[2015] JMSC Civ 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV04896

BETWEEN	**NATHAN WATSON**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

Miss Christine Mae Hudson instructed by K. Churchill Neita & Co. for the claimant

Mrs. Gail N. Mitchell instructed by the Director of State Proceedings for the defendant

Heard: 21st February, 2014 and 30th January 2015

Negligence – Collision at intersection controlled by traffic signals – Whether defendant liable – Assessment of cost of caregiver – National Minimum Wage used as a guide to estimate cost of care to accident victim – Minimum Wage Act S.3 – Interpretation Act S.21

IN OPEN COURT

E. BROWN, J

Introduction

[1] On a sunny mid Wednesday morning in October, 2007, synchronicity brought Nathan Watson and Curtis Bennett, aka Bigga, together in downtown Kingston. Mr. Watson was driving his motorcycle along East Street in a southerly direction while Mr. Bennett was driving a white Toyota Hilux van, owned by the Ministry of Health, easterly along North Street. Each street is a dual carriage way and accommodates traffic in one

direction. Both streets intersect in the vicinity of the Gleaner Company Limited, which is located at the corner of East and North Streets. The flow of traffic through the intersection is controlled by traffic signals.

[2] Each gentleman said he entered the intersection when the traffic light facing him was showing green. Neither saw the other entering the intersection until it was too late as it was a third party who alerted each to the presence of the other. In the case of Mr. Watson it was the scream of a female bystander, while the passenger seated at the left front of the van called Mr. Bennett's attention to the impending danger. Alas, the danger was not averted. How then, did they come to the point of collision?

Case for the Claimant

[3] Mr. Watson said he was driving his motorcycle on the left hand side of East Street at an approximate speed of 11 MPH, behind two or three motor vehicles. There were also vehicles to his right, about one car length ahead of him. Reaching about 5-6 feet away from the intersection he observed a lady and two children standing on the curb wall. Assuming they intended to cross the road he slowed down, signalling at the same time to the vehicles behind to slow down. Realising that he was wrong in his assumption concerning the three pedestrians he proceeded to enter the intersection, after having slowed down for about 10 seconds.

[4] Reaching about the middle of the intersection he heard a lady screaming. That's when he saw the van travelling at a fast rate of speed coming towards him along North Street. Mr. Watson applied his brakes and swerved to his left but that did not prevent his motorcycle from coming into contact with the crash bar at the front of the van. He was thrown from the motorcycle, falling some distance from it. Whilst he was on the ground Mr. Curtis Bennett said to him, "Jah know youte, mi neva se yuh inno." Mr Watson's motorcycle sustained damage to the entire right side. That is, to the gas tank, front shocks, foot stand and handle.

[5] Under cross examination Mr. Watson said he looked at the lady when she screamed. At that time, by virtue of his position in the intersection he could not see the traffic signal. To do so he would have had to look up, being then under the light. He

denied that he was approaching the intersection at the time the lady screamed. He disagreed with the suggestion that he was distracted by the lady's scream. Mr Watson also disagreed that he was the one that hit the left side of the van. Upon the arrival of the police he was taken to the Kingston Public Hospital (KPH) where he was admitted for a week.

Case for the defendant

[6] Mr. Curtis Bennett was not called as a witness. His witness statement was admitted into evidence as hearsay. Among his duties as a driver employed to the Ministry of Health was the transport of medical supplies from the KPH to various health centres. On this day, having collected the medical supplies from the KPH, which is located at the eastern end of North Street, he was proceeding along North Street towards the Windward Road Health Centre. Seated in the front also was Mr. Milton Francis, a male orderly and handyman attached to the Windward Road Health Centre.

[7] There were no vehicles ahead of him. Approaching the intersection, he got the green light and proceeded to enter the intersection. Reaching the middle of the intersection Mr. Francis said to him, 'Bigga, Bigga'. Mr. Bennett then saw a motorcyclist suddenly crash into the side of the van. He immediately applied the brakes. After exiting the van Mr. Bennett noticed damage to the left front of the van, namely the fender, headlight and indicator.

[8] Mr. Milton Francis supported the account of Mr. Bennett that the traffic light was on green as Mr. Bennett drove into the intersection. As they proceeded Mr. Francis noticed the motorcyclist speeding towards the intersection and so he called out to Mr. Bennett. Under cross-examination he however denied that he said the words Mr. Bennett attributed to him. The motorcyclist crashed into the left side of the van, the very side on which Mr. Francis was seated. According to Mr. Francis it was at the time of the collision that Mr. Bennett applied the brakes.

[9] Mr. Francis said Mr. Bennett wasn't really driving fast. There was no traffic along North Street. However, there were a couple of cars coming down East Street with the motorcycle. That notwithstanding, Mr. Francis maintained that Mr. Bennett lawfully

entered the intersection. However, Mr. Francis neither saw a lady nor heard one screamed. He observed Mr. Bennett and Mr. Watson speaking at the scene but wasn't asked if he could have heard what was being said. Mr. Bennett didn't say that he spoke to Mr. Watson at the scene, although he mentioned visiting him at the KPH and speaking with him there.

[10] Also called on behalf of the defence was Mr. Norman Grindley, the Gleaner Company's chief photographer. Happenstance brought him onto the crash site as he was on his way to work in the wake of the accident. He couldn't say how long after the accident he went to the scene. Consequently, he could not say that the photographs represented the respective positions of the vehicles after the accident. Nevertheless, he seized the photo opportunity and photographed the accident scene. Of the three photographs only one is of some relevance that is, exhibit 10. Exhibit 10 shows the motorcycle on its right side in the middle of the intersection.

Issue for determination

[11] The question is which of the two drivers had the lawful authority to enter the intersection at the material time? In other words, the sole question of fact to be resolved is who drove into the intersection in disobedience of the traffic signal? The answer to that question is dispositive of the issue of liability. However, the answer to the predicate question depends on a consideration of the credibility of the witnesses.

Analysis and findings on liability

[12] The sole point of convergence of the case for the claimant and the case for the defendant appears in the evidence of Mr. Francis. Mr. Francis agreed with Mr. Watson that at the time there were other vehicles proceeding along East Street together with the motorcycle. I accept that as a fact. In accepting the fact of other vehicles proceeding along East Street, I am aware that that is as far as the direct confirmation of Mr. Watson's evidence goes. Mr. Francis was not asked where these other vehicles were, whether they occupied both lanes as Mr. Watson said, or their respective positions viz-a-viz the claimant's motorcycle.

[13] In spite of that deficiency, the admission of other vehicles on East Street admits of other findings, inferentially. Firstly, I infer that there were no vehicles in the right lane along East Street at the time of the collision. East Street being a dual carriage way going south, the right lane would be east of the dividing line, making it the closer of the two lanes to North Street. According to Mr. Francis, Mr. Bennett had almost completed traversing the intersection at the material time. That places the accident more in the left lane of East Street. In any event, Mr. Bennett would have traversed the right lane at the time of the collision. Is this inconsistent with Mr. Watson's evidence that there were vehicles in the right lane about one car length ahead of him?

[14] The short answer to that question is no. Accepting as I do that Mr. Watson was 5-6 feet away from the intersection, and that a car length is within the ballpark of that measurement, it is conceivable that the vehicles in the right lane had proceeded through the intersection at about the time Mr. Watson slowed down. This is fortified by Mr. Watson's evidence that his signal to slow down was to the vehicles behind. His silence on any action taken by vehicles in the right lane is significant when it is borne in mind that if the pedestrians were to have been assisted it would have been from the left to the right of the road. Significantly, no one spoke of vehicles in the right lane being impeded at the time of the accident which was inevitable if they had not already crossed the intersection.

[15] So, there were vehicles proceeding along East Street at the time of the accident some of which had already gone through the intersection. None was stationary, as I would have expected them to be, in obedience to the red signal, if in fact red faced them as the defence is asking me to say. Were they en mass acting in disobedience of the red signal? Neither the evidence nor the demeanour of the witnesses impels me to that conclusion.

[16] Indeed, the simple but forthright manner of Mr. Watson in the witness box ringed his evidence with the halo of truth. On the other hand, I never had the opportunity to assess Mr. Bennett and on the totality of the evidence I am constrained to give his hearsay evidence minimal weight. Mr Francis who testified in support of Mr. Bennett's

version was impaled by his own sword. His insistence that the green signal faced Mr. Bennett stands an irresolvable contradiction with his evidence of moving vehicular traffic along East Street at the material time.

[17] I am therefore in full agreement with counsel for the claimant that within the crust of this contradiction, one which is pivotal in my judgment, lies the kernel of truth which supports the case for the claimant. In the same vein, with the requisite deference to learned counsel for the defendant, I disagree with her conjecture as to how the accident occurred. In that submission, counsel opined that in the time Mr. Watson slowed down to facilitate the apprehended crossing of the street, the signal changed from green through amber then red and Mr. Watson tried to "beat it". That is an analysis which proceeded without any attempt to address the stark contradiction in the evidence of Mr. Francis.

[18] I therefore find that the green traffic signal was displayed to traffic along East Street when Mr. Watson entered the intersection. Having so found, I infer that the traffic light on North Street facing Mr. Bennett was showing red: ***Wells v Woodward*** (1956), 54 L.G.R. 142 (DC). Adopting and adapting the reasoning in ***Joseph Eva Ltd v. Reeves*** [1938] 2 K.B. 393, Mr. Watson was entitled to assume that no traffic would be entering the intersection from North Street since he had the green signal, and he had it for several seconds. The signal had not just turned green, which would have required him to anticipate the presence of other vehicles which may have entered the intersection just before the signals changed.

[19] Even if the green signal is no more than a "qualified permission, i.e. a permission to proceed lawfully and carefully in the direction indicated" per Maxey J in ***Galliand v East Penn Elec. Co.*** (1933, 303 Pa. 499), Mr. Watson was not at fault. On my analysis, vehicles ahead of Mr Watson in the right lane had crossed the intersection before the accident. That gives further pith and substance to the assumption that vehicles travelling westerly along North Street would not have entered the intersection unlawfully. Although it took the lady's scream to alert Mr. Watson to the presence of the van being driven by Mr. Bennett, that he had time to observe the van's government

licence plate and attempt evasive action is demonstrative both of his reflexive capacity as well as his care in proceeding through the intersection.

[20] Mr .Watson's actions are in contradistinction to those of Mr. Bennett. Accepting for the purpose of argument that Mr. Bennett, as he said, got the green light as he proceeded along North Street, he continued without a care for other users of the road. Having got the green while going towards the intersection, Mr. Bennett was under a duty to keep a proper lookout for vehicles entering the intersection on the amber from East Street. The subsequent events show that he did anything but that. This is amply demonstrated by the fact of braking only after the collision. So Mr. Bennett neither saw Mr. Watson before the accident nor attempted any evasive action. However, as was earlier indicated, I reject his account, and find on a balance of probabilities that Mr. Bennett disobeyed the traffic signal and caused the accident. Further, I find that Mr. Bennett was the sole cause of the collision.

Assessment of Damages

(i) **General Damages**

[21] When Mr Watson was discharged from the KPH he was unable to walk without the aid of crutches. He used the crutches up to June, 2008. At this time his right leg was weak and numb. He experienced 'sharp shocking pain' between the knee and the ankle. He suffered especially at nights when it became cold. He was for the most part bedridden and had to keep his leg elevated. If he did otherwise, the leg would hurt a lot and become swollen. He exercised the leg and the passing months brought improvement in its strength. That resulted in him taking more steps. However, he continued to experience numbness and weakness in the left foot.

[22] Upon resumption at his place of employment, Mr. Watson was assigned data entry duties. This was as a result of his continued suffering from the effects of the accident. At work he had to keep his right leg elevated in an effort to reduce the swelling and pain. The pain also caused him to make use of his employer's sick bay. His participation in the sport of football came to a halt as he can no longer run. This was a

game he really enjoyed and participated in the Crossroads Business-house Six-a-Side Competition. He played in the midfield and forward positions.

[23] The claimant sustained a 3cm laceration to his scalp at the crown of his head, a small wound to the anterior aspect of his lower right leg which was deformed, swollen and tender. He was diagnosed with an open fracture of the right tibia and fibula. At the KPH, he was given analgesia and prophylactic antibiotics. His leg was placed in calcaneal traction and he underwent surgery on the 30th October, 2007. The surgery facilitated the fixation of the right leg with an intramedullary interlocking nail. Post surgery he went through one session of physiotherapy. Mr. Watson remained a patient in the KPH for a week and upon his discharge continued as an outpatient at the Orthopaedic Out-patient Department until about March, 2008. The claimant received physiotherapy and ambulated on crutches up to June, 2008.

[24] Mr. Watson was evaluated by Dr. Melton Douglas, Consultant Orthopaedic Surgeon on the 19th September, 2008 at the Apex Medical Centre. Mr. Watson complained of pain on the inner aspect of the right leg just below the knee and just above the ankle. Further, he complained of pain in the knee when he kneels and bends the knee joint. As a result, he cannot ride comfortably with the knee bent. Mr. Watson also complained of pain in the right leg when the environmental conditions are cold. He also presented with a limp. His additional complaint was that of being able to stand comfortably for one hour and walk for 15 minutes before the onset of pain. Lastly, he complained of an inability to run and enjoy exercising and sport.

[25] Upon being physical examined, Dr. Melton Douglas found that Mr. Watson walked with a limp. His right leg was slightly swollen in comparison to the left leg. There was a varus deformity of the right leg measuring 10 degrees. The right lower extremity was short by 1.5 cm. The girth of the thighs 20 cm above the tibial tubercle was 48 cm for the right leg and 50 cm for the left. The right knee extended to its full and flexed to 125 degrees, 10 degrees less than the left. The ankle joint could only dorsiflex to neutral position and plantar flexed to 35 degrees. There was an area of skin below the scar of

the medial leg extending to the ankle that had reduced sensation to touch. The saphenous nerve that supplies this area of sensation is injured.

[26] Dr. Melton Douglas' investigation confirmed healed fractures of the right tibia and fibula. The tibia had a segmental fracture that divided into three equal portions. The fractures were healed solid. The fracture of the fibula was a single midshaft fracture that was also healed. Dr. Douglas therefore diagnosed Mr. Watson with a healed open segmental fracture of the right tibia and fibula along with saphenous nerve injury.

[27] A number of residual and permanent problems arise from the fracture. These are the residual limb length discrepancy of 1.5 cm, 10 degrees varus deformity of the tibia, loss of ankle dorsiflection and the injury to the saphenous nerve. The saphenous nerve injury is not associated with any functional deficit. He will, however, experience numbness in the inner aspect of the leg. The shortening of the limb is insignificant in so far as long term complications are concerned. The provision of a shoe raise of the deficit will bring Mr. Watson level and allow him to walk without a short leg gait.

[28] The varus deformity of 10 degrees is outside of the accepted 6 degrees and will put the knee under increased strain, putting him at increased risk of accelerated joint wear and the development of arthritis in the knee joint. This may materialize before the next 20 years. While the severity of the arthritis is difficult to accurately predict, it is more likely to be moderate. If it is mild, it will require activity modification and if it is severe, surgical intervention. The symptoms of pain and intolerance to cold conditions could be relieved by removal of the implant from the leg. This would allow Mr. Watson to return to his regular job as a courier.

[29] Dr. Douglas concluded that Mr. Watson has reached maximum medical improvement. Mr. Watson is left with a combined permanent impairment of 20%. He was rated at 19% from the fractured tibia and 1% from the saphenous nerve injury. The Consultant Orthopaedic Surgeon concluded his report with a breakdown of the cost to remove the intramedullary nail implants from the right tibia. When that is done, Mr. Watson will be totally temporarily disabled for 2 weeks and partially disabled for a further 4 weeks.

Claimant's submission on General Damages

[30] Under the head of general damages, counsel for the claimant cited three cases which she submitted could be used as a guide in arriving at the award in the instant case. The first of this trilogy is ***Barrington McKenzie v Christopher Fletcher & Joseph Taylor*** CL #1996 M075 reported at 5 Khan 72. The claimant was a young man who was run down whilst standing at a bus stop on the 6th May, 1995. The resulting injuries were pain, swelling and tenderness of the right leg, comminuted fracture of the middle third of the tibia and a transverse fracture of the middle right fibula.

[31] His treatment included the application of an above knee plaster of paris splint on the 8th May, 1995. He was advised to use crutches and avoid weight bear for 3 weeks. Upon its removal on the 5th June, 1995, the leg was placed in samiento plaster for a further 6 weeks. The continued use of crutches was advised. No impairment was expected to result from his injuries. He was awarded $420,000.00 for general damages. Using the January, 2014 Consumer Price Index (CPI) of 211.8, that awards updates to $1,915,916.44.

[32] ***Maureen Golding v Conroy Miller and Duane Parson*** 2005 HCV 00478 reported at 6 Khan 62 was the next case cited. The pedestrian claimant was injured by a dislodged motor vehicle wheel on the 24th November, 2003. This resulted in her sustaining an undisplaced fracture of the left fibula at the ankle, with pain in the left leg. At the KPH a plaster cast was applied and she was made non-weight bearing. Following attendance at the KPH's outpatient clinic, the cast was removed on 13th January, 2004.

[33] She continued to experience pain in the left leg and was treated with analgesics and an ankle support. Partial weight was commenced with a reference to physiotherapy. By 22nd June, 2004 she was fully ambulant with no significant complaints. She was therefore discharged from clinic. She was temporarily incapacitated for six months. No permanent disability was expected. The claimant was awarded $580,000.00 for general damages. That award updates to $1,242,103.40, using the January, 2014 CPI.

[34] The last case cited on behalf of the claimant was ***Huclen Carter v Paulette Barnett-Edwards and Clifton Edwards*** CL. 2002/C-130, unreported delivered 19th

July, 2006. The claimant was involved in a motor vehicle accident on the 30th August, 2000. He suffered a fracture of the lower pole of the patella. The lower pole was also comminuted. He was admitted to the St. Ann's Bay Hospital for a period of 8 days.

[35] In hospital, the claimant was placed on bed rest with elevation of the affected limb. Analgesics and antibiotics were also administered. Surgery was performed, during which the lower patella was excised. The patella tendon was re-implanted into the remaining patella fragment. A circlage wire was also inserted to secure the fixation. Post surgery, the claimant was given antibiotics and analgesics. He also received physiotherapy and his knee was placed in a hinged knee brace.

[36] Upon his discharge from hospital the claimant wore non-weight bearing crutches and was made an outpatient. The clamant was seen three times at the outpatient department. He was gradually weaned from non-weight bearing to partial weight bearing. On his last visit he complained of pain in the knee. The range of movement of the knee was from 0 degree to 110 degrees of fixation. When last seen he was fully rehabilitated. However, he may require further surgery to remove the circlage wires used as a fixator. Additionally, he may develop post traumatic osteoarthritis of the knee joint (patella femoral joint). For general damages he was awarded $1,000,000.00, which updates to $2,131,445.90, applying the CPI used above.

Defendant's submission on General Damages

[37] The defendant submitted that liability should be apportioned 70:30 against the claimant. The defendant relied on two cases, the first of which was ***Michael Hughes v Hazel Jarrett and Victor Jarrett*** C.L. 1987 H 077 reported at 5 Khan 66. The claimant was struck from behind by the motor vehicle as he was walking. He suffered a closed fracture of the distal ½ of the right femur, a compound fracture of the right tibia and fibula and a wound to the back of his head.

[38] He was admitted to the KPH for three months. There the femur was treated by skeletal traction and the tibia and fibula manipulated and plaster cast applied. The fractures to the tibia and fibula showed evidence of delayed healing and open reduction plating and bone graft were performed. Upon his discharge on the 29th November, 1986

he walked with the aid of crutches, with the right leg in a plaster of paris cast. He made several visits to the outpatient clinic and the cast was removed on the 9th February, 1987. However, an infected wound persisted at that time. On the 26th October, 1987 a plate and screws which had been fitted were removed.

[39] Dr. Golding examined the claimant on the 27th February, 1991. His disability was assessed at 25% of the function of the right lower extremity. That took into account the shortening of the femur and tibia, combined with external femoral torsion and stiffening of the subtalar joint and ankle. For pain and suffering and loss of amenities the claimant was awarded $300,000.00. Using the March, 2014 CPI of 214.2, that award updates to $1,480,065.41.

[40] The other case relied on was ***Barrington McKenzie v Christopher Fletcher and Joseph Taylor***, *supra*, also cited by the claimant. The award was updated by the defendant using the March, 2014 CPI. So, as at March, 2014, this award was re-valued at $1,937,459.62. However, as is palpable, there is only a marginal difference between the two sets of figures. The explanation for the different CPI usage lies in the filing of the submissions for the defendant on 4th June, 2014. The submissions for the claimant were filed on the 10th March, 2014, at which time the later CPI would not have been available.

Award for General Damages

[41] The bedrock principle by which I am to be guided is *restitutio in integrum*. That is, so far as money can do it the claimant must be restored to the position he would have been in if the tort had not been committed. The compensation contemplated in the area of personal injury is best encapsulated in the judgment of Lord Reid in ***H. West & Son Ltd. And Another v Shephard*** [1964] A.C. 326,341:

> *"Unless I am prevented by authority I would think that the ordinary man is, after the first few months, far less concerned about his physical injury than about the dislocation of his normal life. So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life."*

What the claimant is being compensated for is "the extent to which the injury will prevent [him] from living a full and normal life and for what [he] will suffer from being unable to do so," per Lord Reid, *ibid*.

[42] The dictum of Lord Reid was applied by the local Court of Appeal in ***Beverley Dryden v Winston Layne*** SCCA 44/87 delivered 12th June, 1989. So, in arriving at a just award, I should take into consideration the fact of the physical injury and the consequential difficulties it poses, weighting the latter over the former. Furthermore, in seeking to discover the judicial consensus of awards, as far as possible, I am to compare like injuries and arrive at an award that is not inflated. As Campbell J.A. said in ***Beverley Dryden v Winston Layne***, *supra*:

> *"personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards."*

[43] In seeking to compare personal injury cases, the pitfall of attempting to standardise damages must be scrupulously avoided. The decided cases are a mere guide to avoid making "a wholly erroneous estimate of the damage suffered" or awarding either an inordinately low or inordinately high sum. In fine, the damages awarded should be moderate and just. Birkett L.J. summed up the position with admirable clarity in ***Bird v Cocking & Sons, Ltd***. [1951] 2 T.L.R. 1263:

> *"The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a judge has to perform ... The task is so difficult because the elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and unalterable standard, the courts have been making these assessments over many years, and I think they do form some guide to the kind of figure which is appropriate to the facts of any particular case, it being for the judge, ... to consider the special facts in each case; ... one case cannot really be compared with another. The only thing that can be done is to show how other cases may be a guide, and when, therefore, a particular matter comes for review one of the questions is, how does this accord with the general run of assessments made over the years in comparable cases?"*

This comparative approach is in essence a gathering, or more precisely an unveiling, of the general consensus of opinion as to what the claimant in contemporary society should be awarded: ***Rushton v National Coal Board*** [1953] 1 All ER 314,317.

[44] As I have previously indicated, the defendant's driver was fully responsible for the accident giving rise to the claimant's injuries. It is therefore obvious that the defendant's submission of an apportionment of damages on the basis of a 70:30 assessment of liability must be rejected. What then, should be the award to the claimant in the instant case? From a consideration of the cases submitted by both sides it appears that the range of awards is from a low of $1.2m to a high of $2.1m.

[45] Counsel for the claimant contends that the award in this case should be outside of this range. While the claimant in the case at bar has not been left with any greater disability than the claimant in ***Hughes v Jarrett et al***, supra, that case is distinguishable from the case at bar. The claimant drummer in that case complained of an inability to play the drum post accident. He therefore gave up that occupation and became a watchman. That lasted for a year. Thereafter, the claimant said he could not work. However, the trial Judge found that the claimant exaggerated his inability to pursue gainful employment.

[46] An exaggeration proceeds from the admission of the fact of loss of amenities, but parts ways with the report of its extent. I therefore accept that the claimant in ***Hughes v Jarrett et al***, *supra*, suffered some loss of amenities. In the case at bar, the claimant's loss of amenities stand without challenge. Additionally, the claimant in the instant case will require another surgery, together with the looming possibility of developing moderate to severe arthritis in little over a decade from the date of trial. It is approaching seven years since that prognosis. Importantly, close to a year after the accident, the claimant's complaint of continued pain was medically confirmed. That complaint persisted when he gave the witness statement which was filed on the 8th June, 2012.

[47] In the same vein, it may be said that the instant case may be distinguished from ***McKenzie v Fletcher et al***, *supra* and ***Golding v Miller et al***, *supra*. Indeed, I am in

agreement with the submission of learned counsel for the claimant that the case which is most helpful is ***Carter v Barrett***, *supra*. The latter case and the one at bar may be distinguished in a number of significant respects. First, the claimant in this case will continue to experience numbness in the area of the damaged nerve. Secondly, for the shortening, of his injured leg, this claimant will require a heel raise. Thirdly, whereas there is no reported loss of amenities in the ***Carter v Barrett***, *supra*, the claimant in the instant case has so suffered. Consequently, I incline to the view that this claimant is deserving of an award outside the range identified. Therefore, for pain and suffering and loss of amenities I make an award of $2.7m.

(ii) **Special Damages**

[48] The defendant agreed special damages amounting to $140,700.00. In addition to the agreed items, Mr. Watson said although he did not employ a helper during his period of incapacitation, he received assistance from his spouse and other family members. He claimed the sum of $40,000.00 for this service. It appears in the Amended Particulars of Claim for 20 weeks at $2,000.00 per week. Even though his witness statement says he received the assistance for four months (16 weeks), the sum claimed in both places is identical. This item is unsupported by any documentary proof.

[49] There appears to be an omnibus challenge to any item of special damages which is not properly receipted. The defendant's pithy submission is that if any award is to be made under this head, they place reliance on the receipts attached to the Amended Particulars of Claim in accordance with ***Lawford Murphy v Luther Mills*** (1976) 14 JLR 119 (***Murphy v Mills***). The well known principle, encapsulated in the headnote was quoted:

> *"In any action in which a plaintiff seeks to recover special damage the onus is on him to prove his loss strictly. It is not enough for a plaintiff "to write down particulars, and, so to speak throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it."*

[50] Learned counsel for the claimant based the claim on ***Donnelly v Joyce*** [1973] 3 All ER 475, a decision of the English Court of Appeal. In that case the mother of a six

year old child gave up her part-time job to care for him as a result of the injuries he sustained in the accident for which the defendant was liable. The child claimant sought to recover the loss of wages incurred by the mother. The contention was that the loss was the mother's and not the claimant. It was also contended that the claimant was not under any contractual or moral obligation to pay his mother for the services provided.

[51] The court held:

> *"In an action for damages for personal injuries incurred in an accident, a plaintiff was entitled to claim damages in respect of services provided by a third party which were reasonably required by the plaintiff because of his physical needs directly attributable to the accident; the question whether the plaintiff was under a moral or contractual obligation to pay the third party for the services provided was irrelevant; the plaintiff's loss was the need for those services, the value of which, for the purpose of ascertaining his loss, was the proper and reasonable cost of supplying the plaintiff's needs."*

[52] There appears to be melodious harmony between ***Donnelly v Joyce***, *supra* and ***Murphy v Mills***, *supra*. ***Donnelly v Joyce*** approached the question of the defendant's liability to pay from the perspective of causation. In other words, if the physical incapacitation rendering the claimant in need of the help from the third party is refereable to the accident, then the defendant is liable to pay. However, the value of that service must be quantified. Their Lordships were of the view that the quantification should be hinged to the proper and reasonable cost of supplying that service. ***Murphy v Mills*** would then dictate that the proper and reasonable cost of supplying the service must be strictly proved.

[53] That having been said, as I observed in ***Stone-Myrie v Gordon Williams*** [2014] JMSC Civ. 133, the apparent harsh effect of ***Murphy v Mills*** has been softened by ***Omar Young & Michael Meade v June Black*** SCCA #106/2001 delivered on December 19, 2003 (***Meade v Black***). The court in the ***Meade v Black*** recognized that the circumstances from which some items of special damages arise are not susceptible to the strict proof required by ***Murphy v Mills***. Even so, the question remains, how is the proper and reasonable cost of supplying the service to be ascertained?

[54] Surely, there must be some guide for otherwise it is left to that temperamental animal, judicial discretion. Since we are in the area of caregiving, should evidence be elicited to show the wages payable to such persons? In the absence of that kind of evidence, should the National Minimum Wage be used as a guide? And if the National Minimum Wage is used as a guide, does the claimant have an evidential burden to lay the current order under the **Minimum Wage Act** (**MWA**) before the court? If the National Minimum Wage is being relied on, should it be a part of the Statement of Case?

[55] In the absence of an available data showing what untrained, informal caregivers are paid, in my opinion the National Minimum Wage could be a useful guide. The sum claimed could then be juxtaposed and assessed accordingly for its reasonableness. If that is acceptable, the claimant would have a responsibility to place before the court the current Order under the **MWA**. As Carey, J.A. opined, "I can see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate rate." (***British Caribbean Insurance Co. Ltd. V Perrier*** (1996), 33 J.L.R. 119,127). Although Carey, J.A. was there concerned with information gleaned from a statistical digest published by the Bank of Jamaica, his comment is entirely *apropos* the point being made.

[56] In the case at bar the claimant did not put any documentary material before me to enable me to assess the value of the service he received, outside of that which is implicit in the claim itself. However, no issue was joined with the allegation of incapacitation upon release from the KPH. Since it is accepted that the claimant suffered the loss, the justice of the case demands that he be compensated. How can this be accomplished?

[57] Although the claimant did not place the order under the **MWA** before me I am of the view that that it should be my lodestar. The simple reason for that is it is the law of the land. That is so notwithstanding its existence in an order (regulation) which cannot be judicially noticed: **Interpretation Act** section 21. Under section 3 of the **MWA** the Minister may, by order published in the Gazette, fix minimum wage rates for any occupation and a national minimum wage applicable to all occupations generally. The

Minister's order is subject to affirmative resolution of the House of Representatives under section 3(5) of the **MWA**, and is periodically reviewed. The National Minimum Wage Order, 1975 was last amended in 2014. The order was published in the Jamaica Gazette Supplement dated 17th December, 2013 and came into operation on the 6th January, 2014. That order proclaimed the new rate for household helpers to be $5,600.00 for a normal 40 hour working week and $210.00 per hour for work done during any period in excess of those 40 hours.

[58] I have used the figures for a household helper, as this is the occupation which is comparable to the caregiver. Under the National Minimum Wage Order, 1975, household helper means, "a worker employed to work in a private place of residence." The claim of $2000.00 per week is less than half the national minimum wage payable to a household helper. When the claim is placed in the same scale as the household helper, it instantly becomes pellucid that it is both a proper and reasonable cost of supplying the services rendered to the claimant.

[59] Its reasonableness is manifest also in the period for which it is claimed. The period of the claim terminates in the month before the claimant resumed working. The importance of that lies in the fact that even after his resumption of work the claimant's leg required elevation and occasioned trips to the sick bay. This demonstrates that he had not fully regained the physical independence which makes an individual self reliant in so far as domestic activities are concerned.

[60] So then, the claim of $40,000.00 for extra help, as it is characterised in the Amended Particulars of Claim, is a small sum for a nominal period and arose in the most informal of circumstances. That it is a recoverable loss is made plain by ***Donnelly v Joyce***, *supra*. Having regard to the informal circumstances in which it arose, ***Meade v Black***, *supra* is authority for saying the claimant need not have provided any documentary support as the letter of ***Murphy v Mills***, *supra* would otherwise dictate.

[61] I am altogether uncertain if the defendant's omnibus objection to items of special damages, not supported by receipts, attaches to costs the of future medical care. While the cost is itemised, it is not invoiced. If the objection travels this distance, my short

response is the cost has been supplied by the Consultant Orthopaedic Surgeon, who was himself the attending physician at the KPH. Therefore, no higher authority is needed to verify or otherwise authenticate this item of special damages. Accordingly, it is allowed without further proof.

[62] In the surgeon's opinion, when the claimant undergoes the surgery, he will be totally temporarily disabled for 2 weeks and partially disabled for another 4 weeks. The claim for extra help here is for 6 weeks at $3000.00 per week, that is, $12,000.00. I would allow for 4 weeks at the rate requested, in accordance with the discussion on the point above. I accept that some transportation cost will be thereby incurred. The modest sum of $10,000.00 claimed is therefore allowed.

Conclusion

[63] Having found the defendant's driver to be solely responsible for the accident giving rise to the injuries the claimant sustained, the defendant bears the burden of compensation without any apportionment. Below is a summary of the awards:

(i) General Damages: $2.7 m with interest at 3% from the 10th October, 2008 to the 30th January, 2015.
(ii) Special Damages: $180,700.00 with interest at 3% from the 24th October, 2007 to the 30th January, 2015.
(iii) Future medical care: $272,000.00.
(iv) Costs to the claimant, to be taxed if not agreed.