[2015]JMSC Civ. 15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 07412

BETWEEN	**CHRISMORE REID**	**1ST CLAIMANT/ ANCILLARY DEFENDANT**
A N D	**ANDRAE AARONS**	**2ND CLAIMANT**
A N D	**WARREN WILSON**	**1ST DEFENDANT**
A N D	**STEADMAN WRIGHT**	**2ND DEFENDANT/ ANCILLARY CLAIMANT**

Jason Jones and Shorna-Kaye Edwards, instructed by Nigel Jones and Company, for the Claimants/Ancillary Defendant

Harrington McDermott, instructed by Campbell and Campbell, for the Defendants/Ancillary Claimant

Heard: **12th, 13th, 14th, 15th, and 23rd January, 2015**

NEGLIGENCE – BREACH OF STATUTORY DUTY – GENERAL DAMAGES – SPECIAL DAMAGES

ANDERSON, K. J

Outline of Nature of claim

[1] This claim has been brought by the claimants, against the defendants, for damages for breach of statutory duty and negligence, arising from a traffic accident which occurred on the Minard Main Road in St. Ann, on May 15, 2010. The defendants have alleged contributory negligence on the part of the 1st claimant and contributory negligence would, if proven by the defendants, constitute a partial defence to the claimants' claims, both for breach of statutory duty and negligence.

[2] The 2nd defendant has also filed an ancillary claim against the 1st defendant seeking an indemnity or contribution from him, in the event that he is held liable to pay damages to the 2nd claimant.

[3] The burden of proof is on the claimants to prove their claim on a balance of probabilities and if their claim is proven, such that they are, either individually or collectively, determined by this court as being entitled to recover damages from the defendants, then it will be for the defendants to seek to limit that award of damages, by proving, if they can, that the sum of damages which may otherwise have been awarded to the 1st claimant should be reduced by an extent to be determined by this court, depending on the proportion to which this court considers that it was, to some extent, the 1st claimant's negligence which contributed to the claimants' losses, arising from the accident. This is what is known in law, as contributory negligence. The burden is on the defendants to, if they can, prove contributory negligence, on a balance of probabilities.

[4] The 2nd defendant has the burden of proving his ancillary claim, if he can, on a balance of probabilities. His ancillary claim though, in terms of relief being sought, is not seeking to recover damages arising from any losses that the 2nd defendant may have suffered, arising from the accident. That ancillary claim is only seeking to enable the 2nd defendant to recover an indemnity or contribution from the 1st claimant. As such, that ancillary claim can only properly arise for further consideration by this court and can only be successful in terms of proof thereof, if this court were to conclude that the negligence of the 1st claimant was partially responsible for the occurrence of the relevant motor vehicle accident and therefore, also, partially responsible for the losses suffered by the 2nd defendant as a consequence of same.

[5] The relevant motor vehicle accident occurred only as between two motor vehicles, but this court accepts the 1st defendant's evidence, that after the accident occurred, the Minard Main Road, at the scene of the accident, was blocked in both

directions, for ten-fifteen minutes after the accident, which is when the police and a wrecker came and both vehicles that were involved in the accident, were towed away.

[6] The vehicles involved in the accident were respectively, a Toyota Coaster motor truck (bus), being operated at that time, as a commercial vehicle for passenger transport purposes and a Toyota Corolla motor car. As far as is known to this court, from the evidence provided, no other vehicle was in any way, involved in the accident, or damaged as a consequence of the accident.

[7] At the material time, the motor bus was owned by the 2nd defendant and being driven by the 1st defendant, whereas the Toyota car was being driven by the 1st claimant and was owned by him, with the 2nd claimant – who is a brother of the 1st claimant, having then been a passenger in that vehicle. There exists no dispute, that at the material time, the 1st defendant was driving the 2nd defendant's vehicle, as an employee of the 2nd defendant. Accordingly, if this court concludes, to whatever extent, that it is the 1st defendant's negligence that either completely or partially caused the accident and thus, completely or partially contributed to the claimants' respective losses, then the 2nd defendant will, just as the 1st defendant, be liable to pay as damages to the claimants, the sum determined by this court, as being payable as damages. In such circumstances, the defendants will be held as being jointly and severally liable to the claimants.

Claim for damages for breach of statutory duty

[8] The claimants' particulars of claim, although having alleged breach of statutory duty by the defendants and although having made it clear that they are seeking damages arising from such alleged breach, is nonetheless, defective in certain very important respects. Firstly, it is lacking in proper particularization. It is so lacking, firstly, insofar as the alleged statutory duty breached has not been particularized by means of reference to any specific statutory provision. Such particularization is necessary upon any claim for breach of statutory duty. It is necessary because, the mere breach of a statutory duty imposed on an individual or business entity, or governmental agency,

does not and cannot, in and of itself, properly give rise to a claim for damages for breach of statutory duty being successfully pursued as against that party in breach.

[9] Furthermore, the claimants' particulars of claim, appears to have conflated the separate legal concepts and separate torts of breach of statutory duty and negligence. Indeed, in his opening address on the claimants' behalf, the claimants' lead counsel, Mr. Jones, emphasized that his clients' claim is founded on the law of negligence and he never once mentioned to this court, in that opening address of his, the claim by his clients, against the defendants, for damages for breach of statutory duty. In fact, it was this court which, on the following day after the claimants' opening address had been presented to this court, had, at the commencement of this court's proceedings pertaining to this case, on that day, pointed this out to the claimants' lead counsel.

[10] Also, in respect of the claim at hand, it is the defence's position that, even if there was any breach of the **Road Traffic Act** by the 1st defendant, insofar as the manner of his driving immediately prior to the occurrence of the relevant motor vehicle accident is concerned, any such breach or breaches cannot and do not give rise to a claim for breach of statutory duty, but instead, would give rise only to a claim for damages for negligence. Indeed, it was submitted by defence counsel, as part of his closing address that there is a particular section of the **Road Traffic Act** which specifically states that any breach of that Act is evidence of negligence and therefore, he submitted, it is pellucid, that no claim for breach of statutory duty can properly arise in circumstances wherein there has been a breach or have been, breaches, by someone, of the **Road Traffic Act**, because, that Act of Parliament never so intended and ought not to be so interpreted by this court.

[11] It would, I think, be useful at this juncture, to distinguish between a claim for damages for breach of statutory duty and a claim for damages for negligence, particularly since, in the present case, the claimants' counsel seem to have conflated these two claims in the particulars of claim which would, no doubt, have been drafted by

them and which was, in terms of the averments made therein, certified as being true, by the claimants.

[12] In the case, **London Passenger Transport Board (L.P.T.B.) v Upson** – [1949] A.C. 155, Lord Wright, at pp. 168-169, expressed as follows:

> *'A claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be* confused in essence with a claim for negligence … *I have desired before I deal specifically with the regulations to make it clear how in my judgment they should be approached, and also to make it clear that a claim for their breach may stand or fall independently of negligence. There is always a danger if the claim is not sufficiently specific that the due consideration of the claim for breach of statutory duty may be prejudiced if it is confused with the claim in negligence.'*

[13] As has been stated in the text- **Winfield and Jolowicz on Tort**, 14th ed., 1994, at p. 191–

> *'The question, then, is when a private right of action in tort will be inferred from the existence of a statutory duty. When Parliament has clearly stated its intention one way or the other no difficulty arises, but all too often, this is not the case. Until the nineteenth century, the view seems to have been taken that whenever a statutory duty is created, any person who can show that he has sustained harm from its non-performance can bring an action against the person on whom the duty is imposed. During the first half of the nineteenth century, however, a different view began to be taken, and in* ***Anderson v Newcastle Walterworks Co.*** *[1877] 2 Ex. D. 441, the Court of Appeal's doubts about the old rule were so strong as to amount to disapproval of it. With the vast increase in legislative activity, the old rule was perceived to carry the risk of liability wider than the legislature could have contemplated, particularly in relation to public authorities. Since that time therefore, the plaintiff has generally been required to point to some indication in the statute that it was intended to give rise to a civil action. On this question as was stated by both Lord Normand at p. 412 and Lord Simonds at p. 407, in the case:* ***Cutler v Wandsworth Stadium Ltd.*** *– [1949] A.C. 398, 'the only rule which in all circumstances is valid is that the answer must*

depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted.'

[14] Jamaica's **Road Traffic Act** has absolutely no provision within it, contrary to that which has been submitted on, to this court, by defence counsel, that specifically states that a breach or breaches of the **Road Traffic Act** by someone, can be relied on as evidence of negligence. Indeed, it is equally true, that the said Act does not, at all, expressly state that if there is any breach thereof, said breach or breaches will give rise to, or in other words, provide a basis for a claim for damages for breach of statutory duty.

[15] **Section 95 of the Road Traffic Act** appears to this court, to have been the section thereof, that defence counsel had been referring to in his closing submissions, albeit that defence counsel did not then have a copy of same to either look on himself, while addressing this court, or to pass on to this court, during the presentation of his submissions. Helpfully though, as he had promised, he did pass on to this court, the **Road Code** as at 1987. It is important to note however, that between 1987 and now, there have been three revisions of the **Road Code** and those revisions were done in 1997, 2004 and 2007, respectively.

[16] **Section 95 (1) of the Road Traffic Act** provides –

'The Island Traffic Authority shall prepare a code (in this Act referred to as the "Road Code") comprising such directions as appear to the Authority to be proper for the guidance of persons using roads, and may from time to time revise the Road Code by revoking, varying, amending or adding to the provisions thereof in such manner as the Authority may think fit.' Sub-section (3) of that section, goes on to provide that – 'The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.'

[17] As has also been succinctly stated by the authors of the above-mentioned text, at p. 197, *'…The courts have consistently rejected road traffic legislation as a direct source of civil liability, for the effect would have been to introduce isolated pockets of strict liability into an area generally governed by the law of negligence.'* See: **Phillips v Britannia Hygienic Laundry Co**. – [1923] 2 K.B. 831; and **Badham v Lambs Ltd.** – [1946] K.B. 45; and **Clarke v Brims** – [1947] K.B. 497; and **Coote v Stone** – [1971] 1 W.L.R. 279.

[18] As such, this court has rejected the claimants' claim for damages for breach of statutory duty, against the defendants. The defendants will be awarded judgment on that aspect of the claimants' overall claim against them.

Claim For Damages For Negligence

[19] The claimants have also claimed against the defendants for damages for negligence. Firstly, in consideration of this aspect of their overall claim, it is to be noted that appropriately, there exists no dispute between the parties to this claim, firstly, that while driving along the Minard Main Road in St. Ann, during the early morning of May 15, 2010, at the time of the relevant accident, both the 1st claimant and the 1st defendant owed a duty of care, not only to each other, but also, to the 2nd claimant for present purposes, though, insofar as the 2nd claimant is concerned, it is only the alleged breach of that duty by the 1st defendant in relation to the 2nd claimant which is of any importance for the purposes of this claim, since the 2nd claimant has made no claim against the 1st claimant, but rather, has made his claim only as against the defendants.

[20] Of course too, as earlier stated in these reasons, in the event that this court determines that the 1st defendant is liable to either claimant for damages for negligence, it will follow automatically, as a matter of law, that the 2nd defendant must be held liable by virtue of the law as regards employer's liability, since it has been expressly accepted in the 1st defendant's evidence, and in defence counsel's closing submissions, that at the material time, the 1st defendant was driving a motor bus owned by the 2nd defendant and was driving same while performing his services as a bus driver employed by the 2nd

defendant, to carry passengers for hire, in that bus. In circumstances such as that, the employer will be held liable for any negligent conduct by his employee, while his employee was in the course of driving that motor bus. See: **Century Insurance Co. Ltd. v Nothern Ireland Road Transport Board** – [1942] A.C 509. This is part and parcel of that which is known in law, as vicarious liability.

[21] It is also not disputable that both claimants have suffered some loss and damage, of a physical nature, to themselves, in terms of bodily injuries, but also, financial loss, particularly in terms of having to pay for transportation services provided to them over varying periods of time, amongst other financial losses. It should be noted though, that although the 1st claimant's evidence was that he was, at the material time, the owner of the vehicle which he had then been driving, nonetheless, has made no claim for any loss and/or damage in relation to said vehicle. Furthermore, whilst there is no dispute that the claimants did suffer loss and damages arising out of the relevant motor vehicle accident and indeed, proof of loss and/or damage is a necessary element required to be proven, if a claim for damages for negligence, is to be properly proven (See: **Winfield and Jolowicz on Tort**, *op.cit.,* at p. 146), nonetheless, there does exist dispute as to the extent of loss which has been properly proven by the respective claimants.

[22] Furthermore, there is also no dispute that if it either of the opposing parties' respective statements of case were to be accepted by this court, in material respects, it would then mean, either that the 1st claimant caused his own loss, as well as the 2nd claimant's loss, or alternatively, at the very least, contributed to his own loss, such that this court would be entitled to conclude that since contributory negligence on his part, contributed to his loss and damage, the sum that should otherwise be recovered by him, as damages, arising from the 1st defendant's negligence, should be reduced to the extent by which this court would have determined that it is his negligence which was partially responsible for his loss and damages. See: **Law Reform (Contributory Negligence) Act**.

[23] Alternatively even further, it would then mean that the 1st defendant caused the losses and damage suffered by the claimants. Furthermore, this court's view is that if the claimants' statement of case were to be accepted by this court as having been proven in material respects, there can be no doubt that the losses and/or damage suffered by them, would have been reasonably foreseeable by any reasonable driver of a motor bus on the Minard Main Road at the time of the accident, as having been very likely to occur as a consequence of the 1st defendant's driving of the motor bus, just prior to the occurrence of the accident. In other words, the issue of foreseeability has not arisen for the purpose of any serious consideration by this court in this case.

[24] There is in fact only one serious issue between the parties in this case, insofar as liability in terms of negligence, as alleged, is concerned. It is whether or not it was primarily or partially the 1st claimant's negligence which either wholly caused, or at the very least, contributed to the losses and damage suffered by the claimants, or rather, whether it was the 1st defendant's negligence which wholly caused same.

[25] It is well known, at least by legal practitioners, but is nonetheless, worthwhile restating at this juncture, that negligence is, in law, the lack of, or failure to exercise, reasonable care in the conduct of one's activity, which, as a consequence, results in loss and/or damage to another, which was a reasonably foreseeable consequence of said negligent exercise of that activity. The *locus classicus* on the law of negligence is: **Donoghue v Stevenson** – [1932] A.C. 562.

[26] Since what is in dispute therefore, as regards liability, is whose carelessness it was that was exclusively or perhaps, partially responsible for the relevant accident having occurred, it is clear to this court, that this court's judgment on this claim will be dependent on this court's view as to what evidence ought to be accepted as being truthful and accurate. This must be so, since the disputing parties' accounts of how each of the only two vehicles that were actually involved in the accident, were being driven immediately prior to the accident are divergently different in their most material respects. This court has therefore, carefully considered the evidence of each of the

three witnesses in this case, this being the evidence of the claimants and the 1st defendant.

[27] It is true, as defence counsel has submitted, that the claimants' witness statements and thus, evidence-in-chief, are absolutely identical in certain material respects and that, although enquiry was made of them about whether there was any consultation between them for the purposes of the evidence which they gave in this case, there was, in response to those enquires, no acceptance by any of them that there was any consultation for that purpose.

[28] This court though, does not at all accept that this must mean that the claimants ought, even if they were to be considered by this court, as having been untruthful in that respect, to also be considered by this court and taken by this court, as having been untruthful as to how the relevant accident occurred. A witness may not be truthful, for a variety of reasons – some innocent, while others, blameworthy. Also, it is always open to this court, as the tribunal of fact, to accept part of a witness' evidence and reject another part.

[29] Also, this court does accept, as submitted on by counsel for the parties, that the respective witnesses have each either been unclear in various aspects of their evidence, or have even expressly contradicted themselves in various respects. Furthermore though, this court does not at all accept that, because a witness may have contradicted himself on one point or another, or have been unclear in his or her evidence on one point of another, that must therefore mean that any witness who has done any such thing, should have his or her evidence as given in material respects, treated by this court , either as lacking in credibility, or worthless. Surely that cannot be so. Witnesses may contradict themselves and/or be unclear on certain aspects of their evidence, for a variety of reasons. It is always for this court therefore, to discern where the truth lies. No set rules can be used in order to enable this court to soundly conduct that task of discernment.

[30] This court does not, at this time, intend to refer in detail to the evidence as given by the respective witnesses. Suffice it to state that in terms of the material aspects of their evidence as to how the 1st claimant's and 2nd defendant's vehicles were being driven immediately prior to the occurrence of the relevant accident, this court accepts the claimants' version of events and thus, has concluded that their claim against the defendants, has been proven on a balance of probabilities. This court also, does not at all accept that there was any negligence on the part of the 1st claimant, which contributed to the losses and/or damage suffered either by him, or by the 2nd claimant. The defendant has failed to prove, on a balance of probabilities, contributory negligence. Accordingly, it inexorably follows that the 2nd defendant's ancillary claim has not been successfully proven either.

[31] Suffice it to state that in the 1st defendant's evidence-in-chief, he had testified that after the collision between the bus which he had been driving on that eventful early morning, at approximately 12:45 a.m. and the 1st claimant's vehicle (Toyota Corolla), had occurred, he had noticed that *'the left front side of the bus was also slightly damaged as a result of a large stone on which the bus had rubbed when I had swerved left to avoid the car.'* (Last sentence of para. 7 of the 1st defendant's witness statement).

[32] This was very revealing evidence. If indeed he (the 1st defendant) had caused the bus which he was driving that morning, to rub against the stone which was positioned/situated on his left hand side of the road (the side on which he should have been driving), that morning, and it was the left hand side of the bus that rubbed against that stone, because he, the 1st defendant, had to maneouver the bus which he had been driving, closer to the farthest left, according to him, so as to have tried to avoid colliding with the 1st claimant's vehicle, which he has alleged, was then being driven in his left hand lane, then this must mean that at the material time, the bus was to the right of that stone. The next question to be answered therefore, is, was it positioned so far to the right of that stone, that it was actually positioned at least partially, into the wrong lane –

this being the lane which the 1st claimant has alleged that his vehicle was being driven in, shortly before the accident occurred?

[33] This court has absolutely no doubt whatsoever in its mind, that the 1st defendant was, immediately prior to the relevant vehicle collision having occurred, driving the bus in a manner whereby, at the very least, a significant portion of the bus, was, at the time of the collision, being driven in the wrong lane.

[34] This court has no doubt about this, because of the answers given by the 1st defendant to questions which were posed to him, during his cross-examination by the claimants' lead counsel. At that stage, the 1st defendant's evidence was that there was a large stone on his side of the road, in the location where the accident had occurred and that there were no large stones on the other side of the road, in that location. Furthermore, he gave evidence, while still under cross-examination, that the large stone which he could account for, as having then been on his side of the road, was about 3 feet high and 3 feet wide. It was also his evidence, given while under cross-examination, that the bus which he had been driving that morning, was about 5-6 feet wide, while the width of the lane which he was driving in that morning was about 7 feet.

[35] In the circumstances, the 1st defendant clearly, not having been able to bypass that stone on the left without having driven off the road, did not stop or slow down the bus prior to having attempted to have the bus pass that stone on the right hand side of the road, while approaching a corner. Around the corner, unexpectedly for him, then came the 1st claimant's vehicle, in its correct lane – this having been the same lane that the bus was being partially, but to a significant partial extent, driven in. As a consequence, the vehicle collision between the 1st claimant's and the 2nd defendant's vehicles then: occurred.

[36] This court has concluded, in the circumstances, that it is the 1st defendant's exclusive legal fault, founded in negligence, which caused the said collision to have occurred. The duty on the 1st defendant in those circumstances, was to have

proceeded very cautiously around the large stone, this assuming that he could not have temporarily halted his vehicle, got out of it and moved away the same, prior to his having then proceeded driving along, in the correct lane. Furthermore, if even he had chosen to proceed cautiously around that stone, he would have had to have warned oncoming vehicle drivers coming around the corner, that there then existed, because of the presence of the bus in that wrong lane, danger for them, ahead. Such warning could have been given by means of, at least, blowing the bus' horn. There is no evidence that he had, at any time, immediately prior to the accident, blown the bus' horn and the evidence strongly suggests to this court that the 1st defendant did not proceed to drive around that stone, in the incorrect lane, cautiously. The claimants' claim against the defendants, has thus been proven to the requisite standard.

[37] This court will therefore, next go about the task of assessing general and special damages in respect of each claimant and in that regard, will first consider the special damages claimed for.

Special Damages Claimed For By The Claimants

[38] This court accepts the defence counsel's submission that in the absence of receipts having been provided to this court by the claimants, to prove certain specific losses allegedly incurred by them, as a consequence of the accident, in a context wherein no satisfactory, or in fact any at all, explanation has been provided as to why some receipts have not been provided in respect of sums being specifically claimed for, this court should not award damages for those specific losses claimed for, but in respect of which, no receipts have been provided to this court.

[39] This court also accepts the defence counsel's submission that the evidence which was given by the 1st claimant in relation to one Gary Newton, whom he testified, had, after the accident, transported him on different occasions, from his home in Stewart Town, to the hospital, was that Mr. Newton, although having charged him fees for the provision of that transportation service, over time, was not operating a route taxi, but rather, a private car. In the circumstances, it would have been, when he was

providing said transportation services, for hire, entirely unlawful for Mr. Newton to have done so. It would have been unlawful because, by law, one can only carry/transport passengers for hire, if the driver of that vehicle used for public transportation purposes and that said vehicle, are both duly authorized and licensed so to do. If so authorized, a person in Jamaica can only lawfully provide such services, if operating a route taxi or passenger bus. One cannot lawfully do so, while operating a private car. As such, this court will not and cannot award damages to the claimants for any transportation services provided to them by Gary Newton, since, if this court were to do otherwise, it would be accepting and validating, an illegal contract and additionally, thereby assisting in the enforcement of such a contract.

[40] This court has concluded that the sum proven by the 1st claimant as being awardable to him as special damages, is the sum of $43,500.00 (comprised as follows: receipt from Doctor Peter Glegg - $15,000.00; plus receipts from Ivy Campbell, totaling $6,000.00; plus receipt from St. Ann's Bay Hospital, totalling $22,500.00).

[41] This court has also concluded that the sum which should be awarded to the 2nd claimant as special damages, is nil. In other words, that no sum is to be awarded as special damages to him. This is because, it is a general rule, that special damages must be specially pleaded and specially proven. In the present case, the 2nd claimant in the joint particulars of claim, which was filed on behalf of the claimants, has only specifically pleaded/particularized, as being his claim for special damages, the sum of $1729.60. In his evidence, the 2nd claimant gave no evidence whatsoever, as to his having incurred said sum, or as to why he incurred same, Such evidence was necessary, if this court was to properly be expected to act by awarding said sum as special damages. Equally too, although the 1st claimant had specially particularized same in the joint particulars of claim, he provided no evidence to this court whatsoever, as regards his claim for the cost of a police report and Tara Courier expenses. The only receipts produced to this court at trial and accepted as exhibits, in relation to transportation expenses, were receipts issued by Gary Newton. For reasons earlier given, the payments as evidenced by those particular transportation receipts, are

irrecoverable. Several receipts were sought to be tendered into evidence at trial as hearsay documents and perhaps the most significant of those, were receipts of payments allegedly made by Nigel Jones and Co., on the claimant's behalf. Those receipts were, for the most part, objected to by the defendants, as was their right to have done and the claimants never overcame, or even sought at trial, by means of the presentation of the requisite evidence, in accordance with **section 31 (E) (4) of the Evidence Act**, to overcome that objection. In the absence of those receipts, this court has been unable to conclude that various alleged expenses incurred as a consequence of the relevant accident, have been satisfactorily proven, to the requisite standard. As such, the 1st claimant will be awarded the sum of $43,500.00 as special damages, at an interest rate of 3%, with effect from the date of service of the claimant's claim form and particulars of claim, that being: December 3, 2011. The 2nd claimant will not be awarded any sum as special damages.

General Damages In Relation To The 1st Claimant

[42] Counsel for the parties to this claim, have respectively utilized a few cases, in submitting on the respective sums to be awarded as general damages, to the respective claimants. Those cases were all extracted from the renowned texts – assessment of damages for personal injuries authored by Messrs Karl & Marc Harrison. Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica, Vol. 4 authored by Ursula Khan. The Claimants have relied on the cases: **Kitson v Slater and anor**. – Suit No. C.L. 1987/K037 and **Tricia Thompson (b.n.f. Alethia Sheriffe v Junior Harriott** – Suit No. C.L. 1989/T0224 and **Dacres & Dacres v Tania Reid** – SCCA No. 103/00; **Buchanan v Blake** – SCCA No. 2/93; and **Robinson v Dodd & Wilson** – Suit No. C.L. 1987/R133. For their part, the defendants have distinguished the cases being relied on by the claimants, from this case and thereby submitted that a smaller sum should be awarded, than that which is being sought by the claimants as per their lead counsel's submissions, in respect of general damages. In addition, the defendants have relied on two other cases: **Myers v J.R. Transport Co. Ltd. & Odeon Newman** – Suit No. C.L. 1986/M169; and **Bryan v Terrelonge & anor.** – Suit No. C.L. 1989/B239.

[43] It is accepted by all parties and by this court, that the Consumer Price Index (C.P.I.) which is applicable at this time, is the November, 2014 C.P.I. figure – 224.9.

[44] It is also undisputed that, as has been clearly set out in the expert report of Dr. Peter Glegg, as far as the 1st claimant is concerned his impairment, as a consequence of the accident was determined as being 10% of the whole person. He provided no evidence to the court as regards loss of any amenities, nor any evidence as to any pain and/or suffering endured by him. Whilst though, it would have been helpful for evidence of pain and suffering to be provided, this court can and does infer that some pain and suffering would have been endured by him. The court has been able to draw that inference, based on the medical evidence which has been provided to this court, in relation to his injuries. Equally, the 2nd claimant provided no evidence to this court, as to his pain and suffering, but also an expert report of Dr. Peter Glegg was admitted in evidence in relation to his injuries and from that evidence, this court can and does infer that he endured pain and suffering. Equally too, he has provided no evidence of loss or amenities. Loss of amenities cannot be inferred by this court, since, even if this court were to have desired to have so done, same could not be done without any evidentiary basis, as that would mean that this court would have acted on speculation. Inferences cannot properly be drawn by a court, in circumstances wherein no, or no sufficient evidence exists to justify this court in drawing such inferences.

[45] The extent of impairment caused to the 2nd claimant, has been determined by Dr. Glegg as amounting to 2% of the whole person. The 2nd claimant though, as stated by Dr. Glegg in his report, will, *'remain with permanent and extensive scarring to the face, with a disfigured left upper eyelid and related irritation.'* This court accepts in all respects, the medical evidence which has been provided to it by the claimants, in relation to the extent of their physical injuries as a consequence of the relevant accident. Also, during his evidence, the 2nd claimant did point out to this court, the scarring to his face. That scarring though, was both then and thereafter noted by this court, as having been far from grotesque in nature. The 2nd claimant did suffer a concussion as a result of the accident and also, bleeding from his nostrils. Furthermore,

a laceration which was caused to one of his upper eyelids, was sutured. The 1st claimant had to undergo surgery on two occasions and he was incapacitated for three months. He suffered a mild whiplash injury and fractures (two in number).

[46] This court agrees with the claimants' counsel's submission that the injuries suffered by the 1st claimant are similar to those suffered by the claimant in the **Eric Buchanan case**, but in that **case**, general damages were awarded for pain and suffering and loss of amenities. The updated award in the **Buchanan case** is $3,168,000.00. In this **case** though, no award can or will be made for loss of amenities. This court will award to the 1st claimant, the sum of $2,750,000.00 as general damages.

[47] For the 2nd claimant, the case of **Thompson v Harriott** is useful, but in that **case**, the general damages awarded, also incorporates a sum awarded for loss of amenities. Also though, on the other hand, the injuries to the 2nd claimant were more serious than they were to the claimant in **Thompson v Harriott case**. The updated award in the **Thompson case** is $6,000,000.00. This will be reduced, as far as the 2nd claimant is concerned, to the sum of $5,500,000.00. That is therefore the sum which will be awarded to the 2nd claimant as general damages with interest as the rate of 3% with effect from the date of accident – May 15, 2010 until date of judgment.

Judgment Orders

1. Judgment on the claimants' claim for damages for breach of statutory duty is awarded to the defendants.

2. Judgment on the 2nd defendant's ancillary claim against the 1st claimant is awarded to the 1st claimant, as against the 2nd defendant.

3. Judgment on the claimants' claim for damages for negligence is awarded to the claimants and the 1st claimant is awarded general damages in the sum of $2,750,000.00 with interest thereon, at the rate of 3% with effect from May 15, 2010 until date of judgment and the 2nd claimant is awarded general damages in the sum of $5,500,000.00 with interest thereon, at the rate of 3% with effect from May 15, 2010 to date of judgment.

4. The first claimant is awarded special damages as against the defendants in the sum of $43,500.00 with interest at the rate of 3%, from the date of service of the claim form, that being: December 3, 2011 to date of judgment.

5. Each party shall bear their own costs as regards this claim and as regards the ancillary claim, the 1st claimant is awarded the costs of same, as against the 2nd defendant, with such costs to be taxed, if not sooner agreed.

6. This order shall be filed and served by the claimants.

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Hon. K. Anderson, J.