IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2006 HCV03076

BETWEEN	**SAMUEL LINDSAY**	**CLAIMANT**
A N D	**DON WILLIAMSON**	**1ST DEFENDANT**
A N D	**TIMON WILLIAMSON**	**2NDDEFENDANT**
A N D	**DOREEN WILLIAMSON**	**3RD DEFENDANT**

Mr. Dale Staple and Ms. Oraina Lawrence instructed by Kinghorn & Kinghorn for the Claimant.

Mrs. Denise Senior-Smith instructed by Pauline Brown-Rose for the Defendants.

HEARD: October 25th & 26th 2011 & May 4th, 2012

CORAM: ANDERSON, K. , J.

LIABILITY

[1] In this case, there were three witnesses that testified, these being the Claimant and Don Williamson (the First Defendant) and Johann Williamson (the First Defendant's brother).

[2] Having considered their evidence, this Court concludes that it is not in dispute that a collision occurred on November 2, 2003, which involved a car which is owned by Doreen Williamson, now deceased

and Timon Williamson – the Second Defendant. At the material time, which was sometime between 3:00 and 4:30p.m, on that day, it was the First Defendant that was driving that car and in that car at that time as a passenger, was Johann Williamson. The Second Defendant was not present in the car at the material time.

On that day and at that time, that vehicle collided with a motorbike being used to transport for vending purposes, frozen treats, such as ice cream and which was, at the material time, being rode by the Claimant. That collision occurred near to the entrance to the Keystone community in the parish of St. Catherine. At the material time, the Claimant, while on his motorbike, was desirous of travelling into Keystone and had apparently, turned his motorbike into the direction of the entrance to the Keystone community.

The Keystone community, as I understand it, has its entrance/exit adjoining a corner which, when one is heading from the direction of Spanish Town, curves towards the right. Coming from the other direction then, the road curves to the left and it is on that curve, that the entrance/exit to/from the Keystone community exists. When the collision occurred, the Second Defendant's vehicle had been heading along the Sligoville Main Road, heading in the direction of Spanish Town.

[3] What is in dispute between the parties is the precise concatenation of circumstances immediately preceding and which actually resulted in the collision. I accept the evidence as given by

the Claimant and the First Defendant as well as the evidence of Johann Williamson, that the collision occurred just to the right of the mid-line which exists in the centre of the roadway in front of the entrance/exit to/from the Keystone community that is to the right when facing towards Spanish Town.

[4] This is what the Claimant has stated in paragraphs 6-9 of his evidence-in-chief, by means of his witness statement:-

> ***"I arrived at the intersection with the turn off to go into Keystone. The turn off into Keystone community would be on my right. I turned on my indicator to turn right. I saw a car coming in the opposite direction and so I stopped my vehicle to allow that vehicle to pass. When I first saw the car that was coming from the opposite direction, it was about 40-50 feet away from me. It was coming around a slight bend and it appeared to be coming at some speed. That was one of the reasons why I had stopped my bike in the first place. Because the vehicle appeared to be coming fast to me I decided that I would wait to allow it to pass before I attempted to make the right turn into Keystone. I suddenly noticed the vehicle that I had seen coming from the opposite direction drifting over onto my side of the road. I saw the vehicle coming and I tried to push the bike closer to the left hand side of the road. The car that I had seen coming from the opposite direction and which had drifted onto my side of the road, but came over onto me and hit into the right hand side of the bike and me."*** (Emphasis mine).

I have placed emphasis on the fact that the Claimant had stated in his evidence-in-chief, that when he saw the vehicle coming towards him, he then tried to ‘push’ his bike closer to the left hand side of the road. I have done so, because I believe this use of the word ‘push’ his bike by the Claimant, in describing what action he took in relation to his motorbike at that moment in time, as being of significance. I accept that the Claimant did indeed try to ‘push’ his bike closer to the left hand side of the road – the opposite direction from where he had been facing a few moments prior to the collision having occurred. Why he would have thought it necessary to do this if he had also seen that the vehicle was then “drifting over” to his side of the road (this being the vehicle’s right hand side and the motorbike’s rear), is unfathomable, but nonetheless, I do accept the Claimant’s evidence in this regard as I am aware that sometimes, when one is faced with a seeming crisis which requires one to think and act quickly, one does not always act rationally.

I do believe that the Claimant’s efforts to, ‘push’ his motorbike over to the left hand side of the road at that time, were irrational. It seems to me that if he had remained stationary – as his motorbike was not then, according to his evidence as given during re-examination, yet in first gear as it had to first be put into neutral before it could be put into first gear, then the vehicle which was heading towards him, but which was drifting to the right hand side of the road, would then have relatively easily, been able to have avoided impacting with him. Unfortunately, for all the parties, however, the events of that day, as between them, did not conclude in that way.

[5] Bearing in mind the provisions of the Road Traffic Act, in particular, Section 51(1) (d) thereof and applying that which I have stated at paragraph 4 above in relation to the Claimant's actions immediately leading up to the collision, I am of the view that the collision was partly caused by the carelessness of the Claimant. Section 51(1) (d) of the Road Traffic Act provides that:

> ***"The driver of a motor vehicle shall observe the following rules – a motor vehicle shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic."***

It is clear to this Court that the Claimant in this case, failed to comply with this requirement of the law, which is applicable to motorbike users on the nation's roadways. **In Section 2 of the Road Traffic Act, the term "motor vehicle" is defined as meaning, "any mechanically propelled vehicle intended or adapted for use on roads."** The Claimant should have taken all steps necessary to ensure that the way was clear, such that he could not have obstructed other vehicles, before he began to cross the road so as to enter the Keystone community. Even if he had not, as the Defendants have suggested, actually begun to cross over onto the side of the road where the Keystone community was, with a view to entering there, what is not in dispute, is that when he saw the vehicle coming towards him, he then began to push his motorbike in the

opposite direction from where he had been heading. In the course of his having turned the motorbike in that way, the collision occurred. As such there was carelessness on the Claimant's part, which resulted in the collision.

This will not however, affect the ultimate outcome of this case, either as to liability or damages, insofar as the First Defendant is concerned. This is primarily because contributory negligence has not been pleaded by either of the Defendants in their joint Defence as filed. As such, the same cannot be relied upon. This is because the Law Reform (Contributory Negligence) Act, at Section 3 (1) thereof, requires that the same be specifically pleaded if it is intended to be relied upon by a party. When this statutory provision is considered along with Rule 8.9 (1) & 8.9A of the Civil Procedure Rules, it is clear that in the absence of there having been applied for, much less been granted by this Court, any amendment to the Defendants' Defence, so as to have included therein, an allegation of contributory negligence in respect of the Claimant herein vis-à-vis the relevant motor vehicle accident, not only is it not now open to either of the Defendants to seek to rely on this partial defence but it is also not open to this Court to waive the Defendant's failure to plead the same and nonetheless, to allow either of the Defendants to rely upon the same. On this point, see Fookes v Slaytor [1978] 1 W.L.R. 1293 & Gearon Hall and Han Electrical Co. Ltd. – Claim No. 2006 HCV 02971 – Supreme Court of Jamaica.

[6] This Court though, is also of the view that the First Defendant was also significantly careless and thereby contributed greatly, to the collision having occurred. To my mind, the First Defendant's carelessness arose from the speed at which he must have been driving at the material time. Bearing in mind that he was coming around that which was a blind curve, he ought to have been driving more slowly, especially since, from the evidence as given, it is clear that he is familiar with the particular area where the collision occurred and thus, would have known that the entrance/exit to/from the Keystone community was in the immediate vicinity around the corner in the direction that he was then driving in. Had he been driving more slowly at the material time, he would likely have been able to have altogether avoided the collision, as he would have been able to have stopped the vehicle which he was then driving, before he steered that vehicle into a collision with the Claimant's motorbike. The Claimant testified, under cross-examination, that he saw the vehicle which was being driven by the First Defendant at the material time, when the same was about 40-50 feet away from him. None of the Defendants who testified, gave any evidence as to the distance that the Claimant's motorbike was away from the car, when the car came around the road's curve. When asked to provide that distance to the Court, the First Defendant and Johann Williamson, who testified, both refused to do so, saying that they either cannot recall, or would be unable to provide such estimate. I therefore accept the Claimant's evidence in this regard, as same was unchallenged either during cross-examination of the Claimant or in any of the Defendant's witness statements/evidence-in-chief. In the circumstances, this

Court concludes that just as he (the Claimant) was able to see the car from 40-50 feet away, the driver of the car should have seen him from that distance also. Accordingly, with that distance, the car could have and should have been stopped prior to the collision having occurred. Interestingly enough, neither of the Defendants who testified, gave any evidence as to the car in which they were travelling at the material time, having even begun to slow down anytime immediately preceding the collision. What this Court was informed of instead, was that the First Defendant, rather than having slowed down or even attempted to stop the car which he was then driving, instead chose to swerve that car, which action clearly did not achieve the desired result. It would, to my mind, have been more prudent and careful, bearing in mind the vicissitudes of driving, for the driver of the car, if he could have, to have promptly pressed his brakes and at the very least, slowed down the car significantly, if not stopped it altogether, prior to the collision having occurred. I am of the view that there was no slowing down of the car attempted, because, at the material time, the First Defendant was driving that car too fast, bearing in mind the nature of the area in which he was then driving, when the collision occurred. Had he not been driving so fast, he could and would then likely have slowed down and/or stopped the vehicle prior to the collision having occurred. As things turned out, however, because he was driving too fast at the material time, the only thing that he could think of doing was to swerve and ultimately, the collision occurred. I do not accept the First Defendant's evidence as contained in paragraph 5 of his Witness Statement, which was accepted as his evidence-in-chief, that he was driving, "at about 35 miles per hour."

[7] Insofar as the Second Defendant is concerned, there is no dispute that he was, as at the time when the relevant collision occurred, the sole owner of the relevant motor car. Neither in the Claim n+-`or in the Particulars of Claim as were filed respectively, on August 31, 2006, has it been alleged that at the material time, the First Defendant was driving the relevant motor car as the agent of either or both of the other Defendants. All that has been alleged in relation to the other Defendants is that they were at all material times, the owner of the relevant motor car. This is an allegation which understandably, has not been disputed by either of the two Defendants who are currently alive. Is this allegation as accepted though, sufficient to enable this Court to conclude that at the material time, the First Defendant was driving the relevant motor car as the agent of the Second Defendant? I wish to mention before I proceed to answer this question, that the issue of whether the First Defendant was acting as a servant of the Second Defendant at the material time, does not arise, since there is no contention whatsoever, made by the Claimant, that the First Defendant was ever, much less at the material time, an employee of the Second Defendant. It is also important to note at this juncture, that it was never at any time, even so much as alleged to the First Defendant during cross-examination of him, that at the material time, he was driving with the Second Defendant's permission, either as expressly given, or impliedly arising from the overall circumstances surrounding his use of the relevant car. Timon Williamson, although having given a Witness Statement,

did not testify and thus, no such suggestion was ever made to him either.

[8] It is important to note that even though there now exists a still fairly new procedural code pertaining to civil procedure, the old rules governing the requirements that pleadings be as specific as possible, have not been dispensed with. **Thus, Rule 8.9 (1) of the Civil Procedure Rules provides that – "The Claimant must include in the Claim Form or in the Particulars of Claim a statement of all the facts on which the Claimant relies."** (Emphasis mine). By way of amendment to the Rules of Court, it was provided for, from as of September 18, 2006, in a then newly inserted Rule 8.9A that – "**The Claimant may not rely on any allegation or factual argument which is not set out in the Particulars of Claim, but which could have been set out there, unless the Court gives permission."** (Emphasis mine) It should be noted that there exists inconsistencies between Rule 8.9 (1) – (this being the original provision on this point) and Rule 8.9A – (which is the amended provision on this point.) The latter refers only to the Particulars of Claim, whereas the former refers to the Claim Form or the Particulars of Claim. In addition, Rule 8.9 (1) makes no allowance therein, for the Court to grant permission to dispense with the otherwise, mandatorily expressed requirement of the Rule. On the other hand, Rule 8.9A does just that. In the circumstances, I am of the view that it would be best if Rule 8.9 (1) were to be dispensed with altogether, since it is apparent that the amendment – Rule 8.9A, is now to be applied. This Court will act accordingly. Therefore, no permission having been sought to rely on

the law vis-a-vis vicarious liability so as to properly ground the Claim against the Second Defendant, I could not even if I wished, at this stage, grant such permission. In any event though, I am not inclined to do so, because the Defendants would have had to have been afforded an opportunity to respond, both in terms of amending their Defence, but also, in terms of perhaps being permitted to file Further Witness Statements addressing the issue surrounding the use of the relevant vehicle at the material time, by the First Defendant. Of course too, the Claimant would, in the particular circumstances of this case, not only have had to amend his Particulars of Claim, in order to properly enable this Court to find the Second Defendant vicariously liable for his injuries and loss of property and income, but also, would have to file a further witness statement, if that amendment were to be permitted, so as make allegations of fact to be relied on as evidence at trial, in support of an assertion as against the Second Defendant that he should be held vicariously liable in respect of the Claim as filed. If any of these things had been permitted by this Court, the trial of this matter would have likely either been both part-heard and further delayed, or at the very least, further delayed (bearing in mind that this Claim has been now pending resolution, for over five years). This Court would not have been minded to permit this, but in any event, this Court was not asked to do so.

[9] It is quite settled in law now, that a Defendant may be vicariously liable when he lends his chattel, such as for example, a car or a boat, to another and that other, by virtue of his negligence in the use of that chattel, causes injury to a Claimant. To be liable, the

Defendant must retain both a right to control the use of the chattel and must have an interest in the purpose for which it is being used. See **Ormrod v Crosville Motor Vehicles Ltd. (1953) 1 W.L.R. 1120.** It used to be that the right to control the use of the chattel was strictly construed, such that it was earlier held, in cases – **Samson v Aitchison [1912] AC 844 & Pratt v Patrick (1924) 1 K.B. 488,** that unless the owner remained present in the vehicle at the material time, he the (owner) would have relinquished the right to control the use of the vehicle.

In **Parker v Miller (1926) 42 T.L.R. 408**, however, the owner was held liable notwithstanding that he was not present and there is no doubt that now, a sufficient right to control will exist by virtue of the ownership of the chattel, unless the owner has distinctly abandoned his right as by a bailment of the chattel to another under a contract or otherwise. The ownership of a motor car involved in an accident is prima facie evidence that the car was being driven by the owner, his servant or agent. On this point, see **Chowdhary v Gillot (1947) 2 All E.R 541** and **Rambarran v Gurracharran (1970) 1 W.L.R. 556 (P.C.).**

[10] On the other hand, even though he may retain the right to control the vehicle, the owner will not be liable unless it is proven that he also has an interest in the use being made his chattel. Lord Wilberforce stated in **Morgans v Launchbury** – "….**it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty" (1973) A.C 127, at p 135 (HL.). Thus in Hewitt v Bonvin (1940) 1 K.B. 188**, the Defendant

lent his car to his son for the son's personal use and it was held that, because the Defendant had no interest in the purposes for which the journey in question was undertaken, he was not liable for the son's negligent driving of the car. Notably though , in **Klein v Caluori (1971) 2 QB 24**, a majority of the Court of Appeal of England sought to expand the principles described above in such a way as to come close to holding that the owner of a motor vehicle is liable for the negligence of anyone, or at least, of any member of his family, who drives it with his permission. That view was however, decisively rejected by the House of Lords in **Morgans v Launchbury (1983) A.C. 127** which unanimously reversed the decision of the Court of Appeal and reaffirmed the law as aforementioned, this being that, if the owner of a vehicle is to be held liable for the negligent use of a vehicle by a borrower thereof, then it is necessary that the owner have some direct and significant interest in the purpose for which the vehicle is being used. Thus, in **Norwood v Navan (1981)R.T.R 457**, a husband was not held liable when his wife used his car to go on a shopping expedition with friends even though he knew that she often took the car and in the course of her journey, she did some general shopping for the family. The greater part of the journey was clearly for her own purposes.

[11] I have set out all that is contained in paragraph 8 of this Judgment for two reasons, these being , firstly, to hopefully provide some useful legal guidance on the relevant issue both to legal practitioners and to potential litigants alike, and secondly, to make it clear that on the evidence brought before this Court by the Claimants

and Defendants respectively and on the Claimant's Particulars of Claim, it is apparent that the Claimant's Claim against the Second Defendant cannot succeed, as it has not been alleged in the Claimant's Particulars of Claim, nor has it at all been led in evidence by either of the parties, that at the material time, the First Defendant was driving the relevant car with the consent and/or knowledge of the Second Defendant, nor is there any evidence that at the material time, the First Defendant was driving the relevant car, primarily for the purposes of the Second Defendant. The Claimant has failed on both counts in this regard. Accordingly, the Claimant's claim against the Second Defendant is dismissed with costs of the Claim being awarded to him.

[12] In the circumstances, this Court concludes that the First Defendant is exclusively liable on the basis of his negligence, for the accident which resulted in the Claimant's injuries. With that now out of the way, let me go on to address the issue of damages.

DAMAGES

[13] Insofar as the issue of damages is concerned, let me address the Special Damages first. The Claimant has claimed for each of the following as Special Damages:

i.	medical expenses (and continuing)	-	$20,000.00
ii	loss of earnings - $40,000 per month for 12 months and continuing	-	480,000.00
iii	transportation expenses and continuing	-	5,000.00
			505,000.00

[14] The Claimant gave evidence-in-chief, in paragraphs 30 and 31 of his Witness Statement, as follows:

> **"Whenever I went to Spanish Town Hospital for physiotheraphy treatment, I had to charter a taxi. I had to charter a taxi so that I could stretch out my foot. It cost me $1,000.00 per round trip from my home to the Spanish Town Hospital (paragraph 30). I also had to attend the clinic once a week too. The clinic days were different from the physiotherapy days. I went to the clinic for about 3-4 months and I would have to pay $500.00 for registration at the clinic. The taxi fare for the clinic visits was $1,000.00 (paragraph 31). I never received any receipt from the taxi man for the fares that I paid him and I always paid him in cash."**

It is now settled law in Jamaica as per various Jamaican Court of Appeal Judgments that have decided in the same way on this legal point, that a Claimant is not always required to prove all aspects of his Claim for Special Damages with specificity, in order to be able to recover for same, once liability of a Defendant has been proven. It is only a general rule that Special Damages must always be specially pleaded and specially proven. In the Jamaican context, it is not always possible for litigants to be able to prove with specificity each and every aspect of the Special Damages which they may later claim for. Accordingly, guided by common sense and reason, this Court must, in assessing damages, determine what sums are reasonable to

award under the respective aspects of Special Damages being claimed for in any particular case.

[15] This legal point is particularly apposite in this case, at this juncture. There exists no evidence before this Court, as to how often each week or month the Claimant went for physiotherapy treatment. However, evidence was presented to his Court and left unchallenged by any of the Defendants, that the Claimant did physiotherapy at the hospital for about eight months (paragraph 26 of the Claimant's Witness Statement). There is no doubt also, that the primary injury/injuries endured by the Claimant arising out of his having been impacted by the Second Defendant's vehicle on the fateful day, was/were to one of his legs, which until now, still has, by virtue of surgery done after the accident, metal inserted therein.

[16] In the circumstances, I would consider attendance by the Claimant once per week over eight months to be reasonable, insofar as physiotherapy treatment is concerned. With the Claimant having paid $1,000.00 per week for round trip via taxi, to and from the Spanish Town Hospital, this would have resulted in a cost to the Claimant, of $32,000.00. I accept that travel via taxi would have been necessary for the Claimant during that entire period of time, bearing in mind the nature of the injuries suffered by him. Insofar as transportation via taxi to and from the clinic is concerned, I will award the Claimant a sum representative of his attendance at the clinic for treatment, once per week, for three-and-a-half months (14 weeks). This would constitute a sum of $14,000.00. Thus, in total, for taxi fare,

I would award to the Claimant, the sum of $46,000.00 ($32,000.00 plus $14,000.00). Insofar as medical expenses are concerned, the Claimant is claiming the sum of $20,000.00. Bearing in mind that the relevant accident occurred in 2003 – this having been some years before Jamaicans became entitled to free medical treatment at all of this nation's government owned and operated public hospitals it is reasonable to conclude that the Claimant would have had to pay a relatively nominal sum for the one medical treatment which he received at the clinic. I have also taken into account the Claimant's evidence, as per his Witness Statement, that he had paid $500.00 for registration at the clinic. I consider this though, in the absence of the Court having received any evidence to the contrary, as having been a single payment of $500.00 for registration. In the circumstances, I am prepared to award the specific sum claimed for medical treatment. Thus, the Claimant is to recover for medical treatment, the sum of $20,000.00 and for registration - $500.00 and for taxi fare - $46,000.00.

[17] The largest single sum being claimed for by the Claimant, insofar as his overall claim for Special Damages is concerned, is for loss of income. As stated above, the claim under this head is for: "$40,000.00 per month for 12 months and continuing - $480,000.00." Interestingly enough though, the Claimant in his evidence-in-chief, at paragraphs 33 and 34, stated as follows:

> ***"As an ice cream vendor I was earning approximately $15,000.00 per week. This***

> ***would be my profit, I would work six days out of the week. I would not work on a Friday. I was unable to work for about two years because of the length of time it took me to recover fully. I resumed work in about July or August 2005."***

[18] I had stated above, that interestingly enough, the Claimant claimed in his Particulars of Claim, for loss of income in the sum of $40,000.00 per month. I find this interesting, because, in his Witness Statement, the Claimant stated that his loss of income, in terms of loss of profit, during the period of time when he was allegedly unable to work, was, '$15,000.00 per week,' this of course therefore being equivalent to $60,000.00 per month. No application was made to amend the Particulars of Claim insofar as the Claim for loss of income is concerned. Thus, the apparent disparity between the evidence given by the Claimant as to loss of income and the Claimant's Particulars of Claim still exists. In that context, Rule 8.9A of the Civil Procedure Rules must be considered. That rule states that:

> ***"A Claimant may not rely on any allegation or factual argument that has not been set in his Particulars of Claim, but which could have been set out there unless the Court gives permission."*** *(Emphasis mine)*

With this Rule of Court in mind, is the Claimant properly still able to lawfully rely on a claim for loss of income in the sum of $60,000.00 per month when in his Particulars of Claim, he has only claimed for

loss of income in the sum of $40,000.00 per month? I think that the answer to this question, is, in the particular circumstances of this particular case 'Yes.' I am of this view, because it is not to my mind, a new or fresh allegation that was being made by the Claimant in his evidence-in-chief, insofar as loss of income is concerned. It was instead, a new figure placed before the Court, with respect to the same allegation of loss of income. At the end of the day, this Court must assess the veracity of that allegation. In that regard, the Claimant admitted, while under cross-examination, that he had not shown to the Court any evidence as to how he arrived at his earnings. This indeed was the case, even though the Claimant had also, while under cross-examination, testified to having a book in which he records his sales and that that book can prove how he arrived at that $15,000.00 per week claimed as loss of income.

[19] Surprisingly, though, that book was never placed before this Court as evidence, nor was any reason proffered for the failure of the Claimant to do so, although I do note that insofar as the contents of the alleged book were never disclosed in the Claimant's List of Documents, then such contents could not properly have been placed before the Court as evidence. Overall though, the Claimant's failure to disclose the same, or to seek to have the same be admitted as evidence at trial – perhaps by consent of the Defendants, (if such consent could have been attained), leads me to seriously doubt whether such a book even exists.

[20] In any event though, in the absence of any independent proof of the Claimant's claim of loss of income, this Court will, in the circumstances, have to assess the same as best it can, using reason and common sense. I have borne in mind that the Claimant was, at the time of the accident, engaged in selling frozen novelties which he transported between Spanish Town and Portmore, six (6) days a week, using his motorbike as a means of transportation. The frozen novelties sold were fudges, ice cream cake, ice cream , nutty buddy, super dooper, icicles and popsicles. These are not by any means, items which can be sold at a huge profit. Furthermore, the cost of gasoline has for many years now, been far from cheap.

[21] In the circumstances, I do not accept the veracity of the Claimant's testimony that he earned $15,000.00 per week as profit. I also take into account, that the Claimant claimed $10,000.00 per week as loss of income in his Particulars of Claim – which the Claimant signed a Certificate of Truth in relation to, indeed, just as he did with respect to his Witness Statement, wherein he claimed that his loss of income, in terms of profit each week, was $15,000.00.

[22] This makes it clear to me, that the Claimant is himself uncertain as to how much his loss of profit/income really was. Bearing in mind also, that the relevant accident occurred in 2003, this Court concludes that the Claimant's loss of income, in terms of profit each week, in 2003 and perhaps even also during some of 2004, depending on the period of time that this Court assesses that the Claimant would have been unable to work for, arising from his

injuries, is $7,000.00 per week during that period of time. Insofar as the time that he would have been unable to work is concerned, there can be no doubt that the Claimant would have been unable to work for quite a long period of time.

[23] This Court does not however , accept the Claimant's evidence that he could not have worked for a period of two (2) years following upon the accident. The Claimant testified, under cross-examination, that he was walking using two crutches, after eight (8) months. Thus, this Court is of the considered view that after a year, the Claimant should at least have been in a position whereby he could have begun earning some income again, even if not by the same means as he had done immediately prior to the accident's occurrence. It is noted that a Claimant has a duty to mitigate his losses and if he chooses, for whatever reason, not to do so, then his losses arising from his personal choice not to mitigate, or not to sufficiently mitigate his losses, should not be visited upon any of the Defendants herein.

[24] Thus, I will award to the Claimant, loss of income for one year at $7,000.00 per week, this amounting to $364,000 and an additional three (3) months of loss of income at $3,000.00 per week, this amounting to $36,000.00 This latter stipulated figure arises from what I consider that the Claimant could have earned for himself as profit from any other business enterprise that he could and should have undertaken after a year post-accident, in an effort to mitigate his losses. Thus, this Court awards the sum of $400,000.00 to the

Claimant as loss of income and overall, the sum of $466,500.00 as special damages ($400,000 plus $46,000 plus $20,000 plus $500).

[25] With the Special Damages assessment now having been concluded, I will now move on to assess general damages. In that regard, at trial, the Claimant was permitted to amend his Particulars of injuries as pleaded so as to now have specified under that head, the following injuries:

i) fracture to the right femur;
ii) fracture of the right tibia;
iii) intertrodaiteric fracture of the left femur;
iv) decreased joint space in the right knee;
v) deformity of the right leg with bone protruding through the skin;
vi) post traumatic osteoarthritis particularly in the right knee;
vii) permanent disability.

[26] The Defendants have not, in the slightest, challenged the existence of any of the aforementioned injuries, nor that such were caused by the traffic incident/accident which gave rise to the present Claim. The medical report of Dr. Roy Dixon was admitted as evidence at trial, following upon the same having been attached to a Notice of Intention to tender hearsay evidence and not having been objected to by the defence. It is to be noted that in that medical report, just as is typically the case with any other such document, the

doctor reports on matters which would clearly have been stated to him by his then patient – the Claimant. These are matters of hearsay evidence sought to be given by the doctor, in a document which has itself been admitted as hearsay evidence. I will not accept that which was reported to the doctor by the Claimant, as evidence which goes to prove the truth of the contents thereof.

[27] Such evidence, if sought to be relied upon, ought to have been obtained through the Claimant himself, by means of amplification of evidence, this as being a matter or matters which arose since the Claimant's Witness statement was signed and certified, that having been in May 2011, whereas the medical report, referring to certain information apparently provided to Dr. Dixon by the Claimant, for the purpose of enabling Dr. Dixon to properly conduct his medical assessment of the Claimant's injuries and to subsequently prepare his medical report regarding same, was not prepared by Dr. Dixon until August 2011. This however, was not done. Thus, in terms of that which the Claimant actually experienced arising from his injuries, in terms of pain and suffering and also loss of amenities, I am only able to properly consider that which has been set out in this regard by the Claimant in his Witness Statement.

[28] In terms of the extent of any medical disability and the overall extent of the Claimant's injuries, I will accept the medical expert evidence which has been proffered in this regard. Dr. Dixon, in his report has specified that the extent of the Claimant's disability arising out of the relevant traffic accident is 15% of the whole person. It

appears from the overall tenor of the doctor's medical assessment of the Claimant, that this disability will be permanent in nature, this although it is noted that the doctor has not specifically stated in his report whether the assessed disability will be permanent or temporary. I am prepared nonetheless, to accept that the disability will be permanent, this bearing in mind that the doctor has determined that the Claimant's right leg is now a bit shorter than his left leg and that he is suffering from post-traumatic osteoarthritis which is expected to worsen from as of the next five to ten years. These are the two matters which have given rise to the Claimant's disability as assessed by Dr. Dixon.

[29] I also accept that the Claimant suffered considerable distress and pain, arising out of the injuries which he had to endure due to the relevant accident. He has testified extensively about this, as per paragraphs 14-25 of his Witness Statement. I accept his evidence in this regard, which was, it is to be noted, completely unchallenged by the Defendants. I also accept the Claimant's evidence in paragraph 37 of his Witness Statement, that he used to engage in football and swimming for his enjoyment and that he used to enjoy engaging in these sporting activities with his sons, but he is not able to do them anymore, as a consequence of his injuries. In paragraph 35 of his Witness Statement, the Claimant has given evidence of still suffering from pains 'even today' and that his foot will get swollen if he has to drive for lengthy periods of time. There was no evidence given, however, as to what the Claimant actually meant by his use of the term, "lengthy period of time", in that regard. Also, this Court is

unable to feel satisfied, on the necessary balance of probabilities, that the Claimant is still experiencing swelling of any part of his right leg **at this time.**

[30] The expert report of Dr. Dixon does not suggest in the slightest, that the swelling of the Claimant's right leg is a medical reaction which is to be expected to occur if the Claimant were to drive a vehicle for any prolonged period of time. Accordingly, I do not accept as truthful, this aspect of the evidence as given by the Claimant. Also, the Claimant has testified, in paragraph 22 of his Witness Statement, to things not having been much better at home even after he was released from hospital.

He said he was living with a female friend of his, who ended up leaving him. Whilst I accept the truthfulness of this assertion, what this Court does not know, is the reason why the Claimant was left by that female friend of his. This Court cannot and will not speculate in that regard. Also, this Court will not assess any damages arising from the Claimant's loss of libido as ascertained by Dr. Dixon as being one of his injuries, since the same was never listed as one the Claimant's injuries even amongst the Amended Particulars of Injuries as were allowed by this Court during trial.

I have reviewed the Claimant's submissions vis-à-vis both damages and liability and have carefully considered the same. I received no written submissions from Defence Counsel. In **Vincent Gallimore v Kofi Foster – Khan, Volume 6 pages 45-48**, the Claimant had 45% impairment of the whole person (whereas in the case at hand, this Claimant has 15% impairment of the whole person) as a result of his

injuries sustained and the after-effect of those injuries. In July 2007, the Court awarded the sum of $2,500,000.00. In March, 2012, the Consumer Price Index (CPI) stood at 181.2, whereas in July, 2007, the CPI stood at 106.1. When indexed at present therefore, the sum awarded in the **Gallimore v Foster** case, yields - $4,269,557.02. The injuries suffered by the Claimant in that case were:

i Jagged laceration of the lateral aspect of the right knee joint;

ii fracture of the left femur;

iii mid-shaft and intra-articular fracture of right distal femur; and

iv fracture dislocation of right knee.

It appears to me that the extent of pain and suffering in the **Gallimore** case, would, in my view, have been similar to that which was experienced by the Claimant in the present case. Accordingly, bearing in mind that the disability is less severe for the Claimant in the present case, than was the case with the Claimant in the **Gallimore** case, I will reduce the indexed sum by 66.66% (two-thirds) to more accurately reflect a similar outcome in terms of my award for general damages (this because 15% is two-thirds less than 45% - this as regards the extent of the Claimant's disability). Accordingly, the sum which I will award to the Claimant as general damages is $1,423,185.67.

[31] In the Claimant's Submissions on Damages, it has been strongly suggested that this Court should award to the Claimant a

sum arising from his handicap on the labour market (this being the same as loss of earning capacity). I will not accept the Claimant's invitation in that regard, for two reasons, these being that firstly, the Claimant has brought before this Court no evidence to satisfy this Court that he has suffered a loss of earning capacity. In fact, while testifying under cross-examination, he stated that he now uses a van to sell his ice cream and that the van would hold more than the box on the bike. He also then stated: "My earnings would, in some cases, be far more with the van than with the bike." In the circumstances, this Court would not be entitled to conclude that the Claimant is either "handicapped on the labour market," or in other words, that he has, "lost earning capacity" arising from the injuries which he received. To the contrary, it appears from that evidence as given by him, that he is likely doing better now, financially in terms of his business enterprise, than he was doing before the date when the relevant accident occurred. There is certainly no evidence before this Court even so much as impliedly suggesting the contrary. Added to that reason though, is the other reason for disallowing a claim for damages for handicap on the labour market in the particular circumstances of this particular case. This second reason is that no Claim for such was specifically pleaded. In the text – **Bullen and Leake and Jacob's Precedents of Pleadings** (**13th ed, 1990**), the learned authors have stated as follows:

> ***"The plaintiff must plead any special circumstances which he alleges will lead to his just….losses in future which would …not in the ordinary way be expected to***

> ***flow from the wrongful act, for example inability to set up in business on his own account (see Domsalle v Barr [1967] WLR 630, loss of prospects of promotion or future loss of earnings. In an action for damages for personal injuries, it is good practice to plead specifically a claim for loss of future earning capacity (see Chen Wai Tong v Li Ping Sun [1985] AC 396), and indeed it is….that the Court will not make any such award in the absence of their being pleaded….in an action for damages for personal injuries where a plaintiff makes a claim for loss of earnings or loss of future earning capacity or other expenses, he must prepare particulars of such claims, where appropriate, in the form of a schedule, and serve the same upon all other parties; thereafter each party must indicate whatever… and to what extent each item claimed is agreed or what counter proposal is made, see Practice direction [1984] 1WLR 1127." (Section 23, pg. 304 and 305)***

We do not have such a Practice Direction as referred to in the quotation above, nonetheless, bearing in mind the provisions of Rule 8.9A of the CPR (which has been earlier quoted in this Judgment and thus, will not be repeated here), I am of the considered opinion that the Claimant having neither sought nor received any permission to rely on an allegation of loss of earning capacity/handicap on the labour market at trial, is now precluded from seeking to rely on same. In any event though, as aforementioned, the evidence is clearly not in the Claimant's favour, insofar as the issue of loss of earning capacity is concerned. Thus, I will make no award under that head.

[32] In summary, my Judgment will be as follows:

i) The first Defendant is exclusively and completely liable for the accident which has given rise to this Claim; and

ii) The Claimant's Claim against the Second and Third Defendants is dismissed, with costs of the Claim awarded to the Second Defendant. Such costs are to be taxed if not sooner agreed ;

iii) Special Damages is awarded to the Claimant as against the First Defendant only, in the following composite sum – 466,500.00 with interest at 6% from November 2, 2003 (date of accident) until September 22, 2006; and at 3% from September 23, 2006, until the date of this Judgment ; and

iv) General Damages is awarded to the Claimant as against the First Defendant only in the sum of $1,423,185.67 with interest at 6% from September 8, 2006 (date of service of Claim Form) until the date of this Judgment; and

v) The Claimant and the First Defendant shall each bear their own costs.

……

Honourable Kirk Anderson, J.