



[2016] JMSC Civ. 105

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 03017

BETWEEN	STEVE THOMPSON	1ST CLAIMANT
AND	ERROL ALI (DISCONTINUED)	2ND CLAIMANT
AND	GUILES HALL	DEFENDANT

Ms. Christine Hudson and Ms. Renae Barker for Claimant instructed by K. Churchill Neita & Co.

Mr. Maurice Manning and Mr. Mark Paul Cowan for Defendant instructed by Nunes Schoefield DeLeon & Co.

HEARD: 15th, 16th and 22th June 2016

NEGLIGENCE – COLLISION AT INTERSECTION OF MAIN ROAD AND MINOR ROAD – MINIBUS TURNING FROM MAIN ROAD ONTO MINOR ROAD – MOTORCYCLE TRAVELLING ON MAIN ROAD IN OPPOSITE DIRECTION – MOTOR CYCLIST NOT WEARING HELMET – DUTY OF DRIVERS – WHETHER MINIBUS DRIVER RESPONSIBLE FOR ACCIDENT – CONTRIBUTORY NEGLIGENCE

CORAM: DUNBAR-GREEN J.

Background

[1] This action arose out of a collision between a minibus, owned and driven by the defendant, and a Honda 600 RR motorcycle owned and driven by the first claimant (hereinafter called the claimant) in the vicinity of the intersection of Hagley Park Road (the main road) and Stratford Avenue (the minor road) in the

parish of Saint Andrew, on 19th March 2010. The minibus was travelling in the direction of Three Miles and turning right onto the minor road when the motorcycle, which was proceeding on the main road, in the direction of Half Way, collided with the left rear wheel of the minibus.

[2] The claimant alleges that the defendant so negligently managed and/or controlled his minibus that he caused the collision. As a result, the claimant sustained personal injuries and suffered loss and damage.

[3] The particulars of negligence of the defendant are set out below.

- I. Drove at a speed which was too fast in all the circumstances.
- II. Failed to keep any or any proper lookout or to have any sufficient regard for other road users.
- III. Turned or attempted to turn right from Hagley Park Road onto Stratford Avenue and into the path of the claimant when it was unsafe and dangerous so to do.
- IV. Failed to stop or to wait until the claimant had passed safely before turning or attempting to turn.
- V. Failed to give any or any sufficient or timely warning or signal of his intention to turn.
- VI. Failed to observe the presence of other road users in sufficient time so as to avoid turning or attempting to turn right.
- VII. Failed to stop, slow down, swerve or in any other way manage and/or control the mini bus so as to avoid the collision.

[4] The defendant denies that he was negligent and states that the claimant is wholly to blame or in the alternative, materially contributed to the accident. The particulars of the claimant's negligence are as follows.

- I. Drove at a speed which was manifestly unsafe in the circumstances.

- II. Drove his motorcycle without any or any adequate regard for other road users.
 - III. Attempted to overtake a stationary motor vehicle at a time and place when it was manifestly unsafe to do so.
 - IV. Attempted to overtake at an intersection.
 - V. Failed to see or see in time that the defendant was in the process of turning right.
 - VI. Failed to keep a proper lookout.
 - VII. Collided into the left rear section of the defendant's minibus.
 - VIII. Failed to stop, slow down or otherwise manoeuvre his motorcycle so as to avoid the collision.
- [5] The parties agreed medical reports of Dr. Cary Fletcher dated 4th November 2010 and 19th March 2015, Dr. Guyan Arscott dated 24th February 2011, Dr. Grantell Dundas dated 3rd October 2012, and Dr. Kenneth Vaughan dated 1st June 2013, 14th March 2013 and 14th October 2015 (Exhibit 1); the sum of \$602,366.09 in respect of Special Damages (Exhibit 1); photographs (Exhibit 2); and \$400,000 for future medical expenses.
- [6] Before the trial commenced, the Court heard an application from counsel for the defendant in which he requested that the Witness Statement of Andre Daley be admitted into evidence without the need for oral testimony, and that the Defence be amended to include a paragraph: "To the extent that the claimant has suffered any injury, the defendant will say that same was substantially caused by the claimant's failure to wear a helmet at the time of the accident."
- [7] The application for the first order was denied on the basis that the defendant did not satisfy the requirements under section 31(e) of the **Evidence Act**. The second application was granted on the basis that the information had been contained in the medical evidence which was agreed.

Case for the Claimant

[8] The claimant's Witness Statement, filed 15th July 2015 along with amplification, and those of Miss Joy Thompson and Mr. David Ireland, filed 15th June 2015 and 28th May 2015, respectively, were ordered to stand as their evidence in chief.

Steve Thompson

[9] Mr. Thompson gave evidence that at about 10:30 pm he was riding his motorcycle, with a pillion rider, along Hagley Park Road in the direction of Half Way Tree. He was travelling at approximately forty-five kilometres per hour and there were no cars travelling in front of him. On reaching the vicinity of the intersection at Stratford Avenue, he saw a white Toyota Hiace minibus travelling in the opposite direction. The minibus suddenly made a right turn across his path, towards the minor road, without indicating. He immediately braked and swerved to the right in an attempt to avoid colliding with the minibus but he could not and the motorcycle collided with the left back wheel of the minibus. The collision occurred on his side of the main road.

[10] On impact, the motorcycle was "flung around the back of the bus" and the pillion rider and himself were "thrown" from the motorcycle. The claimant ended up on the left sidewalk of the main road and the motorcycle not too far away. He was not wearing a helmet at the time of the accident.

[11] Under cross-examination, Mr. Thompson said that he was on his way to a party at the University of Technology and was not wearing a helmet for fear that it would be stolen at the party. In describing the motorcycle he said it was not a "fudgy bike" but a "fast, powerful, big bike, with a muffler under the seat and two headlights."

[12] When he first saw the minibus, it was some 85 feet away. At that point, the motorcycle was positioned close to the left sidewalk of the main road. At some 11 feet, he observed the minibus turning across his path towards Stratford Avenue,

without any indication. He disagreed that there were three vehicles which had stopped in front of him to allow the minibus to cross.

- [13] On seeing the minibus crossing, Mr. Thompson said he swerved right but was unable to steer the motorcycle to the opposite side of the road although he had tried to do so. Consequently, he had a “head-on collision with the left rear wheel of the bus.” He admitted that the motorcycle had hit the minibus with “some force” and that after the impact he ended up past Stratford Avenue on the left sidewalk of the main road. This was some 8 or 9 feet away from the point of impact. The motorbike was “a total loss”.
- [14] Mr. Thompson also said that between Portia Simpson Miller Square and the intersection of Waltham Park and Hagley Park roads he had moved from left to right and *vice versa* because there were two lanes in his direction at that point. However, when he left the traffic lights at Waltham Park intersection, he switched to the left side of the road, closer to the curb, and maintained that position until he swerved right to avoid the collision with the minibus.
- [15] In response to questions by the Court, Mr. Thompson said there was no vehicle ahead of the minibus, and the collision occurred close to the middle of the road in his correct lane. He said he did not swerve left because there was a building with a high wall at the corner of the major and minor roads. He said there were street lights close by and both vehicles had on lights. After he first saw the minibus at some 85 feet away, he kept his eyes on his path, on the left side close to the curb.
- [16] Mr. Thompson said he sustained injuries all over his body and suffered pain. He was taken to the University Hospital where he was treated and remained bed-ridden for two weeks. On discharge, he was bed-ridden at home for two months and continued to endure pain. He then started to ambulate with crutches for a further two months and was unable to return to work, as a driver, until September 2013. During the period, he was an out-patient at the University Hospital. He was

also examined at private institutions by orthopaedic and cosmetic and reconstructive specialists.

- [17] The evidence of Mr. Thompson and his witnesses, Miss Joy Thompson and Mr. David Ireland, in relation to special damages, will be dealt with later in this judgment.

Case for the Defendant

- [18] The Witness Statement of Mr. Guiles Hall, filed 30th April 2015, along with amplification, was ordered to stand as his evidence in chief.

- [19] Mr. Hall's evidence was that he was driving his minibus along Hagley Park Road at 30 miles per hour (50kph) with headlamps on and the front windows down. On approaching the intersection at Stratford Avenue, he slowed and put on his right indicator, checked his mirror and came to a complete stop. Two vehicles which were headed in the opposite direction passed as he waited to turn. A third vehicle came to a complete stop and flashed its headlights which he interpreted to mean that he could turn right. Two other cars stopped behind that vehicle. As he started to turn right, he saw no lights from the opposite direction except those from the cars which had stopped.

- [20] As he made his turn, a vehicle which was behind him continued along the main road. Just about when the front of his minibus was aligned with the left front of the car that had stopped to allow him to cross, he saw, through the corner of his eye, a "light flash from the middle of the road between two vehicles" (the one that had continued along the main road towards Three Miles and the one that was waiting for him to turn). He confirmed that it was a motorcycle, as he also heard "the rev" of the engine. He said, that based on the position of his bus, he thought that the motorcycle would have passed behind it but he heard a loud explosion and the minibus "jerked out of control". The front of minibus "swung towards the left fence along Stratford Avenue" then it came to a stop with the left front wheel

touching the left sidewalk on Stratford Avenue and its back slanted towards Half Way Tree.

- [21] Mr. Thompson said that after the collision he remained in his vehicle for some five minutes. He observed a person “slanted on the road”, lying on his back, with head towards Three Miles and feet towards Half Way Tree. Shortly after, he left the scene because he saw two men moving quickly towards his direction and he was worried for his safety. Later that night, he was driven to the police station by his girlfriend and he reported the accident there.
- [22] He said the area in which the collision occurred was well-lit with street lights, the road surface was moderately good and dry, and the main road was straight. He also said the force that hit his minibus was “massive.”
- [23] Under cross-examination, he agreed that there was a concrete fence on both sides of the entrance to Stratford Avenue, and that on Hagley Park Road leading up to the point of collision there was a bend on both sides. He also said that just coming out of the bend, on his side, there was a vehicle about 25 feet ahead and he could not see over that vehicle but he waited at the intersection for some two minutes at which time he observed the vehicles passing in the opposite direction.
- [24] Mr. Thompson said that when the vehicles stopped for him to turn, he could not see beyond them down the road because of their headlights. Those vehicles had taken up about 50 feet down Hagley Park Road.
- [25] He agreed that the collision occurred close to the imaginary dividing line of the roadway, in the lane of traffic towards Half Way Tree.
- [26] He denied making a sudden turn at the intersection, across the path of the motorcycle, causing it to swerve right. He said he never saw the claimant.

Submissions on Liability

- [27] Ms. Hudson submitted that the driver of a vehicle who is changing direction bears the greater duty of care before undertaking his manoeuvre. She relied on ***Pratt v Bloom*** (1958) Times, 21 October, Div. Ct. (reported in ***Bingham and Berryman's Personal Injury and Motor Claims Cases*** 12th ed. 85) in which Streetfield J. said, "The duty of a driver changing direction is (1) to signal, and (2) to see that no one was incommoded by his change of direction and the duty is greater if he first gives a wrong signal and then changes it."
- [28] She contended that the defendant did not indicate his intention to turn right but even if he had done so, he had not ensured that it was safe to turn before doing so. The damage to the minibus, being to its rear on the left side, was consistent with the claimant's account that he took evasive measures to avoid the collision by swerving right.
- [29] Counsel contended further that the failure of the defendant to see the claimant was inexplicable, given that he was able to see some fifty feet down the road and that, on his evidence, he had been stationary at the intersection for some two minutes.
- [30] Regarding contributory negligence, Ms. Hudson submitted that the Court would take into consideration the speed at which the claimant was travelling and the fact that he was not wearing a helmet.
- [31] In response, Counsel for the defendant contended that the burden was on the claimant to show that, on a balance of probabilities, the accident was caused by the negligence of the defendant. He relied on ***Jowayne Clarke and Anthony Clarke v Daniel Jenkins*** Claim No. 2001/C 2011 delivered 15/10/2010 in which it was stated that it is a question of fact in each case whether the driver operated at the standard of care required of him by keeping a proper lookout, avoiding excessive speed and observing traffic rules and regulations.
- [32] Counsel also relied on ***Powell v Moody*** (1966) 110 Sol Jo 2015, Times, 10 March, CA (reported in ***Bingham and Berryman's Personal Injury and Motor***

Claims Cases 12th ed. 227) for the submission that a road user who jumps a queue of stationary vehicles, must do so with great care. Also, **Clarke v Winchurch** [1969] 1 ALL ER 275 WLR 69 for the submission that a motorist who collides with another who undertook a manoeuvre fraught with great hazard is unlikely to be found to be negligent.

- [33] Counsel for the defendant described as “strained credulity”, the claimant’s evidence that he was travelling at 40 to 50 kph on a powerful motorcycle, on a clear stretch of road, with his “bred’ren” heading to a party.
- [34] Counsel submitted that the evidence was further compromised by the claim that the defendant was first seen some 85 feet away and travelled 80 feet to turn suddenly on the claimant, despite the claimant’s motorcycle being in motion at 40 to 50 kph. He asserted that it was unlikely that the defendant, coming along a clear and unimpeded roadway, with no vehicles ahead of him, would turn across the claimant’s path when he was 11 feet away. Also, it was implausible that the defendant would have covered a distance of 80 feet to the point of collision whilst the claimant would have only travelled 5 feet from the point he first saw the defendant to where the collision occurred. On the evidence, if both parties were travelling at relatively the same speed, the claimant should have passed the defendant before the latter reached the point of collision.
- [35] It was also contended that even were the claimant’s version close to being correct, he should have been able to stop, slow down or swerve away from the defendant’s minibus. The collision occurred because the claimant was travelling too fast and not keeping a proper lookout, as evidenced by his claim that he had focused only on his left lane after he saw bus.
- [36] Counsel for the defence contended further that because of speed and inattention the claimant was unable to respond to any circumstances that ordinarily developed on the roadway. One such circumstance was the line of traffic which had stopped to allow the defendant to cross.

- [37] Counsel described as candid, the evidence of the defendant that he had not seen the motorcycle before the accident. This might have been explained by the defendant's evidence that there were three vehicles stopped in a queue, facing the minibus, and the claimant's evidence that he was travelling to the left of the road, close to the curb. From that position, the claimant would not have been seen by the defendant because of the three motor vehicles which had stopped.
- [38] Counsel submitted further that the claimant admitted to moving from left to the right and the Court should find that this occurred because he moved from the left lane to overtake the line of traffic which had stopped. He also contended that the physical damage to the vehicles and the Assessor's Report that the impact was to the front section of the motorcycle, as opposed to the left side, support the view that the claimant had not swerved right at the point of collision but had collided frontally with the minibus.
- [39] Counsel for the defendant also contended that the 'revving' which the defendant heard was consistent with acceleration rather than braking and that also explains why the claimant's motorcycle hit the minibus with "massive force".

Findings of Fact and Analysis

- [40] The parties agree that there was a collision between the two vehicles at the intersection of Hagley Park Road and Stratford Avenue at about 10:30 pm. They also agree on the direction in which the vehicles were travelling, that the collision occurred in the left lane towards Half Way Tree close to the imaginary white line and that the area was lit by street lights. There is agreement that the minibus was impacted to its left rear wheel, resulting in the motorcycle and the claimant being flung or thrown onto the sidewalk on Hagley Park Road some eight to nine feet from the entrance to Stratford Avenue.
- [41] This case turns substantially on the credibility of the witnesses as there was no independent evidence in respect to liability. I find that the defendant's version of what occurred was not shaken by cross-examination and I found nothing incredulous in what he said.

[42] The claimant, on the other hand, lacked credibility, certainly in relation to the speed at which he was travelling. I do not accept his evidence that he was travelling at between 40 and 50 kilometres per hour. At that speed, with good road and lighting conditions, and having applied his brakes, as he said he did, he should have been able to swerve safely and avoid the collision even if the minibus had suddenly crossed his path some 11 feet away. I have arrived at this position having considered his evidence that there were no vehicles ahead or beside him in his lane nor any vehicle coming from the direction Half Way Tree in the adjacent lane, apart from the defendant's vehicle which had commenced turning. I also reject his evidence of speed having regard to the obvious force with which his motorcycle impacted the minibus. I will return to this later but just to say it was also borne out that he must have been going above forty-five kilometres per hour for him to have been "thrown" and the motorcycle "flung" some distance away from the point of impact.

[43] I now turn to the issues which arise and application of the law to the facts.

Issues

[44] The Court has to decide, on a balance of probabilities:

- I. whether the defendant owed a duty of care to the claimant, and if so, whether there was breach of that duty; specifically, did he suddenly and without warning turn into the path of the claimant and cause the collision;
- II. whether the defendant's action caused injury and loss to the claimant and if so were they foreseeable;
- III. whether the claimant, by his own action, contributed to his injuries and loss; and
- IV. the quantum of damages, if any, to be awarded to the claimant.

Duty of Drivers at Junction of Major and Minor Roads

[45] In deciding whether there has been a breach of the duty of care I must consider whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the claimant. In doing so, I must determine how a reasonable driver, faced with the same conditions, should have acted.

[46] Section 51 (1) (d) of the **Road Traffic Act** provides that a motor vehicle:

(d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;...

...

[47] Section 51(2) of the **Act** provides:

Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.

[48] These provisions place a duty on the defendant who was crossing onto a minor road, to do so without obstructing any traffic, keep a proper lookout, manoeuvre in a safe manner as he crossed the main road and in the process to take such action as may have been necessary to avoid an accident. There is also a duty placed on the claimant to keep a proper lookout, manoeuvre in a safe manner as he proceeded on the main road and to take action as may have been necessary to avoid an accident.

[49] In my view, these general propositions are supported by the authorities cited by both counsel.

[50] Counsel for the claimant has asked me to consider that the claimant's version of how the accident occurred is more plausible. However, I find that the impact of the collision was not consistent with the claimant's evidence that he had braked.

[51] The evidence is that he was travelling, initially, below the speed limit of 50 kph and no doubt would have pressed hard on the brakes in the face of what would

have been a peril on the roadway. There is no evidence that his motorcycle skidded which could have caused it to accelerate out of control or that the claimant lost control at all. Neither was there evidence that the defendant's minibus had slowed or stopped in the path of the claimant which might have caused him to misjudge the degree of swerving which was necessary to have him pass safely behind the minibus. What then explains his evidence that he braked and swerved right but "could not" avoid the accident?

[52] I have considered the claimant's case that there was no vehicle to his right or in his lane. Other than the minibus, he had seen no other vehicle in the immediate vicinity of Hagley Park Road. So, he had clear passage to have passed behind the defendant's vehicle as there was no risk of colliding with any other vehicle. The reasonable explanation for him not being able to avoid the collision, apart from speed, could possibly be some obstacle limiting his manoeuvrability. I will return to this point later.

[53] On his own evidence, I find that the claimant was travelling above the speed limit at the point of impact. The evidence that he was 'thrown' and the motorcycle "flung", is consistent with velocity that caused a forceful impact, which the defendant described as "massive" such that the minibus "jerked out of control".

[54] If he were travelling at a speed of about 45 kph, close to the left curb, and seeing the minibus make a sudden turn across his path some 11 feet away, the claimant should have been able to slow down and manoeuvre safely to the right, away from the minibus without colliding with its left rear. The minibus was not stationary, so swerving right should have taken the claimant on a trajectory out of its path as the two vehicles would have now been travelling in opposite direction, across the roadway.

[55] In light of this evidence, I believe, as the claimant himself said, that the motorcycle collided frontally with the minibus and not sideways as would be implied by a swerve to the right. But I do not agree with counsel for the defendant that this was established by the Loss Adjustor's report and the medical evidence.

The Loss Adjustor found that there was damage to the front section of the motorcycle as a result of the impact but it is not disputed that the motorcycle impacted the minibus as well as the ground after it was “flung”, and there is evidence that the claimant sustained abrasions to the left leg contrary to counsel’s submission that there was no injury to his left side.

- [56]** The defendant’s version bears no resemblance to the claimant’s but I find his evidence more reliable. I believe him that he did not see the motorcycle at all. There is no evidence that he did anything to suggest or indicate that he saw the claimant’s powerful motorcycle coming at him while crossing its path. It is telling that the claimant gave no evidence that the defendant sped up, braked, swerved or anything of the like.
- [57]** The defendant is therefore of no help in relation to the manner in which the claimant had manoeuvred up to the time of collision, because he had not seen him. So, I find that if, as the claimant said, the motorcycle had been travelling close to the left curb, prior to the collision, it is plausible that the defendant might not have seen him either because he was not keeping a proper lookout or his line of sight had been obstructed.
- [58]** On the claimant’s case, what is the likelihood that the defendant would not have seen the claimant who was on a big motorcycle with two headlights, in a well-lit area, coming upon the defendant, with no other vehicles on the road? This does not seem plausible. I think the better explanation and I so find, is that there was a line of traffic, as the defendant said, and this might have blocked his view. It might also explain the evidence that when he began turning he did not see the motorcycle but when he was in the process of doing so, he saw a “flash of light”, heard a rev and then an explosion.
- [59]** I also believe that the claimant was obstructed in his view of the defendant until it was too late and this might have been made worse by a difficulty manoeuvring due to obstructions in both lanes, caused by the stationary vehicles in his lane and the vehicle which was proceeding down Hagley Park Road. In those

circumstances he would not have been in a position to swerve liberally to the right nor to the left, for that matter. This, in my view, could account for what the claimant described as a “head-on” collision with the left rear of the minibus.

[60] It concerns me that the defendant was unaware of the presence of the motorcycle until it was practically in line with his vehicle. He told the Court that his front windows were down. I do not understand how, in keeping a proper lookout, which, in my view includes alert hearing, the claimant did not hear what, by the unchallenged evidence of the claimant, was a “powerful motorcycle”.

[61] In using the roadway and keeping a proper lookout, it is foreseeable that a motorcycle can emerge from between traffic anytime and at some speed. This is a common feature on Jamaican roads. Therefore, the defendant should have been alert to the presence of the motorcycle bearing down on him, even in circumstances where his line of sight might have been blocked.

[62] Clearly, the motorcycle had been in the vicinity prior to the collision. Had the defendant been more alert to the presence of the motorcycle even after he started turning, he might have taken some evasive action, given there was no vehicle to his right and clear passage in front of him. There is no evidence that he did anything on seeing the “flash of light” and hearing the “rev.” It was not enough for him to have thought that the motorcycle would have passed behind him. A little acceleration might have made the difference.

[63] I therefore find, on a balance of probabilities, that the defendant failed in his duty when he proceeded to cross from the major road to the minor road, without keeping a proper lookout and to take action that might have been necessary to avoid an accident.

Contributory Negligence

[64] In **Brandon and Another v Osborne Garrett and Company Limited, and Others** [1924] 1 K.B. 548 at 552 Swift J. said that the applicable principle of law was stated by Lord Ellenborough in **Jones v. Boyce** 1 Star. 493, thus:

“... if a person is placed by the negligence of the defendant in a position in which he acts under a reasonable apprehension of danger and in consequence of so acting is injured, he is entitled to recover damages, unless his conduct in all the circumstances of the case amounts to contributory negligence.”

[65] Although I found that the defendant bears liability for his failure to have kept a proper lookout and to take action that might have avoided the collision, the claimant was substantially to blame. He was travelling at too fast a speed in circumstances where there were obstructions, not only by the defendant but other road users, specifically the line of stationary traffic and where his ability to manoeuvre was also limited by traffic in the adjacent lane. He failed to keep a proper lookout and proceeded past a line of stationary traffic without sufficiently reducing his speed to be able to brake and negotiate the defendant’s minibus. He might have avoided the collision had he been travelling within the speed limit and not undertaking a hazardous manoeuvre in proceeding past traffic which had stopped (*Powell v Moody*), causing himself to be “thrown” and his motorcycle “flung” some distance away from the point of impact.

[66] In *Powell v Moody*, the claimant came upon the tail of a stationary line of traffic while riding his motorcycle along a busy roadway. He proceeded along the offside of the line of traffic, overtaking the stationary vehicles. The defendant’s car emerged from a side road on the near side of the line of traffic to pass through a gap to turn right along the main road. He proceeded to inch his way out and as he did so, the claimant, who had not seen the side road, collided with him. Both parties were held to blame with 80 percent liability to the claimant.

[67] In the case before me, I find the claimant 70% liable for the collision and the damages assessed should be adjusted, accordingly.

General Damages

[68] Dr. Grantel Dundas, Orthopaedic Surgeon, examined the claimant on 28th September 2012 and found multiple healed abrasions and lacerations on right

side of face, above thigh and below eye brow. In the pelvic area there was a palpable gap in the symphysis pubis, mild sacro-iliac tenderness and pain at full flexion and right rotation. The claimant complained of pubic and perineal pain and sensation of pressure in pelvis which were aggravated by sexual intercourse, and limp due to pelvis pain. He was unable to resume work as bus driver until January 2011 and had had no physical therapy. Dr. Dundas found that lumbar pain had been in existence for less than a year. He assessed PPD at 5% whole person.

- [69] I accept counsel's submission that Dr. Dundas' disability assessment of 5% whole person should be preferred to those of Drs. Kenneth Vaughan and Carey Fletcher, who had assessed PPD at 12% and 16%, respectively. I do so primarily because Dr. Dundas was the last of the orthopaedic specialists to have examined the claimant.
- [70] On 10th February 2011, Dr. Arscott recommended corrective surgery estimated at between \$390,000 and \$410,000. He found multiple hypohypigmented and hyperpigmented scars over right forehead, right eyebrow, right upper eye lid, right cheek, right side of neck and right arm.
- [71] Counsel for the claimant relied on the cases of **Mavis Peterson v AG et al** Suit No. C.L. 1992, 117 (Reported in Khan Vol 4, 43), **Eric Buchanan v Elias Blake** S.C.C.A (Reported in Khan Vol 4, 45) and **Marsha Page v Malcolm Campbell** Suit No. C.L./P-006.
- [72] In **Peterson**, the claimant suffered abrasions to both knees, elbows and ankle, swelling of right hip and thigh and posterior fracture dislocation of right hip. She was hospitalized for approximately seven weeks and discharged non-weight bearing on crutches and had follow up visits in the fracture clinic and continuous physiotherapy. PPD was assessed at 5% whole person. The award for pain and suffering was \$500,000.00 at 14th July 1997.

- [73] In **Buchanan**, the plaintiff suffered fracture of right sacro-iliac joint with dislocation, rupture of ligaments, weakening and flexion deformity five degrees, restricted internal rotation by fifteen degrees, 1 cm loss of muscle bulk, PPD of right lower extremity at 12% and a high probability of the development of osteoarthritis in the joint and lower back. The award was \$400,000 at 27th October 1994.
- [74] In **Page**, the plaintiff suffered numerous soft tissue injuries, laceration on right face and neck, limited neck movement due to pain, multiple abrasions and lacerations to upper left limb, 3 x 2 cm laceration over the patella of left knee, pain and tenderness with movement in left ankle and displaced fracture of the neck of the left humerus. She was left with permanent scarring on the back and left shoulder. The award was \$700,000 at 29th June 2004.
- [75] Using these cases as a guide, counsel submitted that an award of \$8,000,000 would be appropriate.
- [76] Counsel for the defendant relied on the cases of **Collette Brown v Dorothy Henry and Anor** Suit No. C.L. 1994 B406 and **Campbell v Dillon** Suit No. C.L. 1999.C 267.
- [77] In **Collette Brown**, the claimant suffered tenderness over pubic bone, minor bruises and laceration of leg, fracture of right and left superior and inferior pubic rami without displacement. She was hospitalized for nine days and discharged with instructions to be on bed rest for eight weeks. She also had physical therapy. She complained of pain in her legs and right side and walked with a limp. She was subsequently diagnosed with lumbar strain and complained of pain with intercourse. PPD was assessed at 5% whole person. The award was \$500,000.00 at 30th June 2000.
- [78] In **Campbell**, the claimant suffered abrasions to face, swelling over forehead, severe bony tenderness involving right hemipelvis, multiple fractures involving right hemipelvis, fracture of the rami of the ischium, fracture of pubic bone

without significant displacement and fracture of the acetabulum. She was hospitalized for just over a month in painful distress and discharged on crutches. There was full recovery in four months except for complaint of pain occasionally in right hip and at extremes of hip movement. She was thought to be prone to long term complication such as osteoarthritis. A further diagnosis was made of shortening of the right limb causing a limp, subluxation of the right sacro iliac joint with upward shift of the hemipelvis, dislocation of the pelvis ring (which might affect normal delivery at child birth) and pain over right side on walking. PPD was assessed at 10% whole person. The award was \$1,300,000 for pain and suffering and loss of amenities at 5th June 2000.

[79] Counsel submitted that \$3,500,000 would be an appropriate award.

[80] In assessing the damages that should be awarded to the claimant for pain and suffering and loss of amenities, I consider the case of **Collette Brown** to be most helpful. In both cases the claimants walked with a limp as a consequence of pain, they suffered injury in the public area and complained of pain with sexual intercourse. PPD was assessed at 5% whole person in both cases and there were abrasions and lacerations, only that in the instant case the claimant suffered more, inclusive of a scrotal degloving injury. The major difference between the cases was that Collette Brown suffered fractures of right and left superior and inferior pubic rami while the claimant in the instant case suffered a 4 cm gap in the symphysis pubis. There is no medical evidence as to which of these two injuries was more serious but I note that for Collette Brown the period of hospitalization and recovery was shorter.

[81] I have also considered that the claimant was not wearing a helmet, the purpose of which would be to protect the head and face and thereby possibly prevent injuries or reduce their gravity. I will therefore discount the award for pain and suffering and loss of amenities by 10%.

[82] The **Collette Brown** award of \$500,000 updated with CPI of 54.5 at June 2000 and 228.4 at April 2016, amounts to approximately \$2.1M. I am of the view that

an award of \$3.5 M is appropriate for pain and suffering and loss of amenities. When reduced by 10% the award is \$3.15 M.

Future Medical Expenses

[83] Dr. Arscott's report recommended reconstructive surgery in relation to the cheek, neck, over right eye and arm. He did not distinguish the costs as between the facial reconstruction and that of the arm. In the circumstances, I will treat them as 50/50 and having regard to the failure to wear a helmet, I award \$200,000.00.

Special Damages

[84] The parties agreed \$602,366.09 and I make that award.

[85] In relation to transportation, counsel for the defendant submitted that the sums were not proved and no award should be made. It is true that the claimant did not present any receipts for those costs. However, he gave evidence of visits to the University Hospital Clinic in relation to the injuries he sustained. There was also evidence of visits to other medical offices. It is expected that he would have incurred expenses for transportation. The Court finds that the sum of \$20,000 would not be unreasonable and I make that award.

[86] I make no award for employment of a nurse and household help because there was no proof in relation to those services.

Loss of Earnings

[87] The evidence is that the claimant was a businessman who bought farm produce in St. Elizabeth and Manchester which he sold at the Coronation Market and at a stall in Seaview Gardens. In the Witness Statement he said that his profit would have been approximately \$77,820 per week but under cross examination said it was between \$130,000 and \$145,000.

[88] His weekly expenses were stated as \$57,000, in his Witness Statement. Under cross examination, he said he employed three persons and paid them

approximately \$35,000 per week, including his mother whom he paid between \$12,000 and \$15,000 per week; bought petrol for some \$27,000 weekly; paid between \$1000 and \$2000 weekly for insurance (\$55,000 to \$100,000 per year); incurred expenses of \$24,000 weekly for spoilage; and spent \$70,000 to \$80,000 per trip to purchase produce, twice per week. He could not recall the expenses to maintain his vehicle, market fees or his contribution to household bills.

[89] Contrary to his evidence, Miss Joy Thompson, the claimant's mother, told the Court that he paid her \$4,500 per week.

[90] I found the claimant's evidence as to income, unreliable. I appreciate that as a small businessman he might not have kept records but I would certainly expect him to be consistent and knowledgeable about his business. I find the stark discrepancy between what he said he paid his mother and her evidence of what she was paid, concerning.

[91] Notwithstanding the deficiency and unreliability of the evidence, I believe he worked. I believe his witness, David Ireland, that it is he who had introduced the claimant to the business and knew that up to 2009 he was still engaged in it.

[92] Based on my calculations, the claimant would have been operating at a deficit but having regard to his seeming exaggerations and misstatements, this might not be so. However, I am constrained to make a conservative award.

[93] In determining the period over which I will make the award, consideration will be given to the nature of the injuries and the medical evidence in relation to the likely effect on his health and ability to work. In October 2010, Dr. Fletcher found that the pain did not limit the claimant's ability to drive. I consider that this is what he did mainly in the business.

[94] The claimant's mother testified that after the accident she had continued the business for about 8 months, on a smaller scale, but did not say what the earnings were. The claimant also gave evidence that he did some periodic work for his cousin, selling cars and picking up children. There is no evidence when

this began but as he had started ambulating four months after the accident, it is reasonable to assume that he did not begin any work until then.

[95] Taking all the circumstances into consideration, I make an award of \$8,000 per week for 16 weeks.

Orders

[96] Accordingly, I make the following orders:

- i. General Damages in the sum of \$3,350,000 with interest on the sum of \$3,150,000 at a rate of 3% per annum from the date of service of the claim (18th January, 2012) to the date of judgment.
- ii. Special Damages in the sum of \$750,366.99 with interest at a rate of 3% per annum from the date of collision (19th March, 2010) to the date of judgment.
- iii. Costs to the claimant to be taxed, if not agreed.
- iv. Liability for i – iii herein apportioned as follows: claimant, 70%; defendant, 30%.