[2020] JMCC Comm 111

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

**CLAIM NO. 2014HCV05668**

| | | |
|---|---|---|
| **BETWEEN** | **CLINTON SMITH** | **1st CLAIMANT** |
| **AND** | **ELSIE SMITH** | **2nd CLAIMANT** |
| **AND** | **WINSTON HENRY** | **DEFENDANT** |

**Motor vehicle accident- negligence- overtaking- differing accounts on how collision occurred- damages-cost**

**Ms. Roxanne Bailey instructed by Georgia Hamilton and Company for the Claimants**

**Mr. Francois McKnight instructed by Nunes Scholefield Deleon and Company for the Defendant**

**Heard: on 2nd March, 17th April 2020**

**Open Court**

**Coram: Y. Brown J.**

## Background

[1] On the 18th day of October 2012, a motor vehicle accident occurred along the Nelson Mandela Highway in St. Catherine, giving rise to this claim in negligence by the Claimants who contended that on the said day at approximately 9pm. they were travelling in the right lane along the aforementioned highway, heading towards Kingston.

[2] Upon reaching the vicinity of the Caymanas Crossing, a motor vehicle passed in the left lane at a very fast speed. Shortly thereafter, they felt an impact to the right side of the motor vehicle in which they were travelling and later discovered that the Defendant was the owner and operator of the motor vehicle which had caused the collision.

[3] In advancing his position, the Defendant stated that he too had been travelling along the Nelson Mandela Highway in the right lane, in the direction of Kingston. According to him, upon reaching vicinity of Caymanas Crossing, he observed a Toyota Regius van (the Claimants' vehicle) travelling ahead of him in the right lane. He said that this vehicle began to shift to the left lane thus affording him the opportunity to overtake it by using the right lane. He contended that as he passed the van which had moved from the right lane to the left, a vehicle approaching the left lane caused the driver of the van to swerve back into the right lane and into the path of his vehicle, thereby prompting the collision.

**Law and Analysis**

[4] Due to this claim in negligence, it is the duty of the Court to determine whether there was a breach of a duty of care which was owed, and whether that breach resulted in the injuries and damage alleged by the Claimants herein.

[5] The essence of the duty of care regarding road users was pronounced by Forte JA in the case of **Esso Standard Oil S.A, Limited and Stuart Marston v Ian Tulloch** (1991) 28 JLR 557; where he said: "*All users of the road owe a duty of care to other road users."* In light of that principle neither the

Claimants nor the Defendant can successfully launch a challenge that they did owe a duty of care to each other while they traversed the roadway on the fateful day. Therefore, the issue to be resolved is whether this duty of care was breached and if so, by whom, and in assessing the evidence it was perceptible that the Claimants' version of the accident was diametrically opposed to the that of the Defendant's. Hence, the issue of credibility was central to the determination of liability in this case.

[6] In her written submissions, Counsel for the Claimants asserted that the evidence unveiled during the trial was consistent with the Defendant having used the strip of land, which was to the right of the dual carriage way, to undertake the Claimants' vehicle. This, she stated, was supported by 1st Claimant, Mr. Smith and the Defendant, Mr. Henry in their testimonies that a car, travelling in the left lane had passed them at a very fast speed. This fact, she argued, would have made it impossible for Mr. Smith to have changed lanes because he was travelling at 50 kmph. Thus, the Court was invited to find that Mr. Henry's account "*depicts the tale of a negligent user of the road*". In support of this stance, Counsel advanced that Mr. Henry had admitted to driving at 87kmph in an area which had a speed limit of 80kmph. Additionally, his evidence- in- chief that he was to 3-4 (three to four) car lengths behind Mr. Smith did not accord with his testimony under cross- examination that the accident happened within seconds of the vehicle passing in the left lane.

[7] By way of independent evidence, it was submitted that the Assessor's report tendered on behalf of Mr. Henry, which stated that there were abrasions along the right side of his car, conflicted with his evidence- in- chief that the only

damage to his motor vehicle was to the left front section. It was argued that this variance supported the position that Mr. Henry had used the strip of land to undertake Mr. Smith and this was based on his (Henry's) evidence- in - chief that "*the strip of land is covered in grass at the lower end of the verge and there were fiscus trees and going up further, there were bougainvillea flowers."* In her quest to convince the Court to find favour with the Claimants' version of the incident, Counsel asserted that there was conflict between the Defendant's defence and his witness statement and this had not been resolved. Notwithstanding that claim, Counsel did not identify the conflict and my review of the contents of documents afore stated did not unearth any disparity between the said defence and witness statement. Nonetheless, I did note an inconsistency between two paragraphs namely 10 and 11 of the Defendant's witness statement, but I will address that in my assessment of the evidence in total.

[8] As regards the other issues raised in proof of the Defendant's negligence, I cannot find resonance with the stance that the Defendant's evidence that he was 3-4 car lengths behind the Claimant was incongruous with his narrative that the accident happened within seconds after the vehicle had passed in the left lane. Furthermore, the evidence of the Defendant's vehicle being 3-4 car lengths behind the Claimants' did not relate to the distance between those two vehicles when the other automobile had passed in the left lane. In fact, immediately after giving his response in respect of his distance behind the Claimants' vehicle, the Defendant said that he was able to observe the left lane through his rear view mirror and saw an oncoming car. That response would suggest that he would have had sight of the other vehicle not when it

had passed, but while he was behind the Claimants' vehicle. In any event, based on the speed (87kmph) at which the Defendant was driving, it was likely that he would have covered that 3-4 (three to four) car lengths at the time when the other automobile had passed.

[9] In so far as the abrasions to the side of the Defendant's car is concerned, I cannot countenance the Claimants' Counsel's submission that the presence of these scrapes on the vehicle, has bolstered the argument that they were the result of the Defendant's driving along the strip of land. There was no evidence as to the presence or absence of abrasions or scrapes on that vehicle prior to the collision and were I to arrive at any conclusion on that subject, I would have to embrace the element of speculation. That would be imprudent.

[10] The Claimants' Counsel has taken the Defendant's admission that he was travelling at 87kmph in an 80kmph speed zone as an indication of his negligence pertinent to the accident. However, the opposing Counsel has invited the Court to take judicial notice of *"customary convention and practice that there is generally no prosecution for traffic offences under 10km of the designated limit."* I will venture to say that I find no alignment with the latter viewpoint because speed limits have been imposed to ensure the safe usage of the roadway and to limit the risks of the effects of collisions. The non prosecution of excess speeds under 10km. is, in my view, a mere discretion and ought not to be seen as an endorsement of the breach. Furthermore, it does not diminish the argument that such a breach falls within the ambit of negligence.

[11] In a bit to persuade the Court to accept that the Defendant had offered a more credible account of the accident, his Counsel contended that there were several inconsistencies which arose during cross- examination of the Claimants which rendered their report incredulous. These inconsistencies were that (i) neither of the Claimants described the strip of land as being a slope in their evidence in chief, (ii) the 1st Claimant confirmed that there was grass on the strip of land while the 2nd Claimant failed to mention whether there was grass on the strip of land, (iii) the 1st Claimant said in his witness statement that he could view the left lane while also noting that the conditions were dry and fine and under cross examination, (iv) the 1st Claimant conceded that he was not paying attention to the left lane, (v) the 2nd Claimant noted in her witness statement that she could see clearly what was happening on the road however in cross examination she did not speak about seeing the Defendant's car, and (vi) finally, that though familiar with the road, the 2nd Claimant was unable to give an estimate of a length of the strip of land and appeared evasive when asked follow up questions.

[12] I will now consider Counsel's arguments regarding those inconsistencies he has highlighted as features of the Claimants' case.

(i) **Neither of the Claimants described the strip of land as being a slope in their evidence in chief**:

> This strip of land was the subject of much attention in the cross-examination of the Claimants. However, under cross-examination, the 1st. Claimant was consistent in his description of that area of land and it was also apparent from his evidence-

in –chief that he was providing a bare minimum description of that location instead of a detailed depiction of it. Notwithstanding that in re-examination it was revealed that the said area was sloped and this disclosure was made when the 1st Claimant's Counsel sought to ascertain his reason for disagreeing with the suggestion that that strip of land was dangerous to drive on. As it pertains to the 2nd Claimant, it was only after she was asked in cross examination whether the strip of land was levelled, that mention was made of it being sloped. Hence, the failure of the Claimants, from the outset, to describe the strip of land as being sloped would not fall within the parameters of inconsistency, and neither could it be properly classified as an omission because prior to cross- examination the exact nature of the strip of land, it would seem, was not a focus of the Claimants' case and therefore may not have warranted a detailed narrative beyond that which was necessary to describe the area where the accident occurred.

(ii) **The 1st Claimant confirmed that there was grass on the strip of land while the 2nd Claimant failed to mention whether or not there was any grass on the strip of land**.

The 2nd Claimant's failure to mention the existence of grass on the strip of land cannot be deemed an inconsistency and neither can that omission give rise to any successful claim of conflict pertaining to the 1st Claimant's testimony about the presence of

grass in the said area. It was opened to the Defendant's Counsel to have asked the 2nd Claimant whether there was grass in the said area and it was also his prerogative to have asked her to describe the said area and perchance, this would have yielded her disclosure as to the absence or presence of grass there. Having not seized either of those opportunities, Counsel's conclusion that an inconsistency had emerged from the evidence on that specific subject, is baseless.

(iii) **The 1st Claimant said in his witness statement that he could view the left lane while also noting that the conditions were dry and fine and under cross examination, the 1st Claimant conceded that he was not paying attention to the left lane**:

Contrary to this submission, the 1st Claimant had made no assertion in his witness statement that he could have seen the left lane; instead he stated that, *"there were no street lights, but my vision was never impaired and I could see clearly, as my headlights lighted the path of travel. The weather was dry and fine."* That narrative did not make any mention of the 1st Claimant being specifically able to see the left lane and as such, there is no basis on which to affirm that his statement, *"I could see clearly,"* was in direct reference to the left lane. Therefore, it would not defy logic to say that reference to his headlights lighting the path of travel, meant the path ahead - since that is where headlights were directed - and not the path behind or

beside him. The foregoing does not enliven the stance that that inconsistency was present in this aspect of the 1st Claimant's evidence.

(iv) **The 2nd Claimant noted in her witness statement that she could see clearly what was happening on the road however in cross examination she did not speak about the Defendant's car or seeing it:**

In addition to this viewpoint, the Defendant's Counsel also asserted that it was curious that neither of the Claimants had made any mention of the Defendant's headlights behind them, which would have been visible either in the rear-view or side-view mirrors. However, I have noted that the 1st Claimant had in fact stated in his witness statement that he had observed two cars driving fast behind him. Although he did not state what part of the vehicles was visible to him, his evidence disclosed that he had seen the vehicles prior to the collision. Nevertheless, the 2nd Claimant's assertion that she could have seen clearly was inconsistent with her admission in cross- examination that she did not see the Defendant's vehicle before the impact. This inconsistency though, is not material because the idea that a passenger or a non- driver may not necessarily be as attentive to the movements and positions of other vehicles on the roadway as a driver would, is not farfetched. In the case at bar,

the unchallenged evidence of the 2nd.Claimant was that she was a passenger and a non-driver.

(v) **Though familiar with the road, the 2nd Claimant was unable to give an estimate of a length of the strip of land and appeared evasive when asked follow up question:**

The 2nd Claimant's inability to give an estimate of the length of the strip of land is not an inconsistency. Furthermore, her incapacity to provide an estimate did not appear to be evasive, but was moreso an expression of frustration because she had earlier indicated that she was not good at determining estimations.

A review of the evidence revealed a single inconsistency on the Claimants' case and as was mentioned earlier, it was the 2nd Claimant's admission that she had not seen the vehicle prior to the collision and this conflicted with her evidence- in -chief that she could have seen clearly what was happening on the road way. However, for the reason stated earlier, it is not an inconsistency which is serious or material so as to impugn this Claimant's credibility.

[13] Even so, in assessing the totality of the evidence, I must decipher which account of the collision seems more probable. To this end, the 2nd Claimant's evidence is inconsequential since she did not see how the collision occurred, and so, it is the testimonies of the 1st Claimant and the Defendant that are germane to the determination of liability in this case.

[14] Before embarking upon a detailed analysis of those bits of evidence, I must state that the point of impact on either the 1st Claimant's vehicle or the Defendant's was of any utility in the determination of how the collision occurred, because that factor, presented in' the Loss Adjusters Reports and Assessor's Report', exhibited two and eight, respectively. This representation therefore supports the 1st Claimant's as well as the Defendant's versions of the collision.

[15] It is convenient to start with an assessment of the Defendant 's case because of the inconsistency which was revealed at paragraphs 10 and 11 of his witness statement. In recounting the accident, he stated that the Claimant's vehicle "*began to shift from the right lane to the left lane…*" Then, the statement which followed, "*allowing me the opportunity to overtake that vehicle using the right lane, which I proceeded to do*", would imply that it was while this shift was happening from the right lane that he had overtaken the Toyota van. At paragraph 11 of the witness statement he averred, "*as I was passing the Toyota Regius which had moved from the right lane to the left lane, a vehicle started to come up in the left lane…"* Paragraph 11 therefore painted a picture of the 1st Claimant's vehicle being in the left lane when the Defendant began to pass him in the said lane. It is also incompatible with his earlier testimony that it was while the 1st Claimant was in the process of switching lanes that he had overtaken him. There was a covert attempt to address this dissonance by a series of questions and answers in amplification. They are highlighted as follows:

*Counsel Mr. McKnight: You said you were in the right lane. Could you observe the left lane?*

*Defendant: Yes, through the rear view mirror*

*Counsel Mr. McKnight: What if anything, did you observe?*

*Defendant: There was an oncoming car. In front of me the Toyota van was going over into the left lane*

*Counsel: So the right lane was clear at this point?*

*Defendant: The right lane was clear*

[16] The Defendant's final response that the right lane "*was clear*" bears no congruency with his earlier evidence that the Toyota van was going over into the left lane, which implies that the action was incomplete. It has also rubbished his claim that the right lane was clear at that point in time. The suggestion by Claimants' Counsel that Mr Smith had at no time changed lanes, prompted the Defendant to respond, *"I disagree, he would have (emphasis added) changed*". It is curious that instead of being definitive in his response to the suggestion, the Defendant's choice of the words "would have" conveys an element of doubt as to whether that action did in fact occur. His retort has also reinforced the notion that the right lane was not clear at the relevant time. Were I to entertain the idea that 1st Claimant had switched from the right lane to the left lane, in light of the foregoing, I would still not be satisfied on a balance of probabilities that the Defendant had begun his manoeuvre of overtaking the 1st Claimant on the right after he had been fully in the left lane. I therefore reject this evidence of the Defendant.

[17] The depiction of the accident by each of the parties has assisted me in arriving at a decision as to the version which accords with sound reasoning. The 1st Claimant and the Defendant have agreed that there were three cars

on the roadway travelling in the direction of Kingston, immediately before the collision. These three automobiles were the Defendant's car, the Claimants' Totoya Reigus and the vehicle which had passed in the left lane. Despite the fact that the area in question in 2012 was an 80 km zone, the 1st Claimant's unchallenged evidence was that he was travelling at 50 kmph. He testified that he saw two vehicles travelling fast behind him prior to the collision and that one of them had passed in the left lane. In fact, he agreed with the suggestion put to him in cross examination that after the vehicle had passed in the lane, that lane was clear. Based on that bit of evidence, it would appear that the road ahead of the Claimant was clear and the speed at which he was travelling would suggest that he was in no haste. Thus the question which looms is, in those circumstances, what would have been the motivation for the 1st Claimant to have switched lanes? When his evidence that he had seen two cars travelling fast behind him is scrutinized, it seems highly improbable that he would have switched lanes at the time alleged by the Defendant, since his path of travel would not have been obstructed by any vehicle.

[18] Conversely, the vehicles travelling behind him, which might have been hindered by the 1st Claimant's slower speed would have been more likely to have moved from behind him and in such a circumstance, the 1st Claimant would have had no need to switch lanes. Therefore, it would be ill-advised to countenance the Defendant's account of 1st Claimant's motor vehicle switching from the right to the left lane and then swerving back to the right as the third vehicle had started to come up in left lane. Moreover, Defendant's testimony fell short of a plausible reason as to why the 1st Claimant would have needed to have swerved out of the path of the third vehicle. I also note

the Claimant's unchallenged evidence that he had been driving since around 1982 and based on his experience, without more, it would present a struggle to accept that this Claimant having witnessed two cars driving very fast behind him, would have been so intimidated by their presence that he would have wanted to have gotten out of their path.

[19] Although I have already stated my rejection of the Defendant's evidence that the 1st Claimant had completely transitioned to the left lane before he (Defendant) had begun to overtake him on the right side, I note that the Defendant's evidence is void of any mention of the 1st Claimant giving any signal of his intention to switch to the left lane. Therefore, if the 1st Claimant had given no such indication and the Defendant had witnessed that the vehicle ahead of him was switching lanes, it stands to reason that it would have been prudent for him to have awaited the 1st Claimant's complete transition to the left lane, before attempting to pass him in the right. But according to him, when the 1st Claimant had started (emphasis supplied) to shift to the left lane, it had allowed him the opportunity to overtake, which he had "proceeded to do". This version offered by the Defendant does not absolve him of negligence especially when the principle enunciated in the case of ***Foskett v Mistry*** [1984] R.T.R. 1 is embraced. This case was cited by the Defendant's Counsel, and in it, May LJ said: "*The root of liability is negligence, and what is negligence depends on the facts with which you are to deal. If the possibility of the danger emerging is reasonably apparent then to take no precaution is negligent: but if the possibility of the 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*." The set of circumstances which emerged in the Defendant's case, which included the absence of a signal indicating an intention to switch lanes; the shifting and not keeping on a straight path, as well as the swerving of the Claimant's vehicle would have presented an uncertainty to other road users, thereby heightening the possibility of danger. Under such precarious circumstances, it would not have been reasonable to attempt an overtaking manoeuvre - which the Defendant says that he had done at that time - and any reasonable driver would have appreciated the imminent danger. Therefore, the overtaking by the Defendant in those circumstances was nothing short of negligence. In any event, I can envision no situation where, while travelling on a one-way dual carriage way, it would be permissible for a vehicle to overtake another which was transitioning to the other lane before that task had been completed.

[20] The conflict on the Defendant's case as to whether the 1st Claimant had in fact completely switched lanes before he had attempted to overtake on the right side, coupled with his admission of travelling at 87kmph in an 80kmph zone have prevented me from accepting his account of the collision. In contrast, the 1st Claimant was consistent in his narrative as to how the accident occurred. Furthermore, his unchallenged evidence of the state of affairs which existed immediately before the collision, that is, two vehicles travelling speedily behind him, are such that I am not convinced that the 1st Claimant would have switched or attempted to switch lanes as alleged by the Defendant.

[21] Admittedly, the 1st Claimant could not say what exactly had happened to engender the collision, yet, he speculated in his evidence- in -chief that, "*it*

*appeared as though the driver of the second car tried to pass us by driving onto the strip of land and ended up hitting the right front section of the van.*" Nevertheless, the argument proffered on behalf of the Defendant was that "*although the left lane would have been free, the Defendant have put himself at significant risk by attempting to overtake on an unlevelled grass verge slope*." I have noted that such an act would not have been far-fetched had it been carried out in an attempt to get ahead of the other vehicle which had passed the 1st Claimant on the left. I will venture to say though, that even if an act is unsafe, some drivers will pursue it nevertheless and the Defendant, by his own admission, was at the time driving above the speed limit.

[22] Thus, on a totality of the evidence, I am satisfied on a balance of probabilities that the accident was more likely to have occurred in the manner advanced by the 1st. Claimant. This means that the said Claimant had kept a proper path before the collision and that there was no act or omission on his part which would have led to this accident. I must therefore reject the Defendant's counterclaim in its entirety and this includes his claim of contributory negligence.

**Damages**

**Special Damages**

[23] The Claimants claim for Special Damages is the sum of One Million Sixty-Six Thousand Two Hundred Dollars ($1,066,200) which is broken down as follows:

| **1st Claimant** | |
|---|---|
| Costs to Medical Report | $10,000 |
| Loss of Motor Vehicle | $690,000 |

| | |
|---|---|
| Cost of Loss Adjusters Report | $8,200 |
| Loss of Use- 4 months @ $80,000 | $320,000 |
| | $1,028,200 |
| **2nd Claimant** | |
| Costs to Medical Report | $10,000 |
| Loss of Eye-Glasses | $28,000 |
| | $38,000 |

[24] It is without doubt, that special damages must be specifically pleaded and proved. Thus, in support of their pleadings, the Claimants have tendered a number of receipts, namely, one from the wrecker company, two for medical reports, another from loss adjusters, and yet another from the optician.

[25] The Defendant has taken issue with the receipts for the medical reports on the basis that "*the receipt from the Spanish Town Hospital, annexed to the particulars of claim also shows a fee of $4,000 being sum received from Georgia Hamilton & Co dated March 22, 2013*." It was however argued that "*this inconsistency was not explained at the trial*, *and so, the Court should not task itself with speculating*." A review of those items shows that the receipt in the sum of Four Thousand Dollars ($4,000) bears the notation "Spanish Town Hosp" which I regard as an abbreviation for Spanish Town Hospital. It goes on to state the sum of "*four thousand dollars being medical report Re: Clinton & Elsie Smith*". It is apparent therefore, that this receipt was issued by the Spanish Town Hospital for a medical report. The second receipt on the other hand, signed by one Dr. E. Shaw Bisasor, shows that it was "*received from Georgia Hamilton & Company the sum of Sixteen Thousand Dollars… for detailed report for Clinton Smith and Elsie Smith"*. Accordingly, whilst one receipt represented payments made to the Spanish Town Hospital for a

medical report, the other was for sums paid directly to Dr. Bisasor for a detailed medical report. These receipts therefore represent two different expenditures. A difficulty however arises with the receipt for the sum of Four Thousand Dollars ($4,000) as no separate medical report was tendered from the Spanish Town Hospital to justify that expenditure. However, the two reports from Dr. Bisasor in the sum of Sixteen Thousand can be justified. Consequently, I allow the sum of Sixteen Thousand Dollars ($16,000) in respect of Dr. Bisasor's detailed medical report and refuse the award of Four Thousand Dollars ($4,000) for medical report from the Spanish Town Hospital. Based on the fact that individual reports were produced by Dr. Bisasor I will divide equally, the costs of the medical report; hence, Eight Thousand Dollars ($8,000) will be awarded to each of the Claimants as special damages for the medical report. I will also allow the sum of Twenty-Eight Thousand Dollars ($28,000) which represents the cost to replace the 2nd Claimant's pair of eye glasses which she testified was destroyed in the collision; Thirteen Thousand Dollars ($13,000) for wrecker services and Eight Thousand Two Hundred Dollars ($8,200) which represents the cost for the loss adjusters report.

[26] Although the Defendant's Counsel has made no submission in respect of the 1st Claimant's claim for the cost of the motor vehicle, no successful resistance could have been mounted against this claim because it represents an expense flowing directly from the Defendant's negligence. The assessor's report from Advanced Insurance Adjusters Limited supports the 1st Claimant's evidence that the vehicle was a total loss of Six Hundred Ninety Thousand Dollars ($690,000). I therefore award this sum.

[27] Lastly, in relation to the claim for loss of use in the sum of Three Hundred Twenty Thousand Dollars ($320,000) for a period of four months at a monthly cost of Eighty Thousand Dollars ($80,000), the Defendant's Counsel has submitted that "this sum is not supported by documentary proof additionally and in his evidence, he notes that the sum of $80,000 was the monthly expense. This sum is unreasonable and appears to be a figure that the Claimants have thrown without any proof." Whilst I accept that special damages must be specifically pleaded and proved, I am mindful of the dicta of the Court in **Walters v Mitchell** (1992) 29 JLR 173 where it was indicated that in certain circumstances, the Court may act on 'the say so' of the witness when he speaks of his loss. Notably, this case concerned a push cart vendor who was unable to provide receipts in proof of loss of earnings due to the informal nature of his employment. Based on the 1st Claimant's unchallenged evidence of his being out of use of his motor vehicle for a period of four months, it is not unfathomable that he would have incurred transportation expenses during the relevant period. Since Jamaica's transportation industry is primarily informal, it is likely that the 1st Claimant would not have able to provide receipts to prove his transportation expenses for the stated period. In his quest to provide an estimate of his transportation expenses, the 1st. Claimant stated, for example that, "*the taxi from home to church and back that would cost $1,800*". He further mentioned that he would go to church "*about five times per week, not less than eighty times*". In his response as to whether for each of those outings he had taken the taxi, he said: "*Few times may have been the bus*". He however could not recall on how many occasions he had taken the bus, but stated that the majority of the times it was a taxi. Based on

the number of times provided by the 1st Claimant which is not less than 80, I have arrived at a figure of One Hundred Forty-Four Thousand ($144,000) for the four-month period. I will reduce this sum by a nominal figure of Twenty Thousand Dollars ($20,000) for the occasions when public transportation may have been used. Hence, I will award the sum of One Hundred Twenty-Four Thousand Dollars ($124,000) for transportation costs.

[28] Special Damages is now awarded to the 1st Claimant in the sum of Eight Hundred Forty-Three Thousand Two Hundred Dollars ($843,200) and to the 2nd Claimant in the sum of Thirty-Six Thousand Dollars ($36,000).

**General Damages**

**1st Claimant- Clinton Smith**

[29] The medical report of Dr. Jacqueline Bisasor-McKenzie dated April 5, 2013 indicates that on the examination of the 1st Claimant on the 19th October 2012, he had complained of pain to chest. He was diagnosed as suffering from soft tissue injury.

[30] His next assessment by a doctor was done on the 10th April 2013 and at that time he indicated that within one week of the accident he had developed recurrent headaches but did not seek medical attention in respect of it. He however informed the doctor that he experienced headaches about four times per week which affected his ability to concentrate, but did not affect activities of daily living. He complained of occasional chest pain which did not affect his activities. He further indicated to his doctor that he was unable to drive for four months after the accident and was having flashbacks to the incident, which were frightening.

[31] The doctor advanced that whilst there was no permanent impairment or disability, he had some post traumatic anxiety which was expected to improve with time.

**2nd Claimant- Elsie Smith**

[32] The medical report of Dr. Bisasor dated April 15, 2013 showed that when the 2nd Claimant was seen the day after the accident, she had complained of pain to the chest, head and right foot. A final assessment of soft tissue injury was made.

[33] The 2nd Claimant indicated to Dr. Bisasor, whom she had saw about six months after the accident, that she experienced pain to the neck and right leg for up to two weeks after the accident, she was however still able to carry out the activities of her daily living. The 2nd Claimant also complained of anxiety attacks associated with feelings of fearfulness whenever she is in a motor vehicle. It was the opinion of Dr. Bisasor that she had some post traumatic anxiety which was expected to improve over time.

[34] It was submitted on behalf of the Defendant that the Court should have regard to the "*weight of evidence placed on the doctor's assessment of post traumatic anxiety*" as she is not trained in psychiatry or psychology. In respect of their physical injuries, Counsel drew my attention to Dr. Bisasor's view that the 1st and 2nd Claimants had recovered maximally and their physical examinations were normal, thus he submitted that seemingly no long term effects or injuries have persisted.

[35] I agree with the Defendant's Counsel that is no recent medical evidence to advance the Claimants' testimonies of their present mental health issues, and so I am prevented from making a finding of fact that the headaches, flashback and anxiety attack resulting from the accident, persist. The medical evidence to support both Claimants' averment of existing psychological trauma (anxiety attacks and flashbacks of accident) would have been germane, especially in light of Dr. Bisasor's opinion that the traumatic anxiety of these Claimants was expected to improve with time.

[36] As it pertains to Dr. Bisasor's professional capacity to diagnose the Claimants as suffering from post-traumatic anxiety, I agree that her area of expertise is outside of the medical discipline namely, psychiatry, neurology or psychology which would have afforded her the requisite insight to make a fulsome diagnosis pertinent to the mental health issues of the Claimants. Although the 1st Claimant's evidence that the "*flashbacks became so terrible…I suffered from these frightening episodes consistently for about four months…"* was unchallenged and so too the 2nd Claimant's evidence of continuing to experience anxiety attacks, I am disinclined to make any award for those suffering because the Claimants had had ample time to have sought medical attention from the relevant expert in the medical field and had that been done, then that type of medical evidence might have supported their claims. Besides that, no explanation was advanced by either of them as to their failure to seek the requisite medical attention for their psychological ailment.

[37] In support of the claim for general damages, the Claimants' Counsel relied on the cases of ***Harris Morgan v Shane Henry***, Claim No. 2008 HCV 05002 and

***Shaquille Forbes (an infant who sues by his mother and next friend, Kadina Lewis) v Ralston Baker and others***, Claim No. 2006 HCV 02938 for the 1st Claimant and ***Harris Morgan v Shane Henry (supra) and Winston McKenzie & Calvin Watson v Carlos Brown and another***, Claim No. C.L. 2002/M100, for the 2nd Claimant. Meanwhile the Defendant's Counsel relied on the cases of reported in Khan's Vol 4 at page 215, ***George Wint v Vincent Goloub*** reported in Khan's Vo 4 at page 211, ***Boysie Ormsby v James Bonfield & Conrad Young*** reported at Khan's Vol 4 at page 213, ***Derrick Munroe v Gordon Robertson*** [2015] JMCA Civ 38 and ***Derrick Crump v Andrae Bruce*** [2016] JMSC Civ 71 for both Claimants.

[38] Of those authorities, I *find* ***Harris Morgan v Shane Henry*** (supra) and ***Derrick Munroe v Gordon Robertson*** (supra) to be of some assistance in my determination of an award for general damages for the 1st Claimant, while, ***Winston McKenzie & Calvin Watson v Carlos Brown and another*** (supra) offered a modicum of guidance in relation to an award for the 2nd Claimant.

[39] In ***Harris Morgan***, the Claimant suffered blunt trauma to the chest. He also had an abrasion of less than one centimetre over the 7th rib in the mic clavicular line on the right side. He was treated with analgesics and the abrasion was cleaned and dressed. An award of Eight Hundred Fifty Thousand Dollars ($850,000) was made in October 2009. Using the Consumer Price Index (hereafter referred to as CPI) as at February 2020 that sum updates to One Million Five Hundred Fifty-Three Thousand Fifty Dollars Eighty-Five Cents ($1,553,050.85).

[40] Of note, is that there was no disclosure regarding any peculiar circumstances; for example, the periods of recovery and incapacity which may have been factored in the Court's decision to grant that award. Notwithstanding this, the Court was able to peruse the medical report in respect of Mr. Morgan and from that document, it was able to deduce that there were no other injuries outside of the blunt trauma to the chest. In light of uncertainty regarding any additional factors that the Court may have considered in Morgan, I hardly deem it prudent to rely wholeheartedly on this award in determining an appropriate sum for general damages in respect of the 1st Claimant.

[41] In ***Derrick Munroe*** the trial judge assessed damages on the basis that the Claimant had complained of pain in the head and neck, the shoulder and the anterior chest with a fourteen-day period of partial disability. He was awarded the sum of Three Hundred Thousand Dollars in June 2009. In his visit to a doctor one year after the accident, it was noted that he had fully recovered. This award was upheld by the Court of Appeal in June 2015. Using the CPI for the month of February 2020 this award updates to Five Hundred Sixty-Nine Thousand Three Hundred Sixty-Six Dollars Twenty Cents ($569,366.20).

[42] In applying the facts of Derrick Munroe to the 1st Claimant, it is noted that although there was pain to chest as in the case at bar, the injuries suffered by Mr. Munroe were far less serious than the injuries suffered by the 1st Claimant. The 1st Claimant's period of recovery was more extensive, having testified to experiencing chest pains for four months after the accident. Meanwhile, in Derrick Munroe the medical report noted that he suffered a partial disability for a fourteen-day period. Based on the aforesaid, the 1st

Claimant would be entitled to a greater award than Munroe's and the sum of $800,000 is deemed appropriate for this Claimant at bar

[43] For the 2nd Claimant, the case of ***Winston McKenzie & Calvin Watson v Carlos Brown and another*** (supra) bears some relevance. The Claimant in that case was diagnosed as having suffered multiple trauma, multiple abrasions to the right forearm and right lower limb and soft tissue contusion of the right thigh. At the time of his admission to the hospital, he was unable to urinate on his own and thus a urethral catheter had to be employed. He was treated with analgesics and admitted to the hospital for two days. About fifteen days after being discharged, he returned to the hospital and complained of a swelling of the right leg and was assessed as having haematoma as a result of the injury; but no treatment was required. About nine months after the accident it was found that no further follow up was necessary. At the trial Mr. McKenzie testified that he had been incapacitated for about two months and after that period, he had to take a lighter job than the one he had previously done as he was unable to lift weights. He was awarded the sum of Five Hundred Fifty Thousand Dollars in March 2006. After applying the February 2020 CPI, that award updates to One Million Five Hundred Sixty-One Thousand Nine Hundred Seven Dollars Twenty-Seven Cents ($1,561,907.27).

[44] Undoubtedly, the injuries suffered by Winston McKenzie, though similar to that of the 2nd Claimant particularly as it relates to the soft tissue injury, were more severe. Mr. McKenzie had suffered incontinence for a brief period, was admitted to the hospital, had to change the nature of his employment, was unable to lift weights and was incapacitated for two months as a result of his

injury. The 2nd Claimant, on the other hand, was never hospitalized and neither was she prevented from carrying out or continuing her employment as a result of her injuries. Added to this, though testifying to having recovered four months after the accident, the medical report tendered on her behalf reflected that she had reported that the pain to her neck and right leg had continued for up to two weeks. It is noteworthy that the 2nd Claimant had seen this doctor approximately six months after the accident. If in fact her pain had lasted for four months as she has testified, why then wasn't this included in the medical report? I am therefore compelled to give scant regard to the 2nd Claimant's evidence pertinent to her period of recovery. As was already observed, the injuries of the Claimant McKenzie far outnumbered that of the 2nd Claimant at bar. His were also more serious. Based on the foregoing, the 2nd Claimant would be entitled to less than a half of the award pronounced for McKenzie. Therefore, the sum of $ 600,000 is deemed an appropriate award for her.

[45] In concluding, General Damages is awarded to the 1st Claimant in the sum of Eight Hundred Thousand Dollars ($800,000) and to the 2nd Claimant, the sum of Six Hundred Thousand Dollars ($600,000).

**Costs**

[46] The Defendant's Counsel has submitted that "*any cost recoverable ought to be in keeping with that recoverable in the Resident Magistrate's Court in light of the injuries.*" I cannot find resonance with this position because the aggregate sum recoverable by the Claimants for general damages and

special damages exceeds the Parish Court's jurisdiction of One Million Dollars ($1,000,000). Therefore, I will proceed to grant the usual costs order.

**Disposition**

1. Judgment for the Claimants on the Claim and Counterclaim.

2. Special Damages with interest of 3% per annum from the 18th day of October 2012 to the 17th day of April 2020 is awarded to the 1st Claimant in the sum of Eight Hundred Forty-Three Thousand Two Hundred Dollars ($843,200) and to the 2nd Claimant in the sum of Thirty-Six Thousand Dollars ($36,000).

3. General Damages with interest of 3% per annum from the 29th day of November 2014 to the 17th day of April 2020 is awarded to the 1st Claimant in the sum of Eight Hundred Thousand Dollars ($800,000) and to the 2nd Claimant in the sum of Six Hundred Thousand Dollars ($600,000 )

4. Costs to the Claimants to be taxed if not agreed.