when the 4th Defendant, in the absence of evidence to the contrary, entered the intersection at a point in time when the light in his direction would have to be showing red, if the 2nd Defendant had amber.

**[33]** In the **Theron Scott case** the Claimant was found to be 70% blameworthy. Thompson-James J felt that the Defendant having given evidence that he traversed that portion of the roadway about three times per week should have been aware of the possibilities of a motorist going through the red light. If he had been keeping a proper look out he would have seen the motorcycle and its rider and would have taken precautions to avoid the collision. *Failure to take all steps reasonable to avoid injuring someone who is himself seen to be negligent, is itself negligence* (**Lang v London Transport Executive** page 117*)* as referred to at paragraph 62 of the **Theron Scott case.**

Mrs Campbell is of the view that this case should guide me in coming to my decision on this issue because like Scott, the 2nd Defendant came through the red light. The difference between this case and the **Theron Scott** case is that in the **Theron Scott case,** the evidence is that the Defendant had the green light. There is no evidence as to what colour light the 4th Defendant had in this case but based on the evidence of the Claimant that the car she was in had amber, and operating under the presumption that the lights were working, then the only conclusion that can be drawn is that 4th Defendant had the red light.

**[34]** Mrs Bennett also relied on the case of **Lorna Hayles v The Attorney General of Jamaica [2020] JMSC Civ 39**. This accident involved a private motor vehicle and an ambulance which was travelling with sirens blaring. The driver of the vehicle in which Hayles was travelling gave evidence that he had the green light and that the ambulance had the red light. He went through the green light in obedience to it and the ambulance driver by failing to be careful in entering the intersection since he had the red light was the party at fault. The Court however found that the driver of the vehicle which transported the Claimant was also negligent because he failed to keep a good lookout such that he was totally unaware of the approach of an ambulance which had its siren on and lights flashing. The Court found both drivers equally liable for the collision.

**[35]** Mrs Campbell argues that the case is not helpful because the Judge came to his decision based on 3 reasons:

a. The vehicle had proceeded through the red light in a reckless manner

b. The driver had driven at too great a speed; and

c. The driver failed to keep a proper lookout.

Mrs Campbell says that in the case at bar there is no proof that the 4th Defendant was speeding. The evidence of speeding was on the part of the 2nd Defendant who was trying to beat the amber light. There was no evidence that the 4th Defendant drove through the

red light. The Claimant has not said where the 4th Defendant was positioned on the roadway. The reasoning in the **Hayles case** she says cannot be applied to this one.

**[36]** My response to Mrs Campbell is that if the 3rd and 4th Defendants wanted to say that they did not have the red light, then they had ample opportunity to do so. It is not fair to speak to the absence of evidence as the basis on which no conclusions can be drawn. If this were so, then every defendant could choose to remain silent and expect the Court to rule in their favour. There is evidence from the Claimant. She said the light was showing amber in her direction. It is not likely that she can speak to the colour light in the other direction. She can only speak to what she saw. It is for the 4th Defendant to say what light he had. He chose not to participate in the proceedings. That was his choice. In failing to participate, the only evidence available to the Court, is the Claimant's. The Claimant saw amber light showing in the direction from which she was transported, the only inference that can be drawn is that there was red light showing in the direction from which the 4th Defendant was coming. The 4th Defendant chose not to come to court to say he was not speeding. In the absence of that evidence and with the evidence of the Claimant that she was flung from the vehicle on impact, which evidence has not been refuted, then the inference can be drawn that both vehicles had to be speeding in order to have an impact that caused someone to be flung from the vehicle. The laws of physics would come into play. Then there is the 4th Defendant's failure to keep a proper lookout. The 4th Defendant did not give evidence as to whether or not he kept a proper look out. His failure to do so meant that the Court only has the evidence of the Claimant who said there was a collision in the intersection. If there was a collision in the intersection, it must mean that both drivers failed to keep any or any proper lookout.

**[37]** Notwithstanding all of the above, I also remind everyone that the 4th Defendant does not have a defence.

**[38]** In the case of **Radburn v Kemp (1971) EWCA Civ 107045-4** reported at paragraph 10.129 of Bingham & Berryman's Personal Injury and Motor Claims Cases it was held that

> *"the defendant for whom the light had just changed to green, was under a duty to see that there were no vehicles on the crossing which might still be passing across. He had no business, despite the light being in his favour, to enter the junction at all unless he was satisfied that it was safe for him to do so."*

In that case the Defendant was found entirely liable. I cannot so hold here. The circumstances were somewhat different. In **Radburn**, the cyclist entered the street while on green. When he reached two-thirds of the way, the light turned to amber. The Defendant emerged from a street on his left on the green and struck the claimant. In the case before me this is not a case of a motorist coming upon an amber light while using the motor way. On the clear evidence of the Claimant, this was a case of a motorist speeding up, instead of slowing down, when he came across the amber. While the 4th Defendant should not to have entered the intersection when it was unsafe to do so, the 2nd Defendant also had a duty to slow down in preparation to stop when he got the amber light.

**[39]** Taking into account the evidence, and the cases to which I referred to concerning the issue of contribution on the part of the 2nd and 4th Defendants, I am of the view that in this situation the 2nd and 4th Defendants are both equally to be blamed for the collision.

**Quantum of Damages**

**[40]** The medical report of Dr Mark Minott of the Spanish Town Hospital reports the Claimant's injuries as being a comminuted fracture of the shaft of the right humerus. She was treated with above elbow cast for seven weeks and a humeral brace for a further 2 months. The accident happened on June 6, 2003 and she was discharged on September 23, 2003 - 4.5 months later.

**[41]** Ms Lewis' evidence is that she was hospitalised for 2 weeks. She had to be x-rayed on several occasions during her hospital stay and each time she was x-rayed she felt great pain. She had injury to her leg as a result of the accident which left her with

scars. These leg injuries were not referred to in Dr Minott's medical report. She says that after the accident she experienced residual pain when lifting heavy objects and that she is unable to have a romantic life with her spouse. She has not explained what that means and so that bit of evidence will in no way impact my decision. Ms Lewis also said that upon being discharged from the hospital she was unable to use her right hand so her cousin, Sally, had to stay with her. All of this evidence goes to Ms Lewis' pain and suffering and loss of amenities.

**[42]** Mrs Bennett has relied on her written submissions that were handed up to me. She has offered cases on scarring and mental distress. I will not be considering mental distress separately as there is no evidence from a psychiatrist or psychologist to support that claim. It is expected that someone would have some degree of anxiety after an accident. Unless the anxiety amounts to a disorder as diagnosed by a medical practitioner with speciality in the area, that anxiety ought not to be singled out as an injury in and of itself.

**[43]** As it relates to separating out of each injury (e.g. scarring), counsel is reminded that the injuries are taken as a whole and each injury is not assessed individually.

**[44]** Bearing that in mind, I will therefore concentrate on cases in which the claimant sustained fracture to the humerus. Mrs Bennett relies on the Court of Appeal decision of **Malcolm Campbell v Marsha Page Civil Appeal #77/04**, the oral judgment of McCalla JA (Ag) as she then was delivered on January 18, 2006. In that case the Claimant had numerous soft tissue injuries, laceration on the right side of face and neck, neck movement limited by pain, numerous abrasions and lacerations on the exterior aspect of the upper left limb, 2-3cm laceration over the left knee, pain and tenderness of the left ankle with movement and displaced fracture of the neck of the left humerus. The emphasis on that case seemed to be on the extensive scarring which resulted and required plastic surgery to correct. The court upheld an award of $1.7M in circumstances where the evidence was that the Claimant had pain which affected her ability to sleep on her left side, the fact that the scars became swollen and painful when the temperature increased, she had pain in her ankle, was unable to wear shoes that rubbed on her ankle,

had pain in her knee occasionally and suffered ridicule by persons who made unkind comments to her about her scars.

**[45]** Ms Lewis, based on her evidence, did not go through the scarring and the embarrassment and her pain does not appear to be as extensive as Ms Page's. It means therefore that the award of $1.7M made to Ms Page, which updates to $5,661,983.47 when the CPI of May 2022 which is 120.9 is used has to be discounted. That sum would have to be discounted as Ms Page suffered more injuries than Ms Lewis did and the effects of those injuries on her were more lasting than the effect that Ms Lewis' injuries had on her.

**[46]** Mrs Bennett also relied on the case of **Joyce Haye v Vincent Williams and Jermaine Griffiths [2017] JMSC Civ 83**. In that case the Claimant had tenderness to right shoulder and in the 3rd cervical vertebrae. She also sustained a fracture of the greater tuberosity of the right humerus. She was treated with a U-slab and arm sling. She was assessed as having a 2% PPD and was awarded the sum of $2.8M which updates to $3.664M. Again this sum would have to be discounted to take into account the PPD of 2%. Ms Lewis's PPD was not stated in the medical report.

**[47]** Mrs Campbell relies on the case of **Leroy Swaby v Steve McIntosh** reported at page 91 of Khan's Volume 6. In that case the Claimant sustained tenderness and swelling of left shoulder and left arm, comminuted midshaft of left humerus and tenderness to left ankle. He spent 3 nights in the hospital. He was treated with a U plaster of paris slab and given pain killers. He was discharged to the Orthopaedic Clinic where 3 months later he complained of restricted movement at the elbow joint. X-rays showed callus at the fracture site. He was sent for physiotherapy. He was awarded $740,000 which updates to $2.312M.

**[48]** The **Joyce Haye** and **Leroy Swaby cases** were most helpful. In fact, **Leroy Swaby** is even more helpful as the injuries and treatment were similar. Neither party had an assessed PPD reported and there is no proof that either of them went to physiotherapy. I am therefore persuaded by Mrs Campbell's arguments with respect to the case to be

relied on and order the updated amount of $2.312M to be paid by the Defendants to the Claimant in equal shares.

**Special Damages**

**[49]** With respect to Special Damages, Mrs Bennett sought to amend the Particulars of Claim while making her submissions. Mrs Campbell agreed to all amendments sought except for the loss of the gold chain which she said the Claimant would have known from the claim was first started. I agree with Mrs Campbell on that issue. The amendments sought to the particulars of claim that were agreed are as follows:

| | | |
|---|---|---|
| i. | Medical expenses | $ 5,800.00 |
| ii. | Clothing destroyed | 3,000.00 |
| iii. | Paid to obtain police report | 1, 000.00 |
| iv. | Transportation | 8,000.00 |
| v. | Notice of Proceedings | 7,650.00 |
| vi. | Loss of Earnings | 15,000.00 |
| vii. | Domestic Assistance | 15,000.00 |
| | **Total** | **$55,450.00** |

**[50]** The Claimant having gotten over the hurdle of getting the amendments must now prove that she incurred those expenses and that they were associated with the accident. Special Damages must be specifically pleaded and proven. Mrs Campbell did not say she agreed the sums, she merely agreed the amendment. And even if she agreed them on behalf of the 3rd and 4th Defendants, she could not do so on behalf of the 1st and 2nd Defendants who she does not represent.

**[51]** The following receipts were admitted into evidence:

| | | |
|---|---|---|
| i. | Gleaner receipt | $7,680.09 |
| ii. | Receipt police accident report | $1,000.00 |
| iii. | Receipt medical report | $2,000.00 |
| **Total** | | **$10,680.09** |

**[52]** At paragraph 8 of the Witness Statement, the Claimant says she paid $200 to $300 for a receipt for x-ray done but is unable to find the receipt. The sum is reasonable and an award of $200 will be made for the x-ray. The x-ray would have assisted the doctor with his diagnosis of the fracture to the humerus. I cannot make the same determination with respect to the cast as I have no idea what the cost of a humeral brace is. Although the case law suggests that the Court is mindful of the fact that persons in the private transportation sector do not normally issue receipts, I am of the view that the Claimant is still required to say how that $8,000 came about. How many trips did she make to the doctor? Where did she travel from to get there? What was the cost of the round trip? It is not enough to throw a figure at the defendant without explaining how that sum was arrived at.

**[53]** The sum of $15,000 for the domestic help is allowed. It is understandable that if her right hand was broken and she had to wear a brace for 2 months after being discharged from the hospital she would have needed help. She has also asked for 6 weeks. The Claimant also wants $15,000 for lost earnings. The letter from her employer indicates she was employed with Greenwich All Age School as an ancillary worker for the period September 2002 to June 2003. It indicates that her weekly wage was $2,500. The accident was in June 2003. The inference to be drawn is that she lost her job because she was injured. It is unfortunate that there was no cross-examination on this issue. Schools would have gone on vacation at the end of June. Would Mrs Lewis still he earning a wage during the time school was on vacation? There is no evidence before this Court as to why she could not have resumed work in September 2003, which would have been at a point in time after she would have been discharged from the hospital and had stopped wearing her brace. Mrs Campbell did not question this and so I have the uncontested evidence of the Claimant in this regard. The sum is awarded in her favour.

**[54]** Special Damages in the amount of $40,880.09 is awarded to the Claimant.

**Interest and Cost**

**[55]** I have read the submissions made by Mrs Bennett and Mrs Campbell on the issue of interest. The accident took place in 2003, the claim was filed in 2009 just before the limitation period expired. The Claimant requested a default judgment against the 1st and 2nd Defendants on April 30, 2013. In making the request, the Claimant certified that the she was in a position to prove the amount of damage. If she had not certified that she was in a position to prove her damages, an Assessment of Damages date would not have been given (see CPR 16.2). If it is that she was not in a position to prove her damage, then a Case Management Conference would have been set (see CPR 16.3).

**[56]** Mrs Bennett has indicated that one of the reasons for the delay was that a police report was needed to aid the Claimant's case. The police report was not put before the Court. The police report in any event is hearsay document. Unless it was intended to reconstruct the scene of the accident and a document prepared after a thorough investigation, then it would just be a report of what each driver told the police. Knowing this, the Claimant's attorneys should have made a decision as to whether the information contained in the police report was worth the wait. Apparently it was not, because the trial was engaged upon without the report.

**[57]** The matter came up for Assessment of Damages on November 19, 2014 and it was adjourned to a date to be set by the Registrar. It did not see the light of day again until 6 years later when it had to be adjourned again because the Claimant was not available, the Defendants were not served, no bundles were filed and no witness statements were filed. If the Claimant said she was in a position to prove damage, why was nothing prepared to place before the Court so that these damages could be proved? Why should a Defendant be asked to pay for the Claimant's failure to prosecute her case in a timely manner?

**[58]** Mrs Campbell argues that the 3rd and 4th Defendants should not bear the brunt of the interest in its entirety because the Claimant was always late in prosecuting the claim.

The accident happened in 2003, the claim was filed in 2009, the defence was filed in 2011, mediation was not embarked on until 2019 but did not get underway.

**[59]** Both the Claimant and the Defendants have a duty to help the Court to achieve the overriding objective. I do not think in this case either the Claimant or the Defendants acted with alacrity. However, it is the Claimant's case and the duty owed by her, is greater in my view. Interest will be awarded up to November 19, 2014 when the matter first came up for Assessment of Damages.

**[60]** As it relates to costs, the Claimant would be entitled to costs in the claim. The costs are to be shared by the Defendants equally.

**Orders**

**[61]** I now order as follows in keeping with the equal apportionment of liability of all Defendants as stated above:

a. The Claimant is awarded General Damages in the sum of $2.3M for her pain and suffering and loss of amenities plus interest at 3% per annum from January 14, 2010 to November 19, 2014, Special Damages in the sum of $40,880.09 plus interest at 3% per annum from June 6, 2003 to November 19, 2014 and costs in the claim which are to be taxed, if not agreed.

b. The Claimant's attorneys-at-law are to file and serve the Judgment.