

caused solely by the negligence of the Defendant. The Defendant's contention is that the accident was caused solely by the negligence of the Claimant in that, amongst other, the Claimant disobeyed the stop light and failed to yield to the Defendant's right of way or in the alternative the Claimant significantly contributed to the collision.

The Claim

[3] The Claimant, by way of Claim Form dated July 4, 2011 and filed July 19, 2011, claims against the Defendant, Huntley Manhertz, to recover damages for negligence for that July 9, 2010, he was riding his Zongsheng motorcycle registered 3509F along Old Hope Road in the parish of St. Andrew when on reaching the intersection of Garden Boulevard, the Defendant driving motor vehicle registered 0302FQ travelling along the said main road in the opposite direction suddenly and without warning turned from Old Hope Road into the path of the Claimant causing a collision as a consequence of which the Claimant sustained injuries, suffered loss and incurred expenses. The Claimant filed Particulars of Claim outlining the Particulars of Negligence, Particulars of Injuries, the effects of the injuries on his daily activities of living as well as Particulars of Special Damages.

The Defence

[4] The Defendant, in his defence dated and filed September 21, 2011, disputes the Claim on the following grounds:-

- i) The motor vehicle accident, the subject matter of these proceedings, was solely caused and/or in the alternative significantly contributed to by the Claimant, the driver of the motorcycle registered 3509F.
- ii) The motor vehicle accident, the subject matter of these proceedings, was not as a result of any negligence on the part of the Defendant.
- iii) The Claimant was author of his own misfortune.

The Defendant listed in his Particulars of Negligence that the Claimant:

- i) Disobeyed the stop light;
- ii) Failed to yield to the defendant's right of way;
- iii) Collided into left rear side of Defendant's motor vehicle;
- iv) Failed to keep proper look out.

The Claimant's Account

- [5] **Theron Scott** testifies that June 9, 2010 at about 1:30pm, he was riding his motorcycle registered 3509F along Old Hope Road, St. Andrew, travelling in the extreme right lane towards Barbican. Old Hope Road is a dual carriageway separated by an island. The intersection of Old Hope Road and Garden Boulevard is controlled by traffic light.
- [6] There are two (2) traffic lights on both sides of the road. The traffic light shows green to both traffic going in the opposite direction on the Hope Road. When the lights turn red the vehicle coming from Barbican can turn right onto Garden Boulevard on the filter green signal, when the filter green turns red vehicles coming from Garden Boulevard can turn onto Old Hope Road in the direction of Papine or Barbican.
- [7] Approaching the intersection of Garden Boulevard and Old Hope Road, the traffic light was showing green, so he rode through the intersection. He recalls a collision in a motorcar and the next thing he remembers is waking up in the hospital. He did not disobey the stop light and collided into the left rear of the Defendant's motor vehicle. The stop light was showing green to him when he drove through the intersection. The Defendant did not have the right of way as the filter light had stopped showing green to him for him to turn onto Garden Boulevard.

[8] In **cross-examination**, he testified that the day of the accident was not the first time that he was driving his motorcycle along Old Hope Road using that intersection. During that period, he would use the intersection about 5 times per week. He is very familiar with that intersection. He was riding for about three (3) years. He is a good rider. He agreed that whilst positioned riding towards Barbican, he would not be able to see the traffic light going in the opposite direction. He rode through the intersection at the speed he was travelling before. He did not see the Defendant's vehicle coming at all.

[9] Coming from Papine it would be impossible to see what light was showing to the Defendant. However, if the person coming up turning onto Garden Boulevard has the green filter light, the Claimant would have the red light. When he got to the intersection, he did not see Defendant's vehicle at all. He did not observe the moving traffic. He could not say that the Defendant was speeding. He denied that he was going at a fast rate of speed. He denied that it was because he was going so fast that he was unable to stop or swerve away from the Defendant's vehicle.

[10] He denied that the traffic light at the intersection facing him was on red and that he entered the intersection without care or caution and that he drove his motorcycle without caution that day. He was paying attention to the traffic. He does not know who took him to the hospital. He did not see anyone on the accident scene after the collision. He could not say what side of the Defendant's car he collided into.

[11] In **re-examination**, he testifies that the first time he became aware of the witness, Delroy Thomas, was whilst he was at the hospital. He did not know him before the date of the accident. This witness called him about 2 months after the accident.

[12] The witness, **Delroy Thomas**, testifies that on the day of the accident, he was travelling in a line of traffic on his motorcycle along Old Hope Road heading to Mona. Approaching the intersection of the Garden Boulevard and Old Hope Road, there was a van travelling in front of him. There is a traffic light at the

intersection. The van stopped at the traffic light, which was showing red in the right filter lane to turn onto Garden Boulevard. He stopped behind this van. He noticed a bike man whose name he later learnt to be Theron Scott, travelling at a moderate speed from the direction of Papine, travelling in the right lane coming from Papine. He was the only one coming from that direction. As the bike man approached the intersection, the van suddenly turned right on the red into the path of his motorcycle.

[13] The bike hit the left front door of the van. The impact threw the bike man into the road. The driver of the van continued through the intersection along Garden Boulevard without stopping. After the impact, the filter light turned green. He drove down the van man and informed him that he caused the accident and the complainant was lying in the road. The driver of the van returned to the scene where the complainant was lying in the road covered in blood and seemed unconscious. The driver took up the complainant and to the University Hospital.

[14] In **cross-examination** he said he was travelling from the direction of Hope Pastures. The first time he noticed the van, it was in the line of traffic when it stopped at the intersection on the right hand side of the stoplight turning onto Garden Boulevard. At this time he, the witness, was coming out of Hope Pastures to turn onto Garden Boulevard. Whilst stopped behind the van, he got a glimpse of the complainant coming down, travelling at about 30 miles per hour. The complainant did not stop at the stoplight. He, the witness, was at the intersection for about 6 – 7 seconds. During this time, he cannot recall if he saw any other vehicle at the intersection. He did not observe the complainant trying to slow his speed.

[15] He maintained that the Claimant's motorcycle hit the front left door of the van and that the impact threw him off his bike onto the road. The driver of the van did not stop, but continued through the intersection along Garden Boulevard.

[16] He gave a statement to the police. He denied knowing the Claimant before. He maintained that he assisted in putting the Claimant into the van and that the

Claimant was not travelling at a very fast speed but at a moderate one. He said he was speaking the truth in this respect and he is sure that the Claimant had the green light. The filter light had not changed to green. The Claimant, he agreed, drove into the intersection without braking. The witness testified that he was looking ahead of him and his attention was focused on the Claimant going down Old Hope Road. Again he said he is speaking the truth.

[17] He became friends with the Claimant after the accident and agrees that they in fact spoke about the incident. He said he had a good view of what was coming in the opposite direction. He stopped at the red light. The Defendant as well. He did not see any vehicle going towards Papine. When the Defendant stopped, the light was on red and all of a sudden he proceeded whilst the light was still on red. He denied that the Claimant broke the stoplight and collided into the Defendant's vehicle. The Claimant's vehicle collided into the left rear section of the Defendant's vehicle.

[18] In **re-examination** he said the correct statement is that he Claimant hit the left front door.

The Defendant's Account

[19] The Defendant, Mr. Huntley Manhertz testifies that June 9, 2010 he was driving in an easterly direction along Old Hope Road towards Papine. On reaching the intersection of Old Hope Road and Garden Boulevard, the traffic signal lights were on green (both main light and filter light). On turning, he heard a loud bang indicating that there was a collision with the left rear end of his vehicle. He stopped immediately, exited the vehicle, and observed that a motorist had collided into his vehicle and was injured. With the assistance of some people who had gathered, the injured man was placed in the vehicle. He transported him to the emergency of the University Hospital where he was admitted. He immediately went to Papine Police Station and reported the accident.

- [20] He stopped on impact. He cleared the thoroughfare to go across. He drove out of the main road so as not to impede traffic coming across. No one drove him down and informed him about the accident. He did not drive away from the scene. When he stopped at the light, he did not see a bike behind him. There was no impact to the left front door of the van and it is incorrect to say he turned suddenly; neither did he turn whilst the light was on red.
- [21] In **cross-examination** he testified that he had used that intersection several times. He lectures at the University and at that time he would use that intersection about 3 times per week. His intention was to turn onto Garden Boulevard from Old Hope Road. Turning on Garden Boulevard he would get the green filter light. The solid light at that stoplight at the intersection would be for vehicles going up and going down. He agrees that turning onto Garden Boulevard on solid green light can only be done if the road is clear. He does not agree that the solid green and the green filter would not be on at the same time coming up from Old Hope Road.
- [22] He has never checked how far up on Old Hope Road he could see. His vision is very clear. The first time he saw the motorcycle was after the collision. He was wearing his glasses at the time. His glasses allow him to see further into the distance. When he actually turned his vehicle to go into Garden Boulevard, he did not reach the entrance. He had not yet traversed the intersection. Going up on Old Hope Road, the traffic light has 3 lanes. As he came up he would turn right. He would just be finishing the left lane; that is, the one coming from Papine. He observed no vehicle coming behind him. He observed no other vehicle coming down – very few motorists. It was not a busy day. Coming from Hope Pastures he observed no vehicle coming from behind him.
- [23] When he came to Old Hope Road, both the solid and the filter lights were showing green. Vehicles coming from the opposite direction would have had to come to a stop. Upon hearing the impact, he went into Garden Boulevard, just a few feet to clear the road. He admitted that he did not know whether it was man,

child or dog, not before he came out of the vehicle. As he made the turn, he was going at a very slow speed.

[24] He denied that when he came to the intersection the light was on red, not green. He strongly denied that the impact was to the left front of the vehicle and not to the left rear. He maintained that both the solid green and filter lights were showing that day.

[25] He did not know if a motorcycle was travelling behind him when he came to the intersection. He did not agree that he did not wait to see the actual filter light turn to green. Today in court was the first time he was seeing the witness. The witness did not alert him to the Claimant being hit down by him. The witness did not drive behind his vehicle to hospital.

[26] In **re-examination** he testified that the solid green light is above the filter light.

The Claimant's Submission

[27] The Claimant has asked that the court finds that the solid green and the filter green lights at the intersection would not have been showing at the same time and that when the solid green is showing to vehicular traffic along the stretch of Old Hope Road from Papine, then the Defendant can only turn onto Garden Boulevard when the light is showing green. Further, that the witness Delroy Thomas be accepted as a witness of truth and asserts that this position is supported by the description of the Defendant's motor vehicle which is not contradicted as well as that the Defendant's denial that his motor vehicle was dark greenish is not significant enough to discredit the witness.

[28] The court is also urged to accept the witness's testimony that it was the Defendant who disobeyed the traffic signal. He did not wait for the signal to change and therefore is to be found wholly negligent.

[29] It is posited that if the court harbours doubts as to the credibility of the Claimant and his witness, then the court should consider the issue of contributory

negligence, arguing that the physical layout of the Old Hope Road, in that it is clear, flat, straight and where visibility is not in any way obstructed, it is incredible that neither the Defendant nor the Claimant saw each other before the impact. The collision occurring in broad daylight. The court should be concerned as to why neither party saw the other prior to the collision. On the basis of this unchallenged aspect of the evidence, it is open to question whom the court can rely on, hence a 50:50 percent apportioning of the liability should be considered.

- [30] It is nevertheless posited that it is the Defendant who is changing direction and would therefore have a greater duty of care based on the general principle that it is the turning vehicle which has the greater duty, and thus to ensure that this turning does not inconvenience traffic by changing direction and, similarly, as the Defendant was the one turning, then liability should be apportioned 70:30 in favour of the Claimant.

The Defendant's Submission

- [31] After outlining the agreed facts, issues to be determined at trial as well as the Claimant's and Defendant's case, the common law provisions relating to Negligence and the provisions of Section 51(2) of the Road Traffic Act, it is submitted that there was no evidence to suggest that the traffic lights were not working properly and in the absence of such evidence, it is argued that the green light could not be showing to both parties at the same time and the court is therefore entitled to find that one party was not speaking the truth.
- [32] The area where the collision took place was carefully described by the Claimant and there is no evidence that there was any obstruction which would have prevented the parties from observing each other's approach at the material time. It is clear on the evidence of both the Claimant and his witness that the Claimant drove through the intersection without slowing down or stopping.
- [33] It is posited that it is clear from the evidence that both parties were not paying due care and attention on that day and in the absence of any independent

evidence, the court generally finds that both parties contributed to the accident which is the subject of these proceedings.

[34] Outlining the evidence of the witness, Thomas, and his initial assertion that the collision was to the left front door of the Defendant's vehicle and that of the Defendant that it was to the left rear section, the court is asked to find that the impact was to the left rear section of the vehicle and this would suggest that the Defendant would have been hit when the vehicle was turning. In this vein, the court is urged to find that Delroy Thomas is not a witness of truth but one of convenience and was brought by the Claimant to support and fill the gap in his case. He has admitted that he was brought by his fellow biker to support as well as to supplement and fill the gap in his case.

[35] It is submitted that the Claimant's evidence is that he saw nothing that day. He did not see vehicles waiting at the light; he did not see the Defendant. He was unable to stop or swerve, hence he failed in his duty to take reasonable care and to avoid a collision. The Road Traffic Act places a duty on each driver to take steps to avoid an accident. Further, neither driver was exhibiting the necessary care and skill on the date of the accident.

[36] It is concluded that if the court is not minded to accept the Defendant's version of the events that he had the green light when he turned right and the Claimant collided in the left rear end of his vehicle, the court is asked to find that each party contributed equally to the collision.

The Agreed Facts

[37] It is agreed that:

- (i) A motor vehicle accident occurred June 9, 2010 sometime around 1:30 pm involving the Claimant's motorcycle and the Defendant's motor vehicle.
- (ii) The accident occurred in the vicinity of the Old Hope Road and Garden Boulevard intersection St. Andrew.

- (iii) The intersection is controlled by traffic lights.
- (iv) The Defendant was in the process of making a right turn onto Garden Boulevard when the accident occurred.
- (v) The Claimant was travelling in the opposite direction.

[38] The issues to be decided in resolving this claim, therefore, are as follows: -

- (i) Who was the proximate cause of the accident?
 - (a) Was it the Claimant who disobeyed the stoplight?
- (ii) Was there contributory negligence and if so the apportionment of liability.
- (iii) The quantum of damages, if any, to be awarded to the Claimant.

LAW AND ANALYSIS

[39] Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human would do or doing something which a prudent and a reasonable man would not do; **Blythe v Birmingham Waterworks Co.** [1856] 11 Ex. 781.

[40] **Charlesworth and Percy on Negligence 9th Ed. Para 101**; in current forensic speech, negligence has three meanings. They are: (1) a state of mind in which it is opposed to intention (2) careless conduct; and (3) the breach of a duty to take care that is imposed by either common law or statute law. All three meanings are applicable to different circumstances but any one of them does not necessarily exclude the other meanings.

[41] **Section 32(i) of the Road Traffic Act (RTA)** of Jamaica provides that, if any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence.

[42] **Section 51(2) of the RTA** provides that “It is the duty of a driver to take such action as may be necessary to avoid an accident.”

[43] Further, **section 27** of the **RTA** provides:

“If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable...”

[44] With specific regard to the duty of a driver on making a turn, **section 51(1)** of the Road Traffic Act which provides rules that all drivers of motor vehicles should observe is instructive. **Section 51(1)(d)** provides that a motor vehicle

“shall not be driven so as to cross or commence to cross or be turned in a road if by doing it obstructs any traffic;”

[45] **Section 51 (1)(e)** then provides that a motor vehicle “proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road”; **section 51(3)(a)** states that “a motor vehicle obstructs other traffic if it causes risk of accidents thereto.”

[46] It is well established that the driver of a motor vehicle has a duty to take reasonable care not to cause injury or damage to other road users. Lord Jamieson in **Hay or Bourhill v James Young** 1941 S.C. 395, 429, a statement which was later approved by the House of Lords ([1943] A.C. 92) explained the duty as follows:

‘No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in the premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care.’

[47] Reasonable care means the care which an ordinarily skilful driver would have exercised under all circumstances, and connotes an “avoidance of excessive speed, keeping a good look out, observing traffic rules and signals” and so on. What is reasonable depends on the circumstances of each case and is a question of degree (**Bourhill vs Young** [1943] A.C 92).

In **Esso Standard Oil S.A. Ltd. & Anor. vs Ivan Tulloch** [1991] 28 J.L.R. 553. It was held that “all users of a road have a duty of care to other road users.

[48] From the foregoing, it is clear that both the Claimant and the Defendant owed a duty of care to operate their vehicles in a manner so as not to cause harm to each other.

[49] I agree with Mrs. Brown Rose’s submission that there is nothing from the evidence to show that the traffic light at the intersection was not in proper working condition and also for drawing the court’s attention to the English Court of Appeal decision of **Tingle Jacobs & Co. v Kennedy** [1964] 1A E.R. 888. In which case Denning MR propounds:

“It would not be right to suggest that the lights were not working properly. Furthermore when you have a device of this kind set up for public use in active operation, I should have thought that the presumption should be that it is in proper working order unless there is evidence to the contrary and there is none here.”

I have found useful guidance in this case and in the absence therefore of evidence to the contrary the court holds that the lights were in proper working condition.

[50] The Claimant in his written submission has requested that the court finds that the solid green and the filter light would not be showing at the same time. On the contrary, the court takes judicial notice of the fact that the solid green and the filter light for a period of time show at the same time, but the filter green remains for a shorter period before it changes to amber.

[51] The Claimant in his evidence-in-chief states, “As I approached the intersection of Garden Boulevard and Old Hope Road, the traffic light was showing green to me so I rode my bike through the intersection and recall a collision in a motor car, the next thing I remember is when I wake up in the hospital The stop light was showing green to me - the filter light had stop showing green to the Defendant” However, in cross-examination he had to concede that he could not see the light in the opposite direction. He also agreed that he rode through the light at the

speed he was travelling. He did not see the Defendant's vehicle approaching and could not say if Defendant was speeding. He could not see Defendant's vehicle at all. It means therefore that the evidence that the court has to consider in order to resolve the issues in this case would be that of the Claimant's witness, Mr. Delroy Thomas, and that of the Defendant and, as was submitted by counsel for the Defendant, at the end of the day, the issue is whether the court accepts Delroy Thomas as a witness of truth as against the evidence of the Defendant.

[52] I have carefully analyzed and examined the evidence and considered the relevant aspects of the submissions made on both sides and I have found areas on Mr. Thomas' evidence that raise concerns as it relates to his reliability and credibility as a witness.

[53] In his evidence-in-chief his testimony is that Mr. Scott's vehicle was the only one coming from Papine direction. In cross-examination his testimony is that he cannot recall if he observed any other vehicle at the intersection. Although not a significant issue, his testimony is that the Defendant's Isuzu motorcar was greenish in colour. The Defendant's unchallenged testimony is that it is not so.

[54] The witness has also agreed that he spoke with the complainant about the accident and has come to court to help complainant support his case. However, he has denied that in doing so, he gave incorrect evidence. Of course, he was passionate concerning the handling of bike men "by people who drive car". His testimony is that "people who drive car handle the bike men dem bad outta road"; declaring that he is at court because he feels strongly about his fellow bikers.

[55] However, the most determining bit of evidence, in my view, is his testimony in relation to which section of the Isuzu the bike impacted with. In his evidence-in-chief, he states that the complainant's motorcycle impacted the front door of the Isuzu. In cross-examination he testified that the motorcycle impacted the left rear section and in re-examination he reverted to his original position that the impact was to the left front door. The witness gave no explanation or reason for this conflict. In the result of the foregoing, in my view, Mr. Delroy Thomas is not a

witness on whose testimony I can rely or place credence. His testimony is that he gave a statement to the police on the street. There is no evidence of such statement recorded, neither is there any indication of one made to the insurance investigators.

[56] On a totality of the evidence, I accept the Defendant's narrative as to the occurrence of the accident; that he had the solid green light as well as the filter to turn onto Garden Boulevard and he proceeded to turn when he felt an impact to the left rear of his vehicle. I accept his testimony when he said that in moving away from the point of impact, he did so of his own volition to clear the road and his action was not as a result of Mr. Thomas driving him down. I have also taken into consideration that in examination-in-chief, he had said he stopped immediately, but I accept his explanation as to why he continued. That is so as not to impede traffic coming across. In my view, if the witness, Delroy Thomas, did in fact "drive the Defendant down", the Defendant's stopping would not have been as a result but so as not to impede traffic coming across. I accept that the Defendant made a report to the police after taking the complainant to the hospital.

[57] Having found that the traffic lights were in proper working condition and accepting the Defendant's testimony that he turned whilst the solid and filter lights were on green, then the complainant would have proceeded through the traffic light whilst it was on red and is indeed the proximate cause of the accident. In **Wells vs Woodward** (1956) 54 LGR, it is proposed that where a court finds that the traffic lights are showing green one way, the court is entitled to infer unless the contrary is proved that they are showing red the other way.

[58] I appreciate that there are inconsistencies on both sides, however, on a balance of probability, I find the evidence of the Defendant more credible and more reliable than that of the witness Thomas and that the Claimant had failed to take reasonable care for the safety of other traffic on the road. It is clear, therefore, in

my view, that he was guilty of a high degree of negligence and that this negligence was substantially the cause of the accident.

Contributory Negligence

- [59] Contributory negligence does not mean breach of a duty to take care, but simply means careless conduct on the part of the person, usually the plaintiff, in failing to prevent or avoid the carelessness of the other person's breach of duty to take care (**Charlesworth and Percy on Negligence**, 9th Ed. Para 1-10). Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonable to have foreseen that if he did not act as a reasonable prudent man, he might be hurt himself (see **Jones vs. Livox Quarries Ltd.** (1952) 2 Q.B. 68).
- [60] The evidence is that the portion of road in the vicinity of the collision is clear and without obstruction to the view. The Defendant's testimony is that he did not see the motorcycle or the motorcyclist before the collision. The first time he saw the motorcycle was after the collision. He was wearing his glasses that day. He can see reasonably far with them and they make him see better in the distance when he is driving.
- [61] I appreciate that in consolidated **Bakeries and Victor Williams vs. Pauline Williams** 1968 JLR page 49 held: A motorist was required to exercise reasonable care. He was not required to be a perfectionist. However, as propounded in **Lang v London Transport Executive** 1959 WLR PS 1168 at page 1176 by Havers J.

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

[62] The Defendant's testimony is that he traverses that portion of road about three times per week; then in my estimation, he should be aware of the possibilities of a motorist going through the red light. If he had been keeping a proper look out, it is highly probable that he would have seen the motorcycle and its rider. If he had looked, in my view, the possibility of danger occurring would have been reasonably apparent to him. It seems to me that if he had looked, he could have taken the necessary precaution to swerve or to allow the motorcyclist to continue then proceed, and he would not have turned when he did. His testimony is that he did not see the motorcycle until after the impact, when he had cleared the intersection and returned; he saw the motorcyclist lying on the ground. Failure to take all reasonable steps to avoid injuring someone who is himself seen to be negligent is itself negligence (**Lang vs London Transport Executive** page 117). In the result, I find that the Defendant failed to take reasonable care for the safety of other traffic on the road and was therefore negligent. I have come to this conclusion very reluctantly because he had the green light.

[63] I find, however, that the Claimant was far more to blame than the Defendant driver and that his share of responsibility and culpability was far greater. I find the Claimant 70% to be blamed and the Defendant 30%.

ASSESSMENT OF DAMAGES

Special damages agreed at 421,066.84.

Costs of future medical care agreed at \$612,000.00.

General Damages

[64] The Claimant testifies that he was admitted to the University Hospital. When he came to himself, he noticed that his entire face was swollen, his lower lip was split open, swollen and hanging down. His eyes were blood shot, cuts and bruises were all over his face and there was a large cut over his left eye, several cuts and bruises to his left knee and leg. His left elbow was placed in a sling.

- [65]** He was transferred to ENT, plates and screws were placed in the fractured areas of his face. Braces were placed in his mouth. He was discharged from the hospital with the braces and had to be on liquid diet for about four (4) months. He was readmitted to the hospital August 10, 2010. An operation was performed on his elbow and a cast placed above and below the elbow for two (2) weeks. He was referred to the orthopaedic outpatient for follow up. After the surgery, he still experienced pain in his elbow. He took painkiller, but this did not ease the pain for long.
- [66]** He did about 10 sessions of therapy after which he saw some improvement. He was able to flex his left elbow and touch his shoulder but his hand did not come back to normal. The strength was not as before; movement was still restricted and he was still feeling pain. Since the accident, he has been experiencing constant pain in his face and left hand. The plate in his face causes him severe facial pain especially when it is cold or he is in an air conditioned room. Prior to the accident, he used to play rugby. He does not play anymore as he is afraid that he may injure his face in this physical contact game. He has had sleepless nights because of the elbow pain and sometimes awakens with pain in his elbow.
- [67]** Two years after the accident, he was examined by Dr. Dundas, as he was still experiencing pain in his elbow, as well as the left side of his face and his left knee cup was sensitive to touch. Presently, he is unable to lift heavy objects due to the pain in his left hand. His elbow hurts and is tender to touch. He experiences pains when he chews solid food.
- [68]** Dr. Dean Wright, senior orthopaedic resident to Dr. R.E. Christopher Rose, consultant orthopaedic surgeon, examined the Claimant May 19, 2011. The doctor had available to him the Claimant's file from the University hospital as well as the plain radiographs. The Claimant presented with left elbow pain occasionally at rest but worsened with resistive exercises or when the joint is loaded. Mild pain usually but worsens to five (5) out of 10. On physical examination, amongst others, the doctor found:

- i) Mild wasting of the left triceps and bicep muscles. The arm circumference 17cm proximal to the olecranon process 32cm on the right and 28cm on the left.
- ii) A 7cm longitudinal surgical hypertrophic scar visible on the posterior aspect of the distal arm through to the proximal forearm non-tender to palpation.
- iii) Dynamic stress uncovers a 15 % varus laxity of the left elbow.
- iv) The right (normal) elbow range of motion is 0-155° flexion. That for the left elbow flexing the left elbow 5° – 140° flexion. There is mild crepitus while flexing the left elbow.
- v) Normal forearm pronation and supination is 80° and 90° respectively, compared with 70° and 80° on the left side.

Diagnosis

- 1. Open left maxillary fracture status post ORIF with plates and screws
- 2. Closed left olecranon fracture status post ORIF with plates and screws.
- 3. Recent clinical findings and imaging suggest delayed union of the olecranon fracture.

Prognosis

Calculated impairment **2%** whole person (exh “1”)

[69] April 2, 2012 Dr. Grantel Dundas, consultant orthopaedic surgeon, examined the Claimant and generated exh “2”, his medical report. On presentation he complained of:

- i) Pain in the left elbow
- ii) Hypersensitivity around the left knee cap

iii) Pain in the left side of the face.

The doctor found:

1. Left elbow tender to the touch. He lacks full range of motion of the elbow.
2. The scars around his patella are very sensitive to touch and he was unable to kneel.
3. He had a 7.5cm scar posteriorly over the distal end of the left humerus tender to palpation. A 10° flexion contracture of the elbow. He could flex to 145° compared to $0-155^{\circ}$ on the unaffected side. There was impaired triceps power rated at 4 on a scale of 0-5. There was also reduction of the left mid arm circumference by 1.5cm on the left.

He **diagnosed**:

- (i) fracture left olecranon with open reduction and internal fixation.
- (ii) Peri – patellar laceration with hypertrophic scarring.

Calculated impairment **2%** whole person.

[70] The Claimant testified that it was very difficult to cope after the accident. He had negative feeling about himself. He felt different. Life no longer was appealing. People stopped coming around him and the relationship with his girlfriend came to an end. He had anxiety attack. He still experienced nightmares, panic attacks and he feels defenceless. He was seen by Dr. Clayton Sewell, consultant forensic psychiatrist, February 4, 2013, who generated a report, exh “3”. The doctor diagnosed Post-Traumatic Stress Disorder (PTSSD) and opined with a reasonable degree of medical certainty that the Claimant did sustain and continues to experience mental or emotional injuries as a result of being involved in the motor vehicle accident June 9, 2010. The doctor’s prognosis, amongst others, reveals that (i) Mr. Scott experienced a major stressor that impacted on his emotional state. This is amenable to therapy and may result in significant

amelioration of his symptoms. (ii) His Global Assessment of Functioning (GAF) indicates that mentally he is functioning in the region of 60% of normal whole person levels. (iii) It is likely that Mr. Scott's PTSD symptoms will respond to therapy and given that approximately two (2) years has elapsed since the accident, he should return to close to normal functioning within the next thirty-six (36) months.

Dr. Sewell generated an addendum to exh "3", exh "4", stating that the 60% of normal (whole person) levels represents a 10% residual mental and behavioural disorder impairment.

[71] In relation to general damages, the Claimant submits that the following cases are instructive:

Leroy White v Winston Waldron CL 1996 B 219 Khan Vol. 5 page 103

Tennessee Samuels (bnf Calvin Samuels) v Grace Watt and S. Levin Claim No. 2004HCV01180 Khan Vol. 6 pages 92

Constance Johnson v Exclusive Holiday of Elegance Ltd. et al Khan vol. 6 page 188 and suggested an award of \$3.5M.

In relation to the post traumatic stress disorder the following cases were recommended as useful guides:

Marva Protz-Mancocchio v Ernest Smatt Khan vol. 15 page 284.

Joan Morgan and Cecil Lawrence v A.G for Jamaica Khan vol. 6 page 220 and proposes a sum of \$2M as appropriate under this head of damages.

[72] The Defendant submits as useful guides, the cases of **Ernest Waldon v Kipling Davidson et al Harrison on Damages 2nd ed.** Page 128; **Leroy White v Winston Waldron** Khan vol. 6 page 105, as well as **Tennessee Samuels v Grace Watt**; **Munkman on Damages for Personal Damages and Death 11th Ed** Appendix I , and proposes the sum of \$2M as a fair and reasonable sum, as

Sewell's report shows that the Claimant's emotional state is amenable to pharmacological and psychological therapy and that with the successful implementation of therapy, the Claimant would return to normal functioning within 36 months.

[73] In **Tennessee Samuels'** case, the Claimant, an infant 13, was injured whilst crossing the road. She suffered:

- (i) Pain and swelling of right elbow
- (ii) Displaced fracture of the olecranon
- (iii) T. Condylar fracture of the distal humerus. Her residual deficit was estimated as 2% of the whole person and it was doubted that she would regain full range of extension of the elbow.

In November 2005 she was awarded \$900,000.00 as general damages; revalued this amounts to \$2,316,379.40

In **Leroy White's** case the Claimant, a driver 53 years old at trial, injured in a motor vehicle collision, suffered:

- (i) Swelling and tenderness of the left elbow.
- (ii) Displaced fracture of olecranon process at left elbow. His impairment was assessed at 4% whole person.

In May 1999 he was awarded the sum of \$500,000.00 in relation to general damages: pain and suffering and loss of amenities; revalued this amounts to \$2,456,600.73

[74] The Claimant at bar suffered:

Open maxillary fracture as well as fracture of the left olecranon as well as lacerations and is left with hypertrophic scarring. He had fracture to his face as well. It seems to me that his injuries are within the ranges suffered by **Tennessee**

as well as **White**, hence I would award him the sum of \$2.5M for general damages.

[75] In relation to Psychiatric Damages, I am afraid that I cannot agree with counsel for the Defendant that there should not be a separate award under this head and lean towards the Claimant's submission that an award should indeed be made.

[76] **Munkman on Damages for Personal Damages and Death 11th Ed.** at page 231 points out that cases within Post Traumatic Stress Disorder (PTSD) are exclusively those where there is a specific diagnosis of a reactive psychiatric disorder in which characteristic symptoms are displayed following a psychologically distressing event which was outside the range of normal human experience and which would be markedly distressing to almost anyone and at page 230: the factors amongst others to be taken into account in valuing claims of this nature are:

- I. The injured person's ability to cope with life and work;
- II. The effect on the injured person's relationships with family friends and those with whom he or she comes in contact;
- III. The extent to which treatment would be successful;
- IV. Future vulnerability;
- V. Prognosis;
- VI. Whether medical help has been sought.

[77] I find the case of **Marva Protz-Marcocchio** useful in arriving at an award under this head. The judge awarded a sum of \$100,000.00 in April 2002. In the case at bar, Dr. Aggrey Iron had diagnosed severe PTSD. The doctor opined that the incident had materially affected the Claimant's mental and physical health and that he would require continued therapy for six (6) months.

In the case at bar, Dr. Sewell estimated a period of 36 months. In **Protz-Marcocchio** case, as submitted by counsel for the Claimant, the impact was confined to dogs. Dr. Irons found that her problems were directly related to the incident in which she was attacked by dogs. In **Scott's** case, the impact seems to be on several different aspects of his life, to include self-image, self worth, and relationship with the opposite sex, fear and anxiety disorder. I find that the Claimant's resultant and residual psychological impact from the accident exceeds that of **Protz-Marcocchio**. The sum of \$100,000.00 awarded in April 2002, revalued amounts to \$397,193.21. Hence, I will award the sum of \$500,000.00.

ORDER

[78] Special damages in the sum of \$421,066.84 at 3% interest from June 9, 2010 to October 20, 2017

Future medical expenses \$612,000.00.

General damages in the sum of \$2.5M at 3% interest from August 13, 2011 to October 20, 2017.

Post Traumatic Stress Disorder in the sum of \$500,000.00 at 3% interest from August 13, 2011 to October 20, 2017.

Costs to the Claimant to be agreed or taxed.

(The Defendant pays 30% of the amounts awarded.)