[2015] JMSC Civ. 73

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 06065

BETWEEN	**GERALD REID**	**CLAIMANT**
AND	**ALEXTON GYLES**	**1st DEFENDANT**
AND	**UNITED ESTATES LIMITED**	**2nd DEFENDANT**

Mr S. Kinghorn instructed by Kinghorn and Kinghorn for the Claimant

Ms D. Butler instructed by Samuda and Johnson for the second Defendant.

Heard on: 8th October 2014 and 22nd April, 2015

***Motor vehicle accident – Liability – Driver of 2nd Defendant's vehicle not attending trial - Credibility – Damages - Quantum*.**

Coram: Morrison, J.

[1] The Claimant's claim sounds in damages, interest and costs following on an allegation of negligent driving by the first defendant for whose action the second defendant is deemed to be vicariously responsible.

From the 1st Further Amended Particulars of Claim the Claimant's pleadings read as follows:-

[2] "1. The Claimant was at all material times born on the 27th day of July 1975 and was at all material times a Taxi Operator.

2. By presumption of law, the 1st Defendant is and was at all material times the servant and/or agent of the 2nd Defendant and was at all material times the driver of motor vehicle registration number CD 8218.

3. The 2nd Defendant is and was at all material times the owner of motor vehicle registration number CD 8218 and was at all material times duly incorporated under the Companies Act of Jamaica with the registered offices situated at Bog Walk in the parish of St. Catherine.

4. On or about the 13th day of October 2006, the Claimant was lawfully driving his motor vehicle registration number PB 4997, along the Bog Walk Gorge in the parish of St. Catherine, when the 1st Defendant, so negligently drove and/or operated and/or managed motor vehicle registration number CD 8218, that he caused and/or permitted the said motor vehicle to come violently into collision with motor vehicle registration number PB 4997.

5. Particularly, on or about the 13th day of October, 2006, the Claimant was lawfully driving motor vehicle registration number PB 4997, along the Bog Walk Gorge in the parish of St. Catherine. Upon reaching a certain section of the gorge motor vehicle registration number CD 8218 attempted to overtake the Claimant's motor vehicle but failed and in an attempt to rejoin the traffic motor vehicle registration number CD 8218 collided with the rear of the Claimant's motor vehicle.

Particulars of negligence of 1st defendant were also supplied -

i. Driving at too fast a rate of speed in all the circumstances.

ii. Failing to maintain sufficient or any control over motor vehicle registration number CD 8218.

iii. Failing to see motor vehicle registration number 7719 DY within sufficient time or at all.

iv. Causing motor vehicle registration number CD 8218 to collided into the rear of motor vehicle registration PB 4997.

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

6. …

7. …

[3] The 2nd Defendant's Amended Defence is also set out in full so as to put into relief the full suite of contested issues –

AMENDED DEFENCE OF THE SECOND DEFENDANT

[4] "1. This Defendant neither admits nor denies paragraph 1 of the Particulars of Claim as they are unaware of the truth of its contents and therefore require the Claimant to prove the same.

2. This Defendant admits paragraphs 2 and 3 of the Particulars of Claim.

3. This Defendant admits that a collision involving their said motor truck registered CD 8218 and motor vehicle registered PB 4997 occurred along the Bog Walk George main road in the parish of Saint Catherine on October 13, 2006 as alleged in paragraph 4 of the Particulars of Claim.

4. This Defendant denies however that the 1st Defendant was negligent in the operation of the said motor truck thereby causing it to collide with

motor vehicle registered PB 4997 as alleged in paragraph 4 of the Particulars of Claim.

5. This Defendant says that the said collision occurred in the following manner:

   a. The 1st Defendant was at the material time driving the said motor truck along the Bog Walk Gorge main road in the direction of Bog Walk in a line of traffic. On approaching a left hand corner along the said road the Claimant who was driving a motor vehicle registered PB 4997 in the same direction attempted to overtake the said line of traffic including the 1st Defendant.

   b. While overtaking the line of traffic the Claimant came upon a motor vehicle travelling directly towards him from the direction of Bog Walk causing him to swerve to avoid a collision with the oncoming motor vehicle.

   c. In swerving to his left the Claimant collided with the 2nd Defendant's said motor truck, careened into the left hand embankment and spun into the road in the path of the said motor truck.

   d. The 1st Defendant swerved to avoid a further collision with the Claimant however, the said motor vehicle registered PB 4997 having spun into the road collided with this Defendant's said motor truck for a second time.

6. This Defendant therefore says that the collision was caused and/or contributed to by the negligence of the Claimant.

PARTICULARS OF NEGLIGENCE

The Claimant was negligent in that he:

a) Drove at a speed which was excessive in the circumstances.

b) Failed to keep any or any proper look out or to have any or any sufficient regard for the other traffic on the said road.

c) Failed to exercise or maintain any or any proper or effective control of his said motor vehicle.

d) Drove on or unto the incorrect side of the said road at a time when it was dangerous to do so.

e) Overtook or attempted to overtake the 1st Defendant who was proceeding in a line of traffic in the vicinity of a left hand corner along the said road in the opposite director in close proximity to him.

f) Overtook or attempted to overtake a line of traffic in a reckless and or dangerous manner.

g) Overtook or attempted to overtake a line of traffic in circumstance where there was vehicular traffic proceeding along the said road in the opposite direction in close proximity to him.

h) Swerved to his left in an attempt to avoid a head on collision with an oncoming motor vehicle and collided with the 1st Defendant who was lawfully proceeding along the said road.

i) Failed to have or to keep any or any proper control of his said motor vehicle.

j) Failed to stop, to slow down, or in any way so to manage or control the said motor vehicle so as to avoid the said collision.

7. ....

8. This Defendant denies paragraph 5 of the Particulars of Claim along with the Particulars of Negligence of the 1st Defendant set out therein and repeats paragraphs 3 to 7 herein in response.

9. ...

10. The Particulars of Injuries and Particulars of Special Damages set out in paragraph 7 of the Particulars of Claim are neither admitted nor denied as this Defendant is unaware of the truth of the assertions contained therein and requires the Claimant to prove the same.

11. This Defendant admits the contents of the Medical Reports dated May 19, 2011 and July 10, 2011 and March 18, 2010 prepared by Dr Hugh Barnes and Dr Sandra Nesbeth respectively. This Defendant reserves the right to cross examine the doctors on the contents of the said reports.

12. Save as is herein before expressly admitted this Defendant denies each and every allegation contained in the Particulars of Claim as if the same were set out and traversed seriatim".

[5] I now turn to the evidence mindful as I am that the 1st Defendant driver's evidence was not forthcoming.

Evidence of Claimant

[6] According to the witness statement of this witness, "on reaching the Bog Walk Gorge in the vicinity of Ribitz Corner… there were two (2) trucks travelling directly behind me. One of the trucks overtook me in the corner and the other attempted to overtake me in the corner and the other attempted to overtake my motor car, however, the driver was not able to completely overtake my car because a motor vehicle was coming in the opposite direction. The driver then attempted to rejoin the traffic and collided with right back section of my motor car. The collision caused my motor car to hit the curb wall and then overturn.

I lost consciousness and awoke in the Spanish Town Hospital with bandages behind my right ear and my right shoulder."

He dilates that he was admitted at the Spanish Town Hospital for three (3) days after which he was discharged.
The rest of his account was directed and dedicated to his healing process.

Evidence of the Second defendant

[7] This evidence comes from a Mr Glen Edwards, a truck sideman. His witness statement is dated July 7, 2014 and was filed on July 14, 2014.

[8] His witness statement was received into evidence as his evidence-in-chief. His evidence is that on Friday, October 13, 2006 at about 3:20 p.m. he was travelling in the right front passenger seat of International truck, registration number CD 8218, being driven by Alexton Gyles.

[9] This truck, he testifies, is a left-hand drive one and is owned by the second defendant. Continuing, he says, "We were going through the Bog Walk Gorge and heading to Bog Walk… We were proceeding steadily in a line of vehicle. Another truck was directly ahead of us". After passing an area called "Pum Rock" and approaching a left hand corner in the Gorge, "I looked in the truck's rear view mirror and saw a motor car overtaking a line of traffic behind the truck. The motor car also started to overtake the truck. While in the process of overtaking our truck, the motor car swerved suddenly in front of us in an attempt to avoid a head-on-collision with another truck which was coming in the opposite direction".

[10] "The car", according to this witness, "slammed into the right front bumper of the truck and then collided into a curb wall on the left side of the road. The car then spun in the road. Mr Gyles applied his brakes and swerved from the car but it collided with the truck a second time. The car then overturned. After the collision Mr Gyles stopped the truck and we came out. A Police Officer later came on the scene and took the particulars of the accident".

[11] It will be seen at once that the parties are at odds as to who was the cause of the accident. As for the Claimant, … "motor vehicle registration number CD8218 attempted

to overtake the Claimant's motor vehicle but failed and in an attempt to rejoin the traffic …" the said motor vehicle collided with the rear of the Claimant's motor vehicle.

[12] Whereas for the 2nd Defendant, it was the Claimant who was driving motor vehicle registered PB 4997 in the same direction along the Bog Walk Gorge main road in the direction of Bog Walk, who on approaching a left hand corner attempted to overtake a line of traffic including the 1st Defendant and in the process had to swerve to his left to avoid a collision with an oncoming motor vehicle thereby colliding with the 2nd Defendant's motor truck, "careened into the left embankment and spun into the road into the path of the said motor truck"; the 1st Defendant having swerved to avoid a further collision with the Claimant's vehicle it having spun out into the road, it collided with the 2nd Defendant's motor truck for a second time.

[13] In the result the 2nd Defendant's pleadings attribute the collision to the Claimant and/or that it was contributed to by the negligence of the Claimant.

Evaluation Of The Evidence

[14] Here, I must at once point out that, there is not an iota of evidence coming from an independent witness. Further, the first defendant, Alexton Gyles, driver of the International truck belonging to the second defendant, did not give evidence. According to the written submissions of the second Defendant, Mr Gyles did not give evidence as he was never served. That being the state of affairs, I am to resolve the factual issues raised on the basis of the credibility of the witnesses. Before I do so, I shall here set out my approach to the unravelment of this nodus

[15] In this, it is worth bearing in mind, that the 'facts in issue' are those which the Claimant must prove in order to succeed in his claim and /or which the Defendant must prove in order to succeed in his defence. Accordingly, the facts in issue are determined partly by reference to the substantive law and partly by reference to what the parties allege, admit do not admit and deny.

[16] Where one party fails to give evidence or call witnesses a court may be justified in drawing all reasonable inferences from the evidence given by the other side. Thus,

inferences have been drawn from the unexplained absence of witnesses who were apparently available and whose evidence was crucial to the case.

[17] Support for this proposition is to be had in **Wisniewski v Central Manchester Health Authority** [1992] Lloyd's Rep. Med. 223, where Brooke LJ distilled certain principles from a line of cases beginning with **Lewis v Eliades** [2005] EWHC 488 (Ch.), LTL 6/4/2005 through to **Baigent v Random House Group Ltd**. [2006] EWHC 719 (Ch.), [2006] EMLR 16. Here they are:

a. In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

b. If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

c. There must have been some evidence; however weak adduced to the former on the matter in question before the court is entitled to draw the desired inference, in other words, there must be a case to answer on that issue.

If the reason for the witnesses absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified : per ***Blackstone's Civil Practice, 2011*** paragraph 473***.***

[18] I am to say that I adopt the principles as distilled by Brooke, LJ. Here the reason tendered is that the potential witness was not served. Yet, it is curious to note that he gave a witness statement in this matter. The adverse conclusion, having regard to the evidence of the Claimant begs to be drawn.

[19] As far as the pleadings are concerned, vis-à-vis the evidence, nothing remarkable turns here as both parties are consistent in that their pleadings match their respective evidence. As for the Claimant, the Defendant is wholly to be blamed for the accident. As to the second defendant, "the collision was caused and/or contributed to by the negligence of the Claimant".

[20] In respect of cross-examination as to credit, it is the standing of the witness after cross-examination that the tribunal of fact is concerned about. Thus reminded, I am to say that I prefer the evidence of the Claimant to that of Mr Glen Edwards on behalf of the second defendant.

I find that Mr Edwards was not a reliable witness. His demeanour was as such that it bespeaks a witness whose testimony was comprised of a ready cataract of words which fell trippingly from his lips. He affected sincerity without his being effectively plausible. It is either that he has an eidetic memory or else it was a eidolon of his mind: This non-driver, who is not possessed of a driver's licence, who was sitting in the right front passenger seat of the truck being driven by the first defendant, in respect of the accident of the 13th day of October 2006 and for which he gave a witness statement on

7th July, 2014 would essay to give the approximate travelling speeds of both vehicles that were involved in the accident. Not only that. He was also able to give, while looking through the rear view mirror of the truck, a virtual panoramic view with such detail of the events leading up to, during, and, after the accident, so as to give the impression that he was there to lend credence to a preconception. I reject his evidence, the sheer convenience of which is palpable.

On the contrary, I accepted the evidence of Mr. Gerald Reid as being more likely to be the truth. While I will not say that his evidence was entirely without blemish, nevertheless, he delivered himself with the frankness of undeliberate truth-telling so as to allow this court to place reliance on his evidence.

In the final analysis, on a balance of probabilities, I find that it was the first defendant who was negligent in causing the accident.

The Law

[21] .Starting from a general position it is to be observed that the Road Traffic Act places a duty on each driver to take steps to avoid an accident:S51(2).

[22] Even if it were to be accepted, which I reject, that Mr Alexton Gyles was operating within the prescription of the law and in keeping with his duty he ought to have kept a proper look out. On the evidence of Mr. Edwards it was after the Claimant's car had collided with the right front bumper of the truck that Mr Gyles applied his brakes. This act of applying his brakes is in a context where, incredibly, the front seat passenger, Mr Edwards had looked into the truck's rear view mirror and saw the offending motor car being driven improperly, ill-advisedly, and illegally, overtaking a line of traffic "behind the truck" and as well as the trucking itself.

[23] According to Mr. Edwards, it was "in the process of overtaking" that the motor car "swerved suddenly in front of us in an attempt to avoid a head-on collision with another truck which was coming in the opposite direction". Surely, were that the case, the question is, what steps did Mr Gyles take to avoid the accident, considering he was the better placed party to see what was happening ahead of him? Clearly, the duty imposed by Section 51(1) of the Road Traffic Act would have been violated by the first defendant on the account of Mr. Edwards.

[24] In **Nance v British Columbia Electric Rail Co**., [1951] AC 601, the pronouncement of Viscount Simonds is most apposite: "When two parties are moving in relation to one another as to involve risk of collision each owes the other a duty to move with due care, and this is true whether they are both in control of the vehicles …"

[25] Here it is the second Defendant who has pleaded contributory negligence. It befits such a defendant to prove it. Absolutely, not one jot of tittle of evidence in proof has been proffered. What is on offer is proof by assertion.

[26] It seems then that on the failure by the second Defendant to comport the evidence to meet his pleadings, then his pleading of contributory negligence cannot resonate.

[27] According to duParcq, L.J. in **Lewis v Denye**, [1939] K.B. 540, in order to establish the defence of contributory negligence, the defendant must prove, first, that the plaintiff failed to take ordinary care for himself or, in other words, such care as a reasonable man would take for his own safety, and, secondly, that his failure to take care was a contributory cause of the accident.

[28] I repeat that I find on a balance of probabilities that the accident was wholly caused by the first defendant's negligent driving and that the Claimant was not contributory negligent at all.

General Damages

[29] In determining the quantum under this head I pay regard to the agreed medical reports of Dr Hugh Barned and Dr Sandra Nesbeth dated the 19th May 2011 and the 10th July 2011, respectively. From the first report the Claimant suffered from deep abrasions to the right posterior chest wall 40x30 centimeters with chest wall tenderness on deep palpations; 362 centimeters abrasion to right posterior auricular and mastoid area of scalp; and, mild concussion injuries with soft tissue abrasion.

[30] As to the second report of 10th July 2011, the Claimant suffered severe right tempero-pariotal and occipital headache (pain at the back of right temple extending to the back of the head); 3x2 centimeter abrasion (superficial cut) to the posterior auricular and mastoid area of the head; severe tenderness and swelling in the right tempero-manibular joint with difficulty opening his mouth on examination; severe tenderness and spasm in the neck-whiplash-worst on the right side; severe tenderness and swelling in the right shoulder with difficulty elevating and weight bearing; severe chest pain and swelling with an extensive 40x30 centimeter abrasion on the right antero-lateral to posterior aspect of the chest; and, moderate lower back pain and spasm on the right to the middle of the back.

[31] The Claimant in relying on the following authorities has asked this court to award the sum of $3,500,000.00. The cited authorities on which he relies are:

i. **Henry Bryan v Noel Hoshue –** Khan, Vol. 5, pg. 177
ii. **Bernice Clarke v Clive Lewis** – delivered on the 11th April 2003.

iii. **Icolyn Lawes v JUTC** et al. delivered on the 23rd January 2013.

iv. **Marion Landell v Judah Campbell** – Claim No. 2006 HCV 01324

v. **Claston Campbell v Omar Lawrence** – Suit No. C135/2002

[32] In **Henry Bryan v Noel Hoshu**, supra, the Claimant sustained abrasion to the frontal scalp, severe headaches, dizzy spells, pain and suffering excruciating pains in the back. He was left with no disability. An award of $350,000.00 was given at a time when the CPI was 45.13. The CPI is presently 215.8. After indexation this award updates to $1,673,609.57. As such I lean on the authority of the **Henry Bryan** case it being more consonant with the case at bar and award the sum of $1,675,000.00.

[33] In **Bernice Clarke v Clive Lewis**, supra, the Claimant sustained a mild cerebral concussion. She was left with no disability. The Court mad an award of $550,000.00 at a time when the CPI was 65.7. This award updates to $1,806,544.90.

[34] On the authority of **IcolynLawes v JUTC**, supra, the Claimant sustained a moderate whiplash injury. She was left with no disability. The Court made an award of $900,000.00 at a time when the CPI was 193.8. The award updates to $1,002,167.74.

[35] On the authority of **Marion Landell v Judah Campbell** – Claim No. 2006 HCV 01324, supra, the Claimant sustained a moderate whiplash injury without resulting disability. There the sum awarded was $950,000.00. The Consumer Price Index at the time was 150.4. After indexation the award of now updates to $1,363,098.40.

[36] On the authority of **Claston Campbell v Omar Lawrence** – Suit No. C135/2002, Counsel, for the claimant Ms Dorothy Gordon had argued that the Claimant had sustained a whiplash injury with a permanent partial disability of 10%. The disability was assessed by general practitioner, Dr Douglas Massop. The Court did not accept the doctor's finding of a disability and consequently treated the injury as a moderate whiplash injury without more. The Court made an award of $650,000.00 at a time when the CPI was 64.4. After indexation the award amounts to $2,178,105.59.

[37] It is to be observed that the Claimant in the instant case sustained far more severe injuries over and above those suffered by the Claimant in the cited authorities.

The Claimant, for example had in addition to a cerebral concussion, soft tissue injuries to the chest, neck and lower back. The Claimant also had severe scarring to the chest. This was shown to the Court.

[38] The second Defendant, on the other hand, in referring to **Turkhiemer Moore v Elite Enterprises Ltd. v Sherwin Oliver Brown** reported at Khan's, Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica (Khan's), Volume 5 at p.96 and **George Mykoo v Andrea Blake** reported in Harrison's 2nd Edition, has asked this Court to make an award of $500,000.00.

[39] The second Defendant submits that despite being hospitalised for three (3) day at the Spanish Town Hospital the Medical Summary Report contain no reference to several of the injuries which appears in Dr Nesbeth's report. That at a time when the Claimant was examined, contemporaneous with the accident, noticeably absent were findings of ringing in the ear, tenderness and selling of the jawbone, difficulty opening mouth, tenderness and spasm of neck-whiplash injury, tenderness and swelling of shoulder or lower back pain. These additional symptoms are sufficiently severe that it is highly unlikely that they would have been missed by the doctors at the Spanish Town Hospital.

[40] Second, the Claimant was also examined at eh Spanish Town Hospital two (2) weeks after the accident yet mysteriously the examining doctor again did not observe most of the injuries which appear in Dr Nesbeth's report. In fact, the prognosis in the Medical Summary Report is quite positive and optimistic.

[41] Third, a closer examination of Dr Nesbeth's report reveals that though the first page of the report lists extensive presenting injuries no further mention is made of them elsewhere in the report. Only the Claimant's abrasions receive any meaningful consideration in the report. The Claimant was allegedly under Dr Nesbeth's care for forty-five (45) weeks yet at no point in the report does Dr Nesbeth indicate that she prescribe treatment or medication for any of the Claimant's alleged injuries save and except his abrasions. The 2nd Defendant invites this honourable Court to consider these factors when determining a reasonable award for General Damages.

[42] Fourth, a Claimant is only entitled to compensation on account of injuries caused by the accident arising from a Defendant's negligence. Accordingly, the Claimant should not be compensated for the additional complaints and injuries which were not referred to in the contemporaneous medical report of the Spanish Town Hospital.

[43] Fifth, Dr Nesbeth also made a diagnosis of post-traumatic stress disorder in her medical report however it submitted that his diagnosis should be disregarded, without more, as Dr Nesbeth does not appear to have the requisite expertise to make such a diagnosis.

[44] Sixth, that the injuries suffered by the instant Claimant are far less severe than those referred to in the aforementioned cases. This they submit is borne out by the fact of the absence of a PPD rating assigned to Mr Reid. Further, that when compared with more severe injuries referred to in the aforementioned cases it is they submit that the instant case warrants a significant discount.

[45] In the **Turkhiemer Moore's** case, supra, the Plaintiff suffered loss of consciousness, multiple bruises to the head with haematoma and possible cerebral concussion, multiple bruises to upper limb and fracture of the right clavicle. He was assigned a PPD rating of 2% of the whole person. The Court made an award of $275,000.00 which updates to $1,148,254.72 using the CPI as at August 2014 of 221.3.

[46] In **George Mykoo v Andrea Blake**, *supra*, the plaintiff suffered a fracture of the left clavicle and bruises and abraisions all over the body. His arm was put in a sling for about two months and he had a 10% partial disability of the upper limbs. The Court made an award of $731,812.17.

[47] Of the cited authorities clearly the **Claston Campbell** case is inapposite if only for the fact that the Claimant in that case was given a permanent partial disability (PPD) of 10% whereas in the current case no PPD was assigned to the Claimant.

[48] I find that the adversant polar extremes of the awards that this court is asked to give are in one case an ambitious overestimate and in the other an ambitious

underestimate. The sum of $3,500,000.00 is plainly overambitious and the sum of $500,000.00 lacks substantive reality.

> In assessing the award I bear in mind from the report of July 10, 2011, that "The patient's abrasions healed … and allowed him to move his right shoulder without restrictions". Further, that "The patient resolved very slowly with frequent relapses". However, he was finally discharged … with large healed scars on the chest laterally and posteriorly, otherwise he has no tenderness or spasm".

[49] I do not think that the criticisms levelled at the medical reports by the second Defendant are valid such as to warrant a discount of the sum which I have awarded. After all what is to be regard is "the impaired health and vitality not merely as a cause of pain and suffering but as a loss of a good thing in itself" – per Lord Roache in **Rose v Ford** [1937] AC 826 at 859.

Special Damages

[50] I wish to begin here in noting that the parties have agreed the medical expenses at $95,940.48

[51] On the question of the loss of earnings the parties disagree. The Claimant has asked for $672,000.00 and has urged this Court to embrace Paragraphs 17-20 of the Witness Statement of Gerald Reid which seeks to explain specifically and comprehensively the basis upon which the Claimant makes this Claim for Loss of Earnings. As such the Claimant submits that the sum of $14,000.00 representing one (1) year's earnings is justified.

[52] I disagree. The fact is that though Dr Barned projects that the Claimant is not expected to suffer any long term sequelae from his injuries, Dr Nesbeth opined that the Claimant resolved very slowly and was finally discharged on the 29th day of September 2009. The Claimant presented documentary proof of his loss in the form of his pay slip which was admitted into evidence. However, I have to bear in mind that the documentary support did not match his testimony. His pay advice showed him as earning $9,754.65 per week.

[53] In the case of **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173,relied on the Claimant, the Court of Appeal held that a side walk vendor should be awarded loss of earnings although there was no documentary proof of her earnings. His Lordship Wolfe JA, as he then was stated:

> "Without attempting to lay down any general principle as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earning with the mathematical precision of a well-organized corporation may well be what Bowen, L.J., referred to as "the vainest pedantry".

He continued –

> "In casual work cases it is always difficult for the legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages, the Court has to use its own experience in these matters to arrive at what is proved on the evidence."
>
> This principle is no less applicable to a plaintiff involved in the sidewalk vending trade. This is a small scale of trading. Persons so involved do not engage themselves in the keeping of books of accounts. They pay their domestic bills from the days sale. They provide their children with lunch money and bus fares from the day's sales without regard to accounting"

[54] However, I am unable to glean from this authority anything but that the common self-employed worker, such as a push cart vendor cannot be expected to prove with mathematical precision his loss of earnings in the same way as an organized corporation would be obliged to do what with the expertise of its professionals.

[55] Nothing has been presented to overwhelm the fact that EXHIBIT 3 shows the Claimant to have been earning $9,754.65 up to September 19, 2006.

[56] Nothing was presented to overwhelm the fact that at the time of the accident the Claimant was employed to Glencore Alumina Jamaica Limited as a Jack Hammer Operator.

Surely, such an entity ought to have been able to supply the record of earnings of the claimant.

[57] While the medical report of Dr Nesbeth says that the Claimant was finally discharged on September 29, 2007, nowhere in that report does it actually say that he would have been unable to work for one year.

[58] It is the law that a Claimant has a duty to mitigate his loss yet I recur to the report that the Claimant was given four (4) weeks sick leave; his abrasions were cleaned and dressed for another four (4) weeks. He had to be given medical injections and his abrasions were healing satisfactorily. He was diagnosed with post-traumatic stress disorder and he was able to sleep and travel without any medication after six (6) weeks. However, the clincher in my view is that "he resolved slowly with frequent relapses due to the severity and locations of his injuries" after a period of forty five (45) weeks.

[59] Accordingly, I would hold that the Claimant is entitlement to compensation a period of 45 weeks @ $9,754.65 yielding a total of $438,959.25.

[60] In the upshot, I enter judgement as follows:

1. Special Damages:-
    a) Loss of earnings $438,959.25 plus
    b) Medical expenses of $95,940.48 = $534,899.73 with interest thereon at 3% from October 13, 2006 to date of judgement.
2. General Damages in the sum of $1,675,000.00 with interest thereon at 3% from November 9, 2011 to the date of judgement.

Costs are to go to the Claimant and if not agreed then such costs are to be taxed.