[2020] JMSC Civ. 154

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 05071

BETWEEN	**KELLA SMITH (BNF NICOLE SMITH)**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
AND	**JAVED SMITH**	**2ND DEFENDANT**

IN OPEN COURT

Mrs. DeAndra Grant-Wright instructed by K. Churchill Neita & Co for the Claimant

Ms. Kristen Fletcher instructed by the Director of State Proceedings for the Defendants

Heard: July 8, 9, and 10, 2019 and July 17, 2020

Civil practice and procedure– Negligence– Motor vehicle accident– Child pedestrian– Contributory negligence must be specifically pleaded for defendants to benefit from it as a defence

PALMER HAMILTON, J

BACKGROUND

[1] The 22nd day of October 2010 started as a regular school day for the infant Claimant Kella Smith. It was not foreseen that by 2:30 pm an unfortunate event would change her life forever. On this date, the Claimant, a six (6) year old student at the material time was a pedestrian crossing the South Camp Main Road in the parish of Kingston

when a police service vehicle licenced 30 3687 (hereinafter referred to as "the service vehicle") being driven by Constable Javed Smith (hereinafter "the 2nd Defendant"), collided with her causing her to sustain injuries.

[2] On the 27th day of October 2014 she filed a Claim Form accompanied by Particulars of Claim. The Claimant sues by her mother and next friend Mrs. Nicole Smith and she seeks to recover damages for negligence against the 1st Defendant, The Attorney General of Jamaica and the 2nd Defendant. The 1st Defendant is a party to this suit by virtue of the **Crown Proceedings Act**.

[3] The Claimant asserted that the accident was caused solely by the negligence of the 2nd Defendant and particularised his negligence as follows: -

> *"i. Failed to keep any or any proper look out;*
>
> *ii. Driving at a speed which was excessive in the circumstances;*
>
> *iii. Driving in a reckless and dangerous manner;*
>
> *iv. Failing to have any or any sufficient regard for pedestrians, in particular the Claimant, crossing the said roadway;*
>
> *v. Failed to stop, to slow down, to swerve or in any other way so to manage or control motor vehicle **30 3687** as to prevent collision."*

[4] The Defendants proffered that the 2nd Defendant was travelling southerly along South Camp Road in the service vehicle and was positioned in the right lane of the dual carriageway when the Claimant suddenly ran from the bushes in the median and ran across the road into the path of the service vehicle where she was hit by the service vehicle.

THE CLAIMANT'S CASE

[5] The witnesses who gave viva voce evidence for the Claimant were Kella Smith, Mrs. Nicole Smith and Doctor Tamika Haynes-Robinson. Their witness statements and report were allowed to stand as their evidence in chief and each witness was extensively cross-examined. Several medical reports, school reports and photographs were admitted into evidence.

The evidence of the Claimant

[6] The Claimant indicated that on the 22nd day of October 2010, she was attending Holy Family Primary School and that she was in grade one. She stated that at the end of school she started her journey home by herself. She described the road as big and wide and that cars go up and down. The middle of the road split in two with long grass, tall flowers and a big tree up the road to her left.

[7] She stated that she looked down the road to see if any cars were coming. When the road was clear she started to cross the road beside the white wall. Kella Smith further stated that she walked straight across from the white wall and stood up in the low grass where the road split in two. She also indicated that the tall flowers were further down the road from her right.

[8] Kella Smith indicated that when she was standing in the grass she looked to see if she could cross “the next part of the road”. She looked up and saw two police cars speeding down the road towards her. She stated that she never moved at this point. She saw the police car in front drive near to her and the other police car was behind it in the other lane.

[9] The Claimant stated that she put her hand up so the police car could stop for her to cross the road. The police car nearer to her stopped for her to cross the road. She disclosed that when the car stopped she started to walk pass the car. When she walked pass the front of the car the other police car didn’t stop and it hit her causing her to fall in the road. She stated that she didn’t remember anything after that and that the next thing she remembered was waking up in a hospital and seeing other children beside her.

[10] The Claimant went on to detail her pain and suffering. She indicated that her left leg hurts and that she could not stand by herself or without the help of her parents. She had to wear pampers as a result and she also could not sleep because of the pain. She also spoke to the fact that she endured headaches daily. Kella Smith indicated that because of the pain, she could not play outside like she used to with the other

children, she could hardly hear when the teacher was talking at school and that she could not concentrate. She stated that she could not understand her school work as it was very hard and that this got her angry and sad. She had to stay home from school for two (2) years because of the continued pain and headaches. She however ended her evidence in chief on a good note in that she is doing better at her new school and that she doesn't feel pain in her left leg anymore.

[11] Under cross examination she stated that she was not in a hurry to get home from school and on that day school ended a little earlier than unusual. Although her father would usually pick her up from school, she was alone on that day. She maintained that at that time she knew how to use the road very well by herself. She also insisted that she looked to see that the road was clear before she crossed and that she waited before she crossed the road. The Claimant also maintained that she did not run suddenly into the path of the police car and that the police car was speeding.

The evidence of the Claimant's mother, Mrs. Nicole Smith

[12] The Witness statement of Mrs. Nicole Smith was amplified and allowed to stand as her evidence in chief. She recounted that on the day of the accident she got a telephone call and she was eventually transported to the Kingston Public Hospital where she saw the Claimant.

[13] She detailed that the Claimant was transferred to the Bustamante Hospital for Children and that the doctor explained the Claimant's injuries to her. The pivotal advancements were that of the post-accident events. Mrs. Smith detailed that she noticed in the early mornings that the Claimant would wet the bed and when she enquired of the Claimant as to her reason for doing so, the Claimant would explain that she could not control it.

[14] Mrs. Smith advanced that the Claimant continued to complain of headaches and pain in her left leg so she continued to buy over-the-counter pills like Panadol to ease her pain. After two (2) to three (3) hours the Claimant would complain to her that the pain came back and she would cry until she fell asleep. She also revealed

that before the accident the Claimant used to eat hard food but she could not do so post-accident.

[15] Mrs. Smith averred that the Claimant went back to school for two (2) weeks in February 2011 although she was complaining of pain in her left leg. The teachers thereafter explained to her that they could not manage to lift the Claimant to take her to the bathroom and that she was performing way below her average age and the class. The Claimant stayed home for the remainder of February 2011 and returned to school in March 2011.

[16] She indicated that after three (3) months she noticed that the Claimant started to respond more to her questions. Mrs Smith stated that she could barely understand whenever she talked and that she was not the same “Kella” as before the accident. Before the accident the Claimant used to perform well at St. Michael’s Infant School. She mastered speaking, listening and observation. She was very good at her school work at Holy Family Primary School in September 2010.

[17] Based on these issues, inter alia, she took the Claimant to an E.N.T. specialist on several occasions, The Jamaica Association for the Deaf and back to the Bustamante Hospital for Children.

[18] Mrs. Smith also indicated that at home she observed the Claimant’s behaviour with her siblings and that she would get really rough especially with her younger sibling. She stated that when she intervened the Claimant would go into a corner and cry out, after a while she would go to her and curl up in her arms. Mrs. Smith indicated that the Claimant behaved like a real baby and not like her age.

[19] Mrs. Smith also detailed that when she tried to help the Claimant with her school work it was really hard for her as the Claimant could not read so well. She took the Claimant to do a screening test under the education system transforming programme. Based on the screening test she understood that the Claimant was performing far below her age.

[20] Based on what the teacher and the principal at Holy Family Primary School explained to her, they were not equipped to manage the Claimant's special need. Mrs. Smith indicated that she stayed home for two (2) years between 2013 and 2015. She further indicated that she did not have any money so the Claimant had to stay home and that she left her job as a caregiver to stay home with the Claimant.

[21] She explained that she managed to locate a basic school in Rae Town near where they live to help the Claimant learn the basic mathematics and language from scratch. The Claimant went there on and off for the two (2) years. She took the Claimant to get special screening under the Special Education Project by the Ministry of Education. They recommended that the Claimant attend a special needs school.

[22] Mrs. Smith averred that since the screening the Claimant has been attending the Carberry Special School for over three (3) years since 2015. For the first year the Claimant could not recognize the alphabets and that it was difficult to help her with her school work. In 2017 when she got the Claimant's report from the said school it revealed that the Claimant has been doing a little better in her school work but still had some way to go. Her performance in Language Arts showed that her comprehension is grade two (2) level at her fourteen (14) years of age. Mrs. Smith revealed that in 2018 she received another report that showed that the Claimant improved a little bit but she was still behind her age group.

[23] Mrs. Smith ended her witness statement by disclosing that she incurred expenses for the Claimant's treatment and other medical expenses for which she received receipts. These receipts were tendered into evidence.

[24] Under cross examination Mrs. Smith revealed that on the date of the accident the Claimant's school ended early without either herself or her husband knowing same. She was asked if she ever allowed the Claimant to walk home from school on her own before the accident and she replied that she did not. She also maintained that the Claimant was able to cross the road on her own before the accident.

[25] She also disclosed that it was her decision to keep the Claimant home after the accident because the Claimant was not ready to attend school as there were aches and pains that she was feeling. When questioned if that decision was based on the doctor's instructions she replied no and indicated that the doctor did not say to keep the Claimant home or send her to school. She took the decision because if the Claimant was sent to school she would have to be there throughout as her nanny because the teachers at the school were not trained in that area. Mrs. Smith disagreed with the suggestion that her decision to keep the Claimant out of school negatively affected her academic development.

[26] Mrs. Smith was asked how she knew that the Claimant was very good at her school work in September 2010. She replied that she knew same because she would have dialogue with her teacher in the mornings when she took the Claimant to school as to what were her strengths, what subjects she was good at and what subjects she was not good at.

[27] She also admitted that she was told to get crutches for the Claimant to assist her with walking but she did not do so because of the financial strain she was under.

[28] Mrs. Smith disagreed with the suggestion that the Claimants behaviour with her siblings and her behaving like a real baby was not abnormal for her age of eight (8) or nine (9) years. She further indicated that before the accident the Claimant did not behave in such a manner. It was only after the accident that she had observed these behavioural changes.

[29] It is also important to know that Mrs. Smith vigorously denied giving any statement to the police pertaining to the incident.

The evidence of Doctor Tamika Haynes-Robinson

[30] Dr. Tamika Haynes-Robinson is a Clinical Psychologist and was appointed as an expert witness in this matter. Her Neuropsychological Report dated the 27th day of

March 2012 was certified as an expert report. It was amplified and allowed to stand as her evidence in chief.

[31] Based on information obtained from an interview with the Claimant and her next friend Mrs. Smith, Dr. Haynes-Robinson recorded the Claimant's history that can be summarized as follows: -

> *"Kella has a 2 year history of maladaptive, aggressive behaviours and somewhat regressive development since her involvement in a road traffic accident (22/10/2012)."*
>
> *"Her mother reports that since returning home Kella's behaviour, cognition and personality have changed significantly. Her current behavior includes defiance, aggression, crying episodes, hyperactivity, impulsivity, memory problems, problem solving difficulty, anger, parent and sibling relationship difficulties, immature behavior and tantrums as well as lowered academic performance."*

[32] Dr. Haynes-Robinson in discussing the validity of the examination and behavioural observations made the following findings: -

> *"It was noted that she demonstrated high motor activity as well as impulsive behaviors… She displayed both thought disorder and bizarre behavior.*
>
> *…Language expression and word choice were below normal limits for a child her age… She demonstrated poor motivation and low frustration tolerance. She required extensive praise and motivation throughout the examination in order to maintain effort. Examination had to stop after IQ and academic performance tests were given due to her maladaptive and disruptive behavior.*

[33] Under the heading Arousal and Concentration, Dr. Haynes-Robinson indicated as follows: -

> *"Her ability to attend and concentrate on verbal and visual information was mildly impaired. She demonstrated severe inability in visual processing and simultaneous tracking and manipulation of visual information. The impression is mildly to severely impaired attention and concentration."*

[34] In respect to the intellectual functioning of the Claimant, the **Wechsler Intelligence Scale for Children** – 4th Edition Integrated (hereinafter "WISC-IV") was administered to provide a profile of the Claimant's knowledge, reasoning and problem solving abilities. This gave a general indication of her rate of learning for new information. Dr. Haynes-Robinson indicated the following: -

> *"Kella, with a chronological age of 8 years and 2 months achieved a verbal comprehension IQ of 65 (Extremely Low range). This places her verbal comprehension performance above 1% of her peers. This score includes measures of abstract thought, vocabulary, knowledge of social rules and customs, and her font and general information. Kella achieved a Perceptual reasoning composite score of 51, suggesting that her non verbal reasoning skills fall in the Extremely Low range and above 0.1% of her peers her age. The perceptual reading scale measure her interpretation of visual information and organization of manipulative materials as well as spatial perception, visual abstract processing and problem solving skills, non-verbal abstract problem solving, inductive reasoning, spatial reasoning and ability to quickly perceive visual details. Perceptual organization skills are all severely impaired.*
>
> *Working memory is the ability to hold information in immediate memory while performing operations upon it. The functions of working memory are to hold information, internalize that information and then use it to guide behavior in the absence of external cues. This domain also includes the ability to sustain attention, concentrate, and exert mental control. Kella performed in the Extremely Low range and functioning at 59 above 0.3% of same aged peers. Her performance indicates that mentally manipulating auditory information in her working memory is severely impaired.*
>
> *Processing speed is an indication of the rapidity with which Kella can mentally process simple rote visual information without making errors. Her processing speed composite score was 65, better than 1% of her same aged peers. This is in keeping with her performances in the other cognitive domains and is also considered to be in the Extremely low range.*
>
> *Kella obtained a Full Scale IQ of 51 in the Extremely Low range which is better than 0.1% of peers her age. Kella's scores were marginally better in verbal tasks, suggesting that her ability to reason with words and that she would learn better using both learning strategies. However her overall performances indicate Extremely low and severely impaired global functioning at this time."*

[35] Dr. Haynes-Robinson stated that for academic function, the Claimant was administered the PIAT-R revision to assess her current functioning in specific academic areas. Her performance indicated that she is performing at the level of a child in Kindergarten which is severely below her age expected level in reading recognition, comprehension, math, spelling and written expression. This was commensurate with her overall IQ.

[36] In her summary, Dr. Haynes-Robinson indicated, inter alia, the following: -

> *"…However, her psychological functioning demonstrates significant symptoms of impulsivity, hyperactivity concordant with ADHD however according to reports she did not demonstrate any of these symptoms before the accident. Children who are experiencing psychological difficulties often demonstrate "acting out" behavior at home or at school. These difficulties also have the potential to become so great that their academic functioning is affected. However, her radiological reports,*

length of loss of consciousness, neuropsychological examination as well as personality and behavior change are consistent with a Traumatic Brain Injury.

[37] She made a diagnosis as follows: -

*"**DSM-IV Diagnosis***

Psychological Diagnosis
Axis I: Cognitive disorder NOS
310.1 Personality change due to Traumatic Brain Injury- disinhibited type
Axis II: 317 Mild mental retardation
Axis III:*Traumatic Brain Injury*
Axis IV*: Parent-child relational problem*
Axis V*: GAF=43"*

[38] Dr. Haynes-Robinson made the following recommendations for the Claimant: -

1. A referral for psychotherapy;
2. Placement in a school for special education;
3. A few sessions of family therapy;
4. Referral to a child psychiatrist; and
5. A revaluation of the Claimant's Psychoeducational status in six (6) months (from the date of her report).

[39] Dr. Haynes-Robinson gave evidence under cross examination that Dr. D. Webster, a consultant neurosurgeon, confirmed that the Claimant suffered from a traumatic brain injury and that she was working from the premise that a physical injury existed. She further stated that she was assisted in the diagnosis of the severity of the brain but not of the physical nature of the injuries. She continued by stating: -

"I would be able to speak to how the physical injury affects her behaviour as well as her intellectual, psychological and academic functioning."

[40] It was suggested to Dr. Haynes-Robinson that in relation to an absence of prenatal abnormality, there would be no damage to the functional tissue of the brain and she disagreed with this suggestion.

[41] When questioned about her findings of the Claimant being in the coma for three (3) weeks being in contrast with that reported by Dr. Mark Morgan, that is, five (5) days, Dr. Haynes-Robinson agreed that the time spent in a medically induced coma would be included in her consideration of length of loss of consciousness and that it would also have impacted her findings.

[42] She was also asked whether she saw the medical report of Dr. Randolph Cheeks dated the 16th day of February 2012 and she responded that she did not see this report at the time of assessment. She indicated that the reason for same was that she received this report approximately three (3) days ago.

[43] Dr. Haynes-Robinson confirmed that Dr. Cheeks in his report stated that the Claimant did not suffer from a brain injury. She also agreed that both doctors Cheeks and Webster are neurosurgeons and that divergent reports would have some impact on her consideration and assessment of the Claimant. She further indicated that divergent findings would have impacted her findings to some extent. Dr. Haynes-Robinson also indicated that she did not receive divergent reports at any stage of her assessment.

[44] Dr. Haynes-Robinson was questioned as to the error found in her report. She denied that she used a previous report prepared by her to formulate the content of a new report but disclosed that sometimes she is typing several reports at the same time or in close proximity. She further revealed that she does not go over the report and as such she might miss a name however, the content and core of the report is reflective of the patient even though there may be occasional errors in name or date.

[45] In relation to the issue of academic functioning, it was suggested to Dr. Haynes-Robinson that the Claimant's absence from school for the period after the accident

could have contributed to significant academic delays and she disagreed with this suggestion.

[46] She was questioned about the WISC-IV tests that were conducted and she revealed that the finding of the Claimant's verbal comprehension performance was above 1% of her peers refers to all other persons in the Claimant's age group and gender and this would include persons who have not suffered a traumatic brain injury. Dr. Haynes-Robinson also indicated that it was impossible that other peers of the Claimant who did not suffer a brain injury could have performed below the Claimant or at the same level. Also, in relation to working memory, Dr. Haynes-Robinson indicated that it is possible that a child of the Claimant's age and gender, who did not suffer traumatic brain injury could perform below the Claimant's percentile rank and processing speed.

THE DEFENDANTS' CASE

[47] The witnesses who gave viva voce evidence for the Defendants were Constable Orville Bryan and Sergeant Michael Cottrell. Their witness statements were amplified and allowed to stand as their evidence in chief. A Jamaica Constabulary Force Accident Investigation and Reconstruction Unit Reconstruction Report prepared by Corporal Michael Lewis and dated the 22nd day of October 2010 was also admitted and tendered into evidence.

[48] The witness statements of the 2nd Defendant and Mr. Nicholaus Taylor, a Certifying Officer of Motor Vehicles, were not admitted into evidence as there was no indication of what steps had been laid to locate the witnesses coupled with the fact that the proper foundation was not laid to accommodate the admission of the statements. Learned Counsel for the Defendants however asked the Court in her written submissions to give further consideration to the matter, having regard that section 31E (4) only applies as a bar in the event that the party notified exercises his/her right to require the person who made the statement to be called as a witness. Learned Counsel made similar submissions and indicated that the issue

before the Court in relation to these statements is the weight that will be placed on the said statements. I have already ruled on the inadmissibility of these statements and I stand by this dispensation.

The evidence of Constable Orville Bryan

[49] Constable Bryan indicated that on Friday the 22nd day of October 2010, while he was on duty at the Mobile Reserve he was dispatched to the Saint Catherine South Police Division along with the 2nd Defendant. He alleged that he travelled in the front passenger seat of the marked service vehicle driven by the 2nd Defendant.

[50] He averred that the service vehicle was travelling within the speed limit in a southerly direction along South Camp Road, which is a dual carriageway with a median in between. Thick vegetation appeared at points along the median.

[51] Constable Bryan indicated that at about 2:30 p.m., upon reaching the vicinity of Tower Street, he saw something run in front of the moving service vehicle from the direction of the vegetation in the median. He further alleged that the 2nd Defendant immediately applied his brakes; however, due to the sudden appearance of the object, it was hit before the service vehicle could come to a stop. The object fell on the ground about two (2) meters away from the service vehicle. It was then he realized that the object was a small female child.

[52] He indicated that they hurriedly alighted from the vehicle and went to assist the child. The child was not accompanied by an adult and was alone. He detailed their efforts in getting the child into the service vehicle and transporting the child to the Kingston Public Hospital.

[53] He was asked to describe the area from where he saw something run. He indicated as follows: -

> *"Travelling in the direction towards downtown Kingston, you would have large shrubs and bushes in the centre median and there is a large tree and it would start from after leaving the stoplight, so it would be 50 meters where the shrubs would start and continues 20 meters more."*

[54] Constable Bryan was asked if they observed another police car and he disclosed that at the time they were the only motor vehicle travelling in the right lane. He further disclosed that he did not observe anyone putting up their hand to cross the road.

[55] Under cross examination he indicated that while travelling along the South Camp Road, he was paying attention to the roadway. Constable Bryan stated that he had travelled along that roadway before but when questioned as to what was the speed limit he indicated that he could not say. He however indicated that the service vehicle was travelling within the speed limit and disagreed with the suggestion that the service vehicle was travelling at an excessive speed.

[56] Constable Bryan agreed that there were sections along the roadway where there is no thick vegetation along the median and he further agreed that where there is no thick vegetation you could see the opposite roadway at the time. It was also suggested to Constable Bryan that the accident occurred in the vicinity of Barry Street and not Tower Street. He disagreed and indicated that it happened in the vicinity of Tower Street and Potter Avenue. He however revealed that he did not know the area well and that he was trying to figure out where is Barry Street.

[57] He agreed that the position where he saw the child bleeding through her ear was in the left lane but he disagreed that the service vehicle was travelling in the left lane. He also disagreed that the vicinity where the child crossed from had no thick vegetation.

[58] Constable Bryan indicated that he is aware of the housing scheme to the right of the roadway and that said communities had tall buildings. When asked if it within that vicinity that the accident took place, he indicated that everything is in the same vicinity.

[59] When asked by the Court to describe thick vegetation his answer was *“large flowers, bushes and trees in close proximity to each other”*. He was further asked by the court to describe these and he indicated that these were more than six (6)

feet tall and trees were as large as thirty-five (35) feet tall. He indicated that these were in the median.

The evidence of Sergeant Michael Cottrell

[60] Sergeant Cottrell averred that on the day of the accident at about 3:20 p.m. while he was on duty at the Kingston Eastern Traffic Section, he received information from Police Control about a service vehicle collision along South Camp Road. He stated that he was assigned as the Investigating Officer to investigate the circumstances of the collision.

[61] Based on information received at the scene and observations made, Sergeant Cottrell stated that he learned that the 2nd Defendant of the Mobile Reserve was driving the service vehicle in a southerly direction along South Camp Road in the right lane of the dual carriageway, when upon reaching the about fifty (50) feet south of Barry Street and eight hundred (800) feet north of Tower Street, a female pedestrian, the Claimant was struck by the service vehicle.

[62] He indicated that the information he received pointed to the Claimant ran from bushes in the median at the centre of the dual carriageway. It was reported that the Claimant received injuries and was taken to the hospital.

[63] Sergeant Cottrell stated that Corporal M. Lewis of the Accident Investigation Reconstruction Unit came on the scene, where he observed him taking measurements and photographs. He further stated that statements were taken from the 2nd Defendant and Constable Orville Bryan who at the time of the accident was a Special Constable. He did not take a statement from the Claimant on account of the fact that that she was only six (6) years old at the time of the accident.

[64] He averred that he sent a report by letter dated the 1st day of December 2010 to the Superintendent of Police in the charge of the Kingston Eastern Division in

relation to the incident wherein he concluded that the 2nd Defendant was not at fault and requested that he remain on driving duties.

[65] Sergeant Cottrell ended his evidence in chief by indicating that a statement was taken from Mrs. Nicole Smith at the Elletson Road Police Station and that the statement was taken by Corporal Handel Brown on the 18th day of October 2011.

[66] Under cross examination he stated that he took about twenty (20) minutes to arrive at the accident scene after receiving information and he was there for about forty-five (45) minutes. He indicated that he spoke with the 2nd Defendant during the time he was present at the scene of the accident. He also spoke with Corporal Lewis during this forty-five (45) minutes.

[67] Sergeant Cottrell also indicated that he was the one who pointed out to Corporal Lewis where the collision took place and that the scene was marked by blood in the road and by a tree branch. The tree branch he said represented the point where the Claimant came from. He however revealed that he did not know who placed the tree branch on the scene.

[68] He was shown photographs and thereafter disagreed that section had no thick vegetation. Sergeant Cottrell however agreed that he was seeing the wall on the opposite side in the prevenient photographs. Learned Counsel for the Claimant suggested that the position where the tree branch was placed did not have any bushes and Sergeant Cottrell that bushes were in the area about six (6) feet away from where the branch was placed. He agreed that the area is in the vicinity of Barry Street.

[69] Sergeant Cottrell stated that based on his observation and the information he received he disagreed that the service vehicle was travelling in the left lane. He indicated that the position of the blood stains was closer to the left side than to the right side of the median.

ISSUES

[70] The main issues for the Court's contemplation are as follows: -

1. Whether there was a duty of care owed by the Defendants to the Claimant?

2. If the answer to the previous issue is yes, I will need to determine if the Defendants breach the duty? In deciding this issue, the court will also look at the sub issue of whether the Claimant was contributorily negligent?

3. Is the Defendant liable to the Claimant in negligence?

4. What if any, is the quantum of damages recoverable by the Claimant?

[71] I must, at this juncture, express the gratitude of the Court for the extensive submissions provided by learned Counsel in the matter. I do not wish to recount them in detail. Rather, I will focus on such aspects that have affected my findings and determination in this matter.

THE CLAIMANT'S SUBMISSIONS

[72] Learned Counsel for the Claimant submitted that on the issue of liability, the evidence of the Claimant is to be accepted and that of the Defendants rejected. Learned Counsel submitted that the Court should find that the 2nd Defendant was not driving with due care and attention and that he failed to have a proper lookout in the circumstances. Mrs. Grant-Wright submitted that 2nd Defendant is the sole cause of the accident resulting in the Claimant suffering injuries.

[73] Learned Counsel submitted that the Claimant has proven, on a balance of probabilities, that the 2nd Defendant drove without due care as a reasonable driver would in the circumstances, having contemplated that in a built up area, school children could attempt to cross the road and/or appreciate the possibility of them doing so by ensuring that he could stop to avoid hitting them if the possibility arose.

[74] Mrs. Grant-Wright said the 2nd Defendant could have avoided the accident if he was not travelling at a fast speed. Learned Counsel asked the Court to find that he was traveling at a fast rate of speed and was unable to stop. She asked the Court to

have regard to the fact that Constable Bryan could not speak to the speed limit at the material time and therefore his evidence is unreliable in that regard.

[75] In relation to the mode and the pace at which the Claimant crossed the roadway, Learned Counsel for the Claimant urged the Court to accept that the Claimant was positioned in the roadway at the time of the accident and that she did not run across the roadway, nor did she appear from bushes. She indicated that the photograph evidence attached to the Reconstruction Report shows the position where a tree branch was placed and according to Sergeant Cottrell, this tree branch marked the point at which the Claimant crossed the roadway. She asked the Court to find that there were no shrubs/tall bushes at that point in the median.

[76] Learned Counsel further submitted that the Court should find that the service vehicle was travelling in the left lane at the material time of the accident and that the Claimant was crossing the roadway when the accident occurred. She proffered this averment based on the following: -

1. The evidence of Constable Bryan was that the Claimant fell two (2) metres away from the service vehicle and that he picked up the Claimant in the left lane;

2. The right front section of the service vehicle would be exposed to any impact where the Claimant would be coming from its right while positioned in the extreme right lane;

3. Damage to the service vehicle is seen in the photographs to the extreme front left. It is difficult to explain on a balance of probabilities that the Claimant at the tender age of six (6) years old managed to pass the right front of a moving vehicle and only caused impact to the front left. It is improbable that the Claimant would be hit by the left front of the service vehicle and not the right.

4. The evidence of damage of the service vehicle driven by the 2nd Defendant is more consistent with the evidence of the Claimant in that she passed the right lane of another vehicle when the 2nd Defendant failed to stop as she was proceeding along the roadway and hit her;

5. The appearance of bloodstains is positioned closer to the left sidewalk; this suggests that the 2nd Defendant was not traveling in the right lane, and is further bolstered by the evidence of Sergeant Cottrell and photograph numbered 8.

[77] On the issue of contributory negligence, Mrs. Grant-Wright submitted that the Court is not able to make a finding of contributory negligence when the Defence has not been pleaded by the Defendant. The defence of contributory negligence needs to be pleaded before the Defendants can reap its benefits. The case of **Ainsworth Blackwood, Snr. (Administrator of Estate: Anisworth Blackwood Jnr. Deceased) v Naudia Croskill and Glenmore Waul** [2014] JMSC Civ. 28 was cited in support of this submission.

THE DEFENDANTS' SUBMISSIONS

[78] Learned Counsel for the Defendants commenced her submissions by indicating that although motorists owe a duty of care to pedestrians, pedestrians also have a duty to take care for his or her own safety. She submitted that the Claimant, though she was a child of only six (6) years of age at the time owed a duty to take care of her own safety.

[79] Ms. Fletcher submitted that in the instant case, the presence of the Claimant in the median was concealed by the presence of the shrubs therein. Learned Counsel further submitted that the 2nd Defendant was driving within the speed limit for built up areas. Despite the presence of the shrubs in the median, it is submitted that it would not have been apparent to a reasonable man armed with common sense and experience that he should slow down or toot his horn in that area. Any duty of

care requiring the 2nd Defendant to slow down to a point that there could have been a possibility of him striking a child who had run out suddenly would have been unreasonable, and the chance of it happening was so slight as not to require him to slow down to that extent.

[80] Learned Counsel for the Defendants proffered that the 2nd Defendant did not see the Claimant before she ran across the path of the service vehicle. Accordingly, although he was driving at a perfectly proper speed, when he immediately slammed on his brakes, it was too late. The risk of the Claimant running across the path of the service vehicle was not therefore a "reasonably apparent possibility" in the circumstances of the case.

[81] The case of **Duncan McKoy v Sonia Watson and Lauriston Watson** [2012] JMSC Civ. 34 was cited and Learned Counsel Ms. Fletcher stated that, like the court in that case, this Court should ask itself whether or not the 2nd Defendant saw, could have seen or ought to have seen the Claimant prior to her attempting to cross the road and whether he could or ought to have anticipated a reasonable child attempting *"to cross the road front within bushes in a median such that he should have taken precautions and sounded a warning"*. Ms. Fletcher further submitted that the court in **Duncan McKoy v Sonia Watson and Lauriston Watson** (supra) found that the claimant was stepping as it where into the middle of the road from a position where he could not have been seen.

[82] Learned Counsel submitted that the instant case was similar to the **Duncan McKoy v Sonia Watson and Lauriston Watson** (supra) case. The Claimant could not have been seen by the 2nd Defendant from the bushes in the median and that is the position from which she stepped into the road. She was therefore trying to cross a dual carriageway in a manner in which it was unsafe for her so to do. The 2nd Defendant therefore should not be found negligent and the 1st Defendant ought not to be found liable. Learned Counsel cited the following cases in support of her submissions: -

1. **Jeffery Johnson v Ryan Reid** [2012] JMSC Civ. 7;

2. **Moore v Poyner** [1975] RTR 127;

3. **Robert Richard Barry v John Stanley Wynn** [2001] EWCA Civ. 170; and

4. **Handel Young (a minor) by Delphine Williams Young (his mother and next friend) v Garth Braham and others** [2013] JMSC Civ. 159.

LAW & ANALYSIS

[83] After judiciously examining all the pleadings, evidence led and the submissions advanced, I have found that the issues to be considered touch and concern the credibility of the witnesses.

[84] It is trite law that in an action for negligence, the Claimant must establish that the 2nd Defendant owed her a duty of care and that he breached that duty and further that the Claimant suffered damage as a result of the breach. In the case of **Glenford Anderson v. George Welch** [2012] JMCA Civ. 43 at paragraph 26, Harris, JA stated that in order to satisfy a claim in negligence: -

> *"……there must be evidence to show that a duty of care is owed to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty ..."*

[85] It is also settled law that he who asserts must prove. The onus is on the Claimant therefore to persuade the Court on a balance of probabilities that the 2nd Defendant acted negligently in the circumstances of the case.

[86] Harris JA further stated at paragraph 26 of **Glenford Anderson v. George Welch** (supra) that: -

> *"It is also well settled that where a Claimant alleges that he or she has suffered damages resulting from an object or thing under the Defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities."*

[87] The authorities have established that motorists owe a duty of care to pedestrians on the road. This duty is codified in the **Road Traffic Act** and it instructs that a driver of a motor vehicle should take such action as may be necessary to avoid an accident.

[88] The authorities have suggested that a greater duty of care is owed to a claimant who is a child, than that would be owed to an adult claimant. The case of **Moore v Poyner** (supra), which was relied on by both Counsel, sets out the test to be applied in determining whether a defendant is negligent in a case involving an infant claimant. In that case, the test was laid down as follows: -

> *"The test to be applied to the facts was this: would it have been apparent to a reasonable man, armed with common sense in and experience of the way pedestrians particularly children are likely to behave in the circumstances such as were known to exist in the present case, that he should slow down or sound his horn".*

[89] McDonald-Bishop, J further solidified this position in the case of **Craig Martin (B.N.F. Carmen Brown) v John Archer** (unreported), Supreme Court, Jamaica, Claim no. 2008 HCV 05180, judgment delivered on the 19th day of December 2011. After conducting an exploration of the standard of care required of a defendant in the exercise of his duty of care owed to users of the road, at paragraph 49 of the judgment, McDonald-Bishop, J enunciated as follows: -

> *"The fact is that he owes a duty of care to children pedestrians to exercise reasonable care for their safety while using the road. The degree of care required to discharge this duty may be greater than the norm depending on the circumstances of the case, which includes the age and understanding of the child."*

[90] It is unequivocal and also not in dispute that the 2nd Defendant, the driver of the service vehicle owed the Claimant pedestrian a duty of care. What is in dispute is whether this duty of care was breached by the 2nd Defendant. If it is determined that this duty is breached, then this will ground a finding of the Defendants herein being negligent.

[91] Harris JA stated at paragraph 29 of **Glenford Anderson v. George Welch** (supra) that: -

> *"Liability will be affixed to negligence where the defendant's act is the sole effective cause of the claimant's injury or it is so connected to it to be a cause materially contributing to it. The negligent act as a cause of a claimant's injury may arise out of a chain of events leading to liability on the part of a defendant but the claimant must so prove. Proof that a claimant's injury was caused by the defendant's negligence raises a presumption of the defendant's liability. However, the claimant must satisfy the court that his or her injury was caused by the defendant's negligence, or that for want of care, the defendant's negligence substantially accounted for the injury".*

[92] Having established that a duty of care was owed in this case, I will now focus my deliberations on whether the evidence reveals that negligence could have been ascribed to the 2nd Defendant. I had the opportunity to listen to the witnesses and to observe their demeanour and I accept the Claimant's account to be the more reliable of the two (2). In my judgment, there were irreconcilable inconsistencies and gaps in the Defendants' evidence that affected the foundation on which their case was built.

[93] There are two essential limbs on which the Defendants mounted their Defence. Firstly, that the Claimant suddenly ran across the path of the service vehicle. Therefore, there was nothing that the 2nd Defendant could do to avoid the accident. The Reconstruction Report admitted into evidence described South Camp Road as: -

> *"…an asphalted roadway, dual carriageway that is separated with elevated concrete median (2.5M) and is constructed to accommodate two lanes of traffic travelling simultaneously in opposite direction".*

[94] By way of the photographs admitted into evidence, I have been able to view the roadway in question. It is of note that this is also a frequently traversed route which I am familiar with. I do not accept that the point at which the Claimant crossed was thick with vegetation. The photographic representation shows that there were no shrubs/tall bushes at that point in the median. The Defendants also agreed that there are points in the roadway where there is no thick vegetation and that the opposite side of the roadway could be seen by traversing motorist. I find that one such point is that from which the Claimant crossed. I am of the view that the 2nd Defendant would have had a clear view of the Claimant at the point from which she crossed

the roadway. The 2nd Defendant would have been afforded the opportunity of seeing the Claimant before she set out on her journey to cross the road.

[95] The second limb on which the Defendant's mounted their case is that the service vehicle was travelling in the right lane at the material time of the accident and that the Claimant was crossing the roadway when the accident occurred. After examining the evidence, I find it difficult to accept this version of events. The evidence of Constable Bryan was that the Claimant fell two (2) metres away from the service vehicle and that he picked up the Claimant in the left lane.

[96] I examined the extent of the damage to the service vehicle and the relationship to the injuries of the infant Claimant. at the point from which the Claimant crossed the roadway, in my view, the right front section of the service vehicle would be exposed to any impact while positioned in the extreme right lane. I agree with Learned Counsel for the Claimant that it is difficult to explain on a balance of probabilities that the Claimant at the tender age of six (6) years old managed to pass the right front of a moving vehicle and only caused impact to the front left. It is improbable in the circumstances that the Claimant would be hit by the left front of the service vehicle and not the right.

[97] I also agree with Learned Counsel for the Claimant that the evidence of damage of the service vehicle driven by the 2nd Defendant is more consistent with the evidence of the Claimant in that she passed the right lane and the 2nd Defendant failed to stop as she was proceeding along the roadway, and hit her. Another factor that has influenced my view of the evidence is that the appearance of bloodstains is positioned closer to the left sidewalk. This is bolstered by the photographs and the evidence of the witnesses for the Defendants. I find it more credible than not that the service vehicle was travelling in the left lane.

[98] After my findings above, I need to consider if the 2nd Defendant would be negligent in these circumstances. The only evidence presented as to the speed limit in that area, is that of the Reconstruction Report that indicated that the speed limit is thirty

miles per hour (30mph). I am having a difficulty appreciating the fact that if the 2nd Defendant was driving within this speed limit why then was he not able to stop immediately or swerve from any immediate danger. In my judgment, if he was keeping a proper lookout he would have had sight of the infant Claimant before impact, given that the Claimant had commenced crossing the road and had in fact successfully completed crossing the right lane. It would mean that she would have been halfway across the roadway at the point of impact. On a balance of probabilities, I find that he was not keeping a proper lookout and therefore failed to take sufficient steps to avoid the accident.

[99] Even if I were to accept that the Claimant made a sudden entrance into that roadway, the Reconstruction Report indicated that *"a single lane is situated to the eastbound and westbound of South Camp Road that is regularly used by pedestrians (residences of Southside) to travel across the roadway"*. Therefore, it would have been reasonably foreseeable that children of that age, and pedestrians in general, would have been utilizing the roadway at 2:30 pm on a Friday afternoon to cross over into the nearby communities.

[100] The only evidence that spoke to the presence of another police car was that of the Claimant. I find that if there was in fact no other vehicle along that roadway as averred by the Defendant, it would not have affected the point of main contention. It would not have affected the fact that the 2nd Defendant failed to keep a proper lookout which resulted in the collision.

[101] Having established that the 2nd Defendant was negligent in the circumstances, I will now turn to examine the issue of contributory negligence. The Honourable Ms. Justice Calys Wiltshire in the case of **Natasha Clarke v Jacinth Morgan-Collie and Shawn Collie** [2018] JMSC Civ. 122 at paragraph 31 stated: -

> *"Contributory negligence is attributable only to the conduct of a Claimant. It is where the Claimant has failed to use reasonable care for his own safety, and by his own act or omission to act, materially contributed to the injury and/or damage caused."*

[102] It is well settled that the burden of proof in contributory negligence is on the Defendant in order to succeed they must prove that the infant Claimant failed to take such care *"as a reasonable man would take for his own safety"* and that said failure contributed to the injuries she suffered. McDonald-Bishop, J in the case of **Craig Martin (B.N.F. Carmen Brown) v John Archer** (supra) stated examined contributory negligence and indicated that there is no rule of law of general application that a child can never be held blameworthy or that a defendant must be liable. McDonald-Bishop J also referred to the case **Gough v Thorne** [1963] 3 All ER 398 in which Lord Denning pointed out that a judge should only find a child guilty of contributory negligence if he is of such an age as reasonably to be expected to take precautions for her own safety and then she should only be found guilty if blame should be attached to her.

[103] From these authorities I glean that it is clear that the fact that the Claimant is a child does not prevent a finding of contributory negligence. My finding is further bolstered by the authors of the 10th Edition of **Charlesworth and Percy on Negligence** at page 182 paragraph 3-28 where it was explained that: -

> *"Accordingly, while the fact that the claimant is a child does not prevent a finding of contributory negligence, the crucial points are the child's age and understanding. Infancy, as such, is not a "status conferring right", so that the test of what is contributory negligence is the same in the case of a child as of an adult. That test is modified only to the extent that the degree of care to be expected must be apportioned to the age of the child. The degree of care it is appropriate to expect of a child is a matter of fact for decision on the evidence in the particular case."*

[104] The Claimant has however submitted that the Defendants did not plead this defence and therefore cannot reap its benefit. I analysed the case of **Ainsworth Blackwood, Snr. (Administrator of Estate: Ainsworth Blackwood Jnr. Deceased) v Naudia Crosskill and Glenmore Waul** (supra) that was submitted by Learned Counsel for the Claimant. The Honourable Mr. Justice David Fraser at paragraphs 39 to 40 examined this principle. He stated at paragraph 39 that: -

> *"…**The court is not able to make a finding of contributory negligence when that defence has not been pleaded by the defendants.** The Law Reform (Contributory Negligence) Act permits the court to apportion liability between claimants and defendants. However case law has made it clear that the defence*

> *needs to be pleaded before defendants can reap its benefit. In* ***Fookes v Slator*** *[1978] 1 W.L.R. 1293... The judge found that the defendant had been negligent but that the plaintiff's own negligence had contributed to the accident and he reduced the amount of damages by one third. On appeal by the plaintiff it was held allowing the appeal, that* ***contributory negligence had to be specifically pleaded by way of defence to a plaintiff's claim of negligence; that, since there had been no such plea, the judge had erred in law in finding that the plaintiff's negligence had contributed to the accident****. The principle has been followed in subsequent cases including* ***Dziennik v CTO Gesellschaft fur Containertransport MBH and Co also known as CTO Gesellschaft fur Containertransport MBH and Co v Dziennik*** *[2006] EWCA Civ 1456 and* ***The Estate of Arthur John Lenton Deceased v Sidney Anthony George Abrahams (Administrator of the Estate of Mrs Gurmit Kaur Deceased), Mrs Jaspal Kaur*** *[2003] EWHC 1104 (QB)." [emphasis supplied]*

[105] I am in agreement with Learned Counsel for the Claimant that the Defence did not speak to the Claimant being contributorily negligent. I have however found that the case of **Ainsworth Blackwood, Snr. (Administrator of Estate: Anisworth Blackwood Jnr. Deceased) v Naudia Croskill and Glenmore Waul** (supra) and the cases that Fraser, J relied on are distinguishable. In these cases, the findings of contributory negligence were overturned or rejected because it had not been pleaded or argued at trial. In the instant case, whilst it was not pleaded, Learned Counsel for the Defendant did advance this argument in her submissions and she led evidence at trial that would not bar a possibility of such a finding.

[106] In any event, even if I am wrong on this, it is my view in the circumstances that the Claimant is not liable for contributory negligence. Lord Denning in the case of **Gough v Thorne** (supra) indicated the circumstances under which a judge should find a child contributorily negligent. He stated at page 399: -

> *"…A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances.* ***Judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her safety: and then he or she is only to be found guilty if blame should be attached to him or her****. A child has not the road sense of the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy." [Emphasis added]*

[107] In the case at Bar, I accept, on a balance of probabilities that the 2nd Defendant would have had a clear view of the Claimant at the point from which she crossed the roadway and I also accept that the Claimant had gotten half way across the roadway when she was hit by the less than vigilant 2nd Defendant. I find that the 2nd

Defendant did not take measures to allow the infant Claimant to complete crossing the roadway and I do not find her negligent in failing to appreciate the oncoming service vehicle and. I find that she behaved in a way to be expected of children of that age in that they momentarily forget or do not fully appreciate the perils of crossing the road. The 2nd Defendant is wholly liable for the accident.

ASSESSMENT OF DAMAGES

[108] I now segue to assess the damages for the injuries that the Claimant suffered. It is not disputed that she sustained injuries as a result of the collision. The Claimant has particularised her injuries by dissecting each medical report tendered into evidence.

Report of doctor Dileep Byregowda

[109] This report is dated the 14th day of June 2011. Dr. Byregowda is an Orthopaedic Resident at the Bustamante Hospital for Children. His findings were swelling of the left thigh with tenderness and deformity, and cloned fracture of midshaft of left femur.

Report of doctor Mark Morgan

[110] This report is dated the 7th day of December 2011. Dr. Morgan is a Consultant Neurosurgeon. His findings were: -

"i. Glasgow Coma Score of 11/15;

ii. Right facial paresis;

iii. Blood in external ear canals;

iv. Moderate head injury;

v. Middle Fossa Skull Base Fracture;

vi. Occipital Condylar Fracture;

vii. Diffuse Axonal Injury;

viii. Closed Femoral Fracture."

Report of doctor Randolph E. Cheeks

[111] The Court also certified Dr. Randolph E. Cheeks, Consultant Neurosurgeon as an expert witness and granted permission for his medical report dated the 16th day of February 2012 to be tendered into evidence at the hearing of the trial without the need for him to give oral evidence. His diagnosis was: -

> *"1. Head injury with concussion and fracture of the skull base. Status: recovered.*
>
> *2. Fracture of the left femur which has healed with mild shortening."*

[112] The evidence of Dr. Tamika Haynes-Robinson has already been stated in details and I need not recite them here.

[113] The impact of the injuries on the Claimant's daily activities of living were pleaded as follows: -

> *"i. Flare ups of pains in the right foot;*
>
> *ii. Walks with a noticeable limp;*
>
> *iii. Frequent fainting spells;*
>
> *iv. Difficulty concentrating at school;*
>
> *v. Significant fall in academic performance;*
>
> *vi. Regular wetting of the bed;*
>
> *vii. Displays stubborn and rebellious behavior;*
>
> *viii. Aggressive towards her siblings resulting in frequent fights;*
>
> *ix. Behavior consistent with that of a baby;*
>
> *x. Gets very emotional."*

[114] Learned Counsel for the Claimant relied on the following cases: -

1. **Floyd Miller (b.n.f. Henry Miller) v Fitzroy Hamilton & Barrington Laidley** [Suit No. C.L 1987/M349] cited at page 326 of **Harrison's Assessment of Damages for Personal Injuries**, Revised Edition of Casenote no 2;

2. **Andrew Sinclair (b.n.f. Ellen Willliams) v Eglon Mullings** Suit No. C.L. 1985S180 cited at page 328 of **Harrison's Assessment of Damages for Personal Injuries**, Revised Edition of Casenote no 2;

3. **Isiah Muir v Metropolitan Parks & Markets Limited and Dennis Whyte** Suit No. C.L. 1991/M090, damages assessed on the 21st day of July 2005 cited at page 185 of Khan's Volume 4; and

4. **Karen Brown (b.n.f. Cynthia McLaughlin) and Cynthia McLaughlin v Richard English and Alfred Jones** reported at page 190 of Khan's Volume 4, damages assessed on the 1st day of February 1991.

[115] It was submitted that an award within the range of seventeen million dollars ($17,000,000.00) to eighteen million dollars ($18,000,000.00) would be appropriate for general damages.

[116] On the medical evidence presented, Learned Counsel for the Defendants submitted the following: -

> *"It is submitted that the Claimant has failed to prove by way of direct and credible expert evidence that she suffered a traumatic or any brain injury. In light of the facts that there is not now before the Court any reliable evidence that the Claimant suffered a brain injury, whilst there is before the Court reports from more than one neurosurgeon, stating inter alia that the Claimant suffered a moderate head injury, and that the internal structure of the Claimant's brain was not injured, and further based on Dr Haynes-Robinson's evidence that her report was prepared on the premise that Kella had suffered traumatic brain injury, the Court is being asked to find that no neuropsychological disorder arose as a result of this incident. It is therefore submitted that the Court should disallow the Claimant's claim in this regard."*

[117] The case of **Handel Young (a minor) by Delphine Williams Young (his mother and next friend) v Garth Braham and others** (supra) was cited and it was submitted that an award between the range of four million dollars ($4,000,000.00)

and four million five hundred thousand dollars ($4,500,000.00) would be reasonable to compensate the Claimant for general damages.

[118] Having considered the awards for general damages made in the cases referred to by both Learned Counsel, the authority of **Handel Young (a minor) by Delphine Williams Young (his mother and next friend) v Garth Braham and others** (supra) is instructive. The claimant, a seven (7) year old boy suffered unconsciousness, multiple lacerations to the head and face, fractured right femur and left clavicle, fracture of frontal lobe, contusion of frontoparietal area of brain, traumatic subarachnoid haemorrhage and contusion of the liver. Despite the Court's finding that there was no liability on the part of the Defendant, it was indicated that, in order to save time and costs in the event of a successful appeal, the Honourable Mr. Justice David Batts indicated that he would have assessed damages at six million dollars ($6,000,000.00) for pain and suffering and loss of amenities in November 2013 (CPI 209.5). This award would update to seven million four hundred and eighty thousand six hundred and sixty-eight hundred dollars and twenty-five cents ($7,480,668.25) using CPI of 261.2 for July 2019.

[119] I also considered the case of **Karen Brown (b.n.f. Cynthia McLaughlin) and Cynthia McLaughlin v Richard English and Alfred Jones** (supra). In this case, the claimant sustained a head injury with probable basal skull fracture, cerebal concussion with loss of consciousness for two (2) days, injury to the left leg causing swelling and tenderness along lateral upper thigh lasting for more than twelve months and bleeding from the ear. The Claimant suffered brain damage of 60% causing intellectual impairment, kelodial scar 2.5cm of the ear producing cosmetic disability and difficulty coping with school work. The claimant was awarded the sum of three hundred and eighty-five thousand dollars ($385,000.00) in February 1991 (CPI 170.6) which updates to five hundred and eighty-nine thousand four hundred and sixty dollars and seventy-three cents ($589,460.73) using CPI of 261.2 for July 2019.

[120] I found the case of **Kiskimo Limited v Deborah Salmon** SCCA No. 61/89, reported at page 187 of **Harrison's Assessment of Damages for Personal Injuries**, 2nd Edition instructive. The claimant, a thirteen (13) year old schoolgirl suffered severe brain damage as a result of severe trauma to the head. The Court of Appeal upheld an award of five hundred thousand dollars ($500,000.00) made on June 23, 1989 (CPI 117.7) for pain and suffering and loss of amenities which is now worth one million one hundred and nine thousand six hundred dollars and sixty-eight cents ($1,109,600.68) using CPI of 261.2 for July 2019.

[121] Considering that the Claimant at Bar suffered more severe injuries than those in the aforementioned cases as well as the Claimant's resultant disability, I found the authority of **Ramon Barton (An infant by his father and Next Friend Wilburn Barton), Wilburn Barton v John McAdam, Wesley McAdam, Lawrence Dennis & Wright's Motor Service Limited** (unreported) Supreme Court, Jamaica, Claim No. C.L.1996/B110, judgment delivered on the 13th day of March 2008 to be most instructive. The claimant, a nine (9) year old boy suffered severe diffuse head injury with unconsciousness and evidence of brain stem injury in the form of extensor posturing, swelling of the right upper eyelid and right side of lower jaw. Like the instant Claimant, the claimant in this case manifested a regressive child-like behaviour. He was awarded ten million dollars ($10,000,000.00) for pain and suffering and loss of amenities in March 2008 (CPI 122.94). This figure updates to twenty-one million two hundred and forty-six thousand one hundred and thirty-six dollars and thirty-two cents ($21,246,136.32) using CPI of 261.2 for July 2019.

[122] I will echo at this juncture the words of the Honourable Mr. Justice Bryan Sykes (as he then was) in the case of **Phillip Granston v Attorney General of Jamaica** (unreported) Supreme Court, Jamaica, Claim No. 1680 of 2003, judgment delivered on the 10th day of August 2009 stated at paragraph 74: -

> *"…The goal of looking at past awards is to make sure that awards are consistent but the desire for consistency cannot be used to suppress awards that are properly due to the injured party even if that award is outside of the past cases."*

[123] I garner from this authority that it is within the inherent powers of the Court to grant an award befitting in the circumstances despite the prevalence of authorities cited by Counsel that do not support the award I think is just.

[124] I note that the claimant in the case of **Ramon Barton (An infant by his father and Next Friend Wilburn Barton), Wilburn Barton v John McAdam, Wesley McAdam, Lawrence Dennis & Wright's Motor Service Limited** (supra) suffered more severe injuries than the instant Claimant. however, given the resulting disability and brain injury as well as the intellectual abnormality of the instant Claimant, I find that an award of fifteen million dollars ($15,000,000.00) is appropriate in the circumstances for general damages.

[125] It is trite that special damages must be specifically proven. The sum of ninety-two thousand six hundred dollars ($92,600.00) was specifically proven. As it relates to transportation, the Claimant has asked for the modest award of two thousand one hundred dollars ($2100.00) and I am prepared to do same. The total sum for special damages is therefore ninety-four thousand seven hundred dollars ($94,700.00).

ORDERS & DISPOSITION

[126] Accordingly, I make the following Orders: -

1. Judgment for the Claimant;

2. Special damages in the sum of $94,700.00 with interest at a rate of 3% per annum from the 22nd day of October, 2010 to the 17th day of July 2020;

3. General damages in the sum of $15,000,000.00 with interest at a rate of 3% per annum from the 4th day of November, 2014 to the 17th day of July 2020;

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