[2015] JMSC Civ. 234

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

**CLAIM NO. 2013HCV01474**

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| **BETWEEN** | **ELIZABETH BROWN** | **CLAIMANT** |
| **AND** | **DAPHNE CLARKE** | **1ST DEFENDANT** |
| **AND** | **WILTON CLARKE** | **2ND DEFENDANT** |
| **AND** | **CARROL WILSON** | **3RD DEFENDANT** |
| **AND** | **BERVIN ELLIS** | **4TH DEFENDANT** |

**CONSOLIDATED WITH:**

**CLAIM NO. 2011HCV03945**

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| **BETWEEN** | **BERVIN ELLIS** | **CLAIMANT** |
| **AND** | **DAPHNE CLARKE** | **1ST DEFENDANT** |
| **AND** | **WILTON CLARKE** | **2ND DEFENDANT** |

**CONSOLIDATED WITH:**

**CLAIM NO. 2011HCV03946**

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| **BETWEEN** | **ANDREW THOMPSON** | **CLAIMANT** |
| **AND** | **DAPHNE CLARKE** | **1ST DEFENDANT** |
| **AND** | **WILTON CLARKE** | **2ND DEFENDANT** |

**AND**

| | | |
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| **AND** | **DAPHNE CLAKE** | **1ST ANCILLARY CLAIMANT** |
| **AND** | **WILTON CLARKE** | **2ND ANCILLARY CLAIMANT** |
| **AND** | **CARROL WILSON** | **1ST ANCILLARY DEFENDANT** |
| **AND** | **BERVIN ELLIS** | **2ND ANCILLARY DEFENDANT** |

Miss Sharon Gordon, Attorney-at-Law instructed by Gordon & Associates, Attorneys-at-Law for the Claimant Elizabeth Brown in Claim No. 2013 HCV 01474, Ms. Kimberly Facey, Attorney-at-Law instructed by Bignall Law, Attorneys-at-Law for the Claimants Bervin Ellis in Claim No. 2011 HCV 03945 and Andrew Thompson in Claim No. 2011 HCV 03946, Ms. Kamesha L. Graham, Attorney-at-Law for the Defendants Daphne Clarke and Wilton Clarke in all three claims and for the Ancillary Claimants Daphne Clarke and Wilton Clarke in Claim No. 2011 HCV 03946, Mr. Harrington McDermott, Attorney-at-Law instructed by Campbell & Campbell, Attorneys-at-Law for the 3rd and 4th Defendants Carrol Wilson and Bervin Ellis in Claim No. 2013 HCV 01474 and for the Ancillary Defendants Carrol Wilson and Bervin Ellis in Claim No. 2011 HCV 03946 and Elizabeth Brown, Bervin Ellis, Andrew Thompson

**Negligence – Motor Vehicle Accident – Effect of Breach of the Road Code – Apportioning of liability – Damages – General damages for whiplash injury**

**HEARD: 2nd, 3rd, 4th and 26th November 2015.**

**K. LAING, J**

**[1]** On the 2nd day of May, 2011 at approximately 3 p.m. there was a collision between a Grey Toyota Corolla Sedan Motor Car ("the Car") which was being driven by Mr. Bervin Ellis ("Mr. Ellis") and a Mitsubishi panel Van ("the Van") which was being driven by Mr. Wilton Clarke ("Mr. Clarke").

**[2]** The collision took place at Bog Walk in the parish of St. Catherine. The Car was owned by Ms. Daphne Clarke ("Mrs. Clarke") and the Van was owned by Mr. Carrol Wilson ("Mr. Wilson").

**[3]** After the Car and the Van collided, ("the Primary Accident") the Van struck Ms. Elizabeth Brown ("Ms. Brown") who was standing at an area in front of a battery shop ("the Secondary Accident"). Ms. Brown was completely off the roadway when she was struck. (The Primary Accident and the Secondary Accident are together for convenience referred to as "the Incident").

**[4]** Arising from the Incident the following claims were filed:

(i) Claim No. 2011HCV03945 was filed in which Mr. Ellis is the Claimant, Mrs. Clarke is the First Defendant and Mr. Clarke is the Second Defendant.

(ii) Claim No. 2011HCV03946 in which Mr. Andrew Thompson who was a passenger in the Car of the Claimant, Mrs. Clarke the First Defendant, Mr. Clarke the Second Defendant, and there is an Ancillary claim in which Mrs. Clarke is the First Ancillary Claim, Mr. Clarke is the Second Ancillary Claimant, Carrol Wilson the First Ancillary Defendant and Mr. Ellis the Second Ancillary Defendant.

(iii) Claim No. 2013HCV01474 in which Ms. Brown is the Claimant, Mrs. Clarke First Defendant, Mr. Clarke the Second Defendant. Ms. Wilson the Third Defendant and Mr. Ellis the Fourth Defendant.

**[5]** Save where necessary or otherwise indicated the parties will be referred to by their names and not the capacity in which they appear in the various claims.

**[6]** Mrs. Clarke and Wilson are joined in the claims on the basis that Mr. Clarke and Mr. Ellis were acting as their respective servant and/or agent of each owner at the time of the accident. This fact has been admitted in the statement of case and the issue of agency did not fall for the Court's determination.

**[7]** By case management order made on 8th July 2014, Claim No. 2013HCV01474 was sensibly consolidated with Claim No. 2011HCV03945 and Claim No. 2011HCV03946. I wish to take the opportunity at the outset to commend all Counsel on the proficient, responsible and pragmatic approach that they took in their advocacy. This

assisted greatly in ensuring that the Court's time was used efficiently thus ensuring that the intended benefits of the consolidation were realised.

**[8]** The three claims are for damages for negligence. Despite the multiple claims including the ancillary claim, there are common issues of law and facts to be decided. I am of the view that the correct sequencing of the issues to be decided may be helpful in efficiently analysing the issues that have to be decided in respect of each claim.

**[9]** To this end, I think it is prudent to first determine whether the Primary Accident was caused by the negligence of Mr. Ellis solely, Mr. Clarke solely, or by the negligence of both.

**The evidence of Mr. Ellis as to how the Primary Accident occurred**

**[10]** The evidence of Mr. Ellis is that he was driving the Car in the left lane heading in the direction of Linstead along the Bog Walk main road. This road has also been referred to in the trial as Church Road but nothing turns on this, there being no dispute as to the area the Incident occurred.

**[11]** Mr. Ellis stated in his Witness Statement that as he approached a minor road on his right, called "Swamp Lane" he slowed the Car to about 15 kph and turned on his right indicator. He checked both rear mirrors to ensure that it was safe to proceed. After he was sure that it was safe (to proceed) he started to turn right onto swamp lane. Suddenly and without any warning he heard a loud sound and felt a violent impact coming from the right side of the Car. He turned the Car sharply to the left. He felt a second impact immediately afterwards coming from the right side of the Car and the Car came to a stop.

**[12]** During the cross examination of Mr. Ellis he said that he stopped (which he did not say in his first witness statement), put his indicator on, then checked both his rear view mirrors. He indicated, quite surprisingly, that he does not know what a blind spot is and that in his rear view mirror he could see around no vehicle. He disagreed with the suggestion that there was a spot to the right of his vehicle that was not visible to him (using the rear view mirrors.)

**[13]** He said that he was travelling at about 45-50 kph before reaching the intersection with Swamp Lane. He said that Swamp Lane is about 40 feet from a corner that he had passed and that he did not see the Van before the impact of the Van with the Car.

**[14]** He also disagreed with the suggestion that there was no impact of the Van with the rear of the Car and denied that the accident was caused by him turning right, into the side of the Van as it was overtaking the Car.

**The Evidence of Mr. Thompson as to how the Primary Accident occurred**

**[15]** Mr. Thompson's evidence is that he was in the front (left) passenger seat of the Car and observed that the Car slowed in the vicinity of Swamp Lane. He asserted that he saw Mr. Ellis put on the right Indicator (by moving the indicator stem/lever) and that he saw the right arrow of the indicator on the dashboard lit.

**[16]** The Car then started to manoeuvre to the right when he heard a loud sound and felt a violent impact to the right side of the Car. The Car then spun to the left and came to a stop in a section of the road.

**[17]** In cross examination he confirmed that he did not see the Van before the impact with the Car. He asserted that the Car had come to a complete stop before beginning to turn right.

**[18]** It is noteworthy that the first time that both Mr. Thompson and Mr. Ellis were asserting that the Car had stopped before it started to turn right, was during cross examination. In their witness statements they both said that the Car had slowed down.

**[19]** Mr. Thompson also disagreed with the suggestion that it was not the Car that swung to the right and collided with the Van.

**The Evidence of Mr. Clarke**

**[20]** In his witness statement Mr. Clarke stated that the Car was travelling at a distance of about four (4) Car lengths in front of him and that he had been following the

Car for about a quarter mile or less. He asserted that the Car started slowing down and pulled to its left "*as if to make a stop*".

**[21]** His evidence is that he did not observe any indicator light lit on the Car and since there were no on-coming vehicles, he attempted to overtake the Car by passing it on its right side. He said that it was while he was passing the Car that it swung to the right and impacted the Van on the left front panel, behind the front wheel.

**[22]** On his evidence, the impact forced the Van further right causing the left front section of the Van to strike a pedestrian (Ms. Brown).

**[23]** In cross examination Mr. Clarke admitted that Ms. Brown was struck when she was on a concrete section in front of the battery shop on the right side of the road (that is to say, not on the roadway).

**[24]** He agreed with the suggestion that if the Car had its indicator on he would have had no difficulty seeing it.

**[25]** In answer to a question from the Court he said that as he rounded the corner he could see about ½ mile down the road to the square and informed the Court that in any event the distance was more than the distance from the witness box to the DPP's Building across the street from the Court.

**[26]** He denied hitting the Car in the back and said that he only knows of one impact. He asserted that when he rounded the corner he was travelling at about 40 kph and eased off the accelerator. He estimated that when he was overtaking the Car he was travelling at about 35 kph.

**[27]** He agreed that the distance between the point of impact and the point at which the Van struck Ms. Brown was about 40 feet (which is the same distance indicated by Mr. Ellis).

**[28]** He denied that he was travelling at a speed of greater than 35 kph and said he did not apply his brakes immediately after the impact with the Car. He said he did not apply his brakes until the Van hit Ms. Brown. He initially said he did not have sufficient

time within which to do so but subsequently expressed to the Court that he did not apply his brakes over the distance of 40 feet that he travelled because he "*got so frightened*".

**The Law**

**[29]** It is settled law that in every claim for negligence in order to succeed, the Claimant must prove on a balance of probabilities:

(i) the existence of a duty of Care, owed to the Claimant by the Defendant,

(ii) a breach of that duty, and

(iii) damage resulting from that breach

(See **Headley Bryne & Co. Ltd v. Heller & Partners Ltd.** [1963] ALL ER 575 **Anns v. Merton** 1977 2 ALL ER 492 and the plethora of authorities since those decisions including **J.P.S. Co. Ltd v. Pamela Rance** Civ. App No. 11/92.)

**[30]** It is similarly settled law that all users of the road owe a duty of Care to other road users (see **Esso Standard Oil SA Ltd & Another v. Ian Tulloch** [1991] 28 JLR page 553.)

**[31]** The driver of a motor vehicle must exercise reasonable care to avoid causing injury to persons or damage to property.

**[32]** Reasonable care is the care which an ordinary skilful driver would have exercised under all the circumstances and includes an avoidance of excessive speed, keeping a proper look out and observing traffic rules and signals (see **Bourhill v. Young** [1943] AC 92.)

**[33]** Section 51(2) of The Road Traffic Act ("the RTA") imposes a duty on motorist to take such action as may be necessary to avoid an accident.

**[34]** Section 51(1)(b) of the RTA provides that a vehicle being overtaken by other traffic shall be driven so as to allow such other traffic to pass.

**[35]** Section 51(1)(d) of the RTA provides that a motor vehicle shall not be driven so as to cross or commence to cross or be turned into a road if by so doing it obstructs any traffic.

**[36]** Pursuant to section 51(1)(g) of the RTA a motor vehicle shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead.

**[37]** As Mr. McDermott quite rightfully submitted, the Road Code 1987 issued by the Island Traffic Authority at 8(c) provides that one should not overtake at or when approaching a road junction.

**[38]** Mr. McDermott referred to section 95(3) of the RTA which provides that the failure of a person to observe any provisions of the road code may in civil and criminal proceedings be relied upon by any party to the proceedings tending to establish or to negative any liability which is in question in those proceedings.

**[39]** Counsel further cited and relied on the case of **Albourne Matthews and Winston Morrison v. The Attorney General and Gregg Gardener** 2007 HCV 04547 to demonstrate the operation of section 95(3) of the RTA, albeit on different facts.

**Findings**

**[40]** Having observed the demeanour of Mr. Clarke as he was cross examined I was impressed with his candor and he struck me as a witness who was speaking the truth. He was quite prepared to make admissions which had the potential of weakening his case, the most glaring of which is his statement that after the impact between the Car and the Van, he did not apply his brakes until he struck Ms. Brown because he was so frightened. The Court will further address this issue of the failure to apply his brakes in greater detail later in this judgment.

**[41]** I accept the evidence of Mr. Clarke on a balance of probabilities, that he had been following the Car for approximately a quarter (1/4) of a mile before the Primary Accident.

**[42]** I also accept Mr. Clarke's evidence that the Car did not stop prior to beginning to turn but that it in fact moved to the left before turning.

**[43]** Accordingly I find that the evidence of Mr. Ellis and Mr. Thompson that the Car came to a stop to be a fabrication with the aim of strengthening their respective cases. This assertion is in stark contrast to their witness statements and no reasonable explanation for this inconsistency was offered to the Court for its consideration.

**[44]** I find that before Mr. Clarke began to overtake the Car Mr. Ellis had not put on his indicator.

**[45]** I have reached the conclusion that the Primary Accident was caused, in part, by Mr. Ellis attempting to turn right onto Swamp Lane at a time when it was manifestly unsafe to do so.

**The blind spot**

**[46]** As all ordinary skilful drivers should know, the blind spot is an area which is not visible in the rear view mirror. For purposes of this case the relevant blind spot on a right hand drive vehicle such as the Car, which was being driven in the left lane, is an area to the right of the Car within which an overtaking vehicle would not be visible purely by looking in the rear view mirror which is located on that right side.

**[47]** It is also common knowledge that there have been a number of attempts to eliminate this potential hazard, the most popular of which are blind spot mirrors which may be attached to the rear view mirror, and with advances in technology, (and perhaps less widely known) blind spot warning systems using sensors on some luxury vehicles.

**[48]** Driver aids aside, as all drivers of ordinary skill should know, the conventional way and extremely effective way of accounting for this inadequacy of the side mirror/mirrors on a right hand drive vehicle being driven in the left lane, is to simply make a turn of one's head to the right (in addition to and after using the mirror) to see if there is a vehicle present which might not have been visible in the rear view mirror.

**[49]** Mr. Ellis did not do so in this case and this is quite understandable since he said he did not even know what the blind spot was. It would therefore not be likely that he would have taken steps to guard against a danger which he did not know even existed.

**[50]** It is of importance that the point of impact was about 40 feet from the corner. I do not accept that Mr. Clarke traversed this 40 feet between the time when Mr. Ellis said he checked his rear view mirror and the time Mr. Ellis started to turn right.

**[51]** I find on a balance of probabilities that when Mr. Ellis started to turn right the Van was already alongside the Car but that Mr. Ellis did not see it, either because he did not check his rear view mirror or if he did, did not do the additional check of turning his head to glance quickly over his right shoulder to ensure that there was no vehicle in his blind spot.

**[52]** As Theobalds, J pointed out in **Calvin Grant v. Pareedon and Pareedon** Suit No. C.L. 1983/G 108, the physical evidence such as the point of impact, drag marks (if any) and the location of damage to the respective vehicles or parties may well be of crucial importance in asserting a tribunal of fact in determining which side is speaking the truth.

**[53]** In this case, the damage was to left front door and center door panel of the Van as indicated by the estimate from Williams Auto Repairs dated August 23, 2011, which was admitted as Exhibit 1. This is evidence which I find supports the conclusion that the Van was alongside the Car when the Car turned into the side of the Van.

**[54]** The estimate of repairs to the Car provided by Howard Engineering Limited admitted as Exhibit 2, also does not support the argument that the Van crashed into the Car as it was turning.

**[55]** Although the estimate speaks to right side fender, the evidence of Mr. Thompson speaks to one impact and so does the evidence of Mr. Clarke. I find that there was one impact between the Car and the Van and that it was to the right front section of the Car. This is the area where Mr. Ellis says was the site of the second impact that is, to the

right front tyre area. I therefore draw the reasonable inference and find that the right fender which is referred to in the Howard Engineering extract is the right front fender.

**[56]** I find that Mr. Ellis by failing to check his blind spot before beginning to turn right was negligent. The Court also finds that he failed to keep a proper look out as a reasonable prudent driver of ordinary skill would have done in the circumstances.

**[57]** The fact that the area was T-junction (i.e. a junction in the shape of a "T") where Swamp Lane joined the road without intersecting it, did not absolve Mr. Ellis of the duty to take reasonable Care.

**Was Mr. Clarke also responsible for the Primary Accident?**

**[58]** Ms. Graham who represents Mr. Clarke submitted that Mr. Clarke was not negligent. Counsel submitted that there was no statutory requirement on him to blow his horn while overtaking (which he admitted he did not do).

**[59]** Counsel also submitted that the prohibition against overtaking at a junction was not absolute as submitted by Mr. McDermot, but that the prohibition had to be considered in the context of other surrounding circumstances, for example, visibility of the road ahead, the type of junction and the size and usage of the minor road in the case of a T junction such as the one under consideration.

**[60]** Counsel further submitted that the fact of overtaking at a junction *per se*, was not reasonable evidence of negligence, but one factor for the Court's consideration.

**[61]** I do not make a finding as to whether the prohibition against overtaking at a T-junction is absolute and do not find it necessary to do so in this case. There may well in fact be junctions with small rarely used minor roads where there are broken white lines suggesting that overtaking is permitted. In any event, there is insufficient evidence as to the nature and characteristics of this particular junction (other than Swamp Lane being a dead end road) that would permit the court to find that this T-junction was somehow exempt from the general prohibition referred to in the Road Code.

**[62]** Having regard to the fact that:

(a) Mr. Clarke was familiar with the area and knew of the existence of the T-junction;

(b) He saw the vehicle slow and move to the left (as if stopping);

(c) He did not confirm that the vehicle was in fact stopping and admits that he misread the movement of the Car; and

(d) He did not sound his horn (especially in light of (a) and (b) above),

I find that Mr. Clarke was also negligent and partly responsible for the Primary Accident, since he did not discharge his duty to exercise reasonable care to avoid the accident. I find that he failed to keep a proper look out, and failed to observe the Road Code prohibition against overtaking at a junction.

**[63]** I do not find that Mr. Clarke was driving at an excessive speed in all the circumstances considering the traffic and visibility after he came around the corner. I accept that he was travelling at a speed of about 35 – 40 k.p.h. at the time of the collision with the Car.

**[64]** Ms. Graham took a technical procedural point and submitted that Mr. Ellis had not specifically pleaded the overtaking at a junction in the particulars of the negligence of Mr. Clarke and that the Court ought to disregard that fact. However I find that it is subsumed under the particular at 6 (c) of the particular of claim filed on behalf of Ms. Brown – "*overtaking when it was not safe to do so*" and the Court is obliged to consider that issue in a consolidated claim in examining all the factors which might have a bearing on the issue of liability. The fact that the Incident occurred in the area of a Junction was evident to all and I do not find that Mr McDermott in representing the interests of his client by relying on this undisputed fact caused a prejudice to any party.

**[65]** I do not find that Mr. Clarke's speed played any role in the Primary Accident and I reject the theory advanced that he came around the corner at an excessive speed and met upon the Car that was positioned to turn right with the right indicator on, but that he

nevertheless proceeded to attempt to overtake the Car (whether because he was speeding or for any other reason) and thereby solely caused the accident.

**The apportioning of the liability**

**[66]** Counsel have made various submissions as to the appropriate percentages on an apportionment of liability if the Court decides that this is a proper case.

**[67]** Ms. Facey helpfully provided to the Court and sought to rely on the case of **Burton v. Evitt** [2011] EWCA Civ. 1938 a decision of the English Court of Appeal. In that case the driver of a motor car was found to not have checked an area which he could not see "*a blind spot*" or "*triangle of invisibly*" caused in part by a BMW 4x4 which was behind his vehicle with the result that he collided with a motorcycle rider who was overtaking a line of traffic.

**[68]** In that case the Court of Appeal set aside the apportionment of 66/33 made by the Judge and apportioned the liability in terms of eighty (80) percent as to the motorcyclist and twenty (20) percent to the driver of the motorcar.

**[69]** It is to be noted that the Court found at paragraph 19:

> *"it is difficult to consider if any explanation consistent with anything other than gross negligence by Mr. Burton [the motorcyclist] in driving at the speed he did and overtaking this line of Cars that was slowing down. The negligence was of a very high order and there is no doubt in my view that it very well substantially contributed to what happened".*

**[70]** The traffic situation faced by the driver in **Burton** was far more complicated and difficult than that faced by Mr. Ellis. Mr. Ellis had no vehicle to contend with which was behind him blocking his vision, whether wholly or partially. The Court finds that had he simply looked over his right shoulder he would have seen the Van. The conduct of Mr. Clarke in this case cannot be reasonably or justly equated with the conduct of the motorcyclist in Burton, since I have found that he was not driving at an excessive speed in the circumstances.

**[71]** Considering all the factors in the round, I am of the view that responsibility for causing the Primary Accident Van is to be shared equally between Mr. Ellis and Mr. Clarke. Accordingly liability is to be shared 50:50 as between Mr. Ellis and Mr. Wilson on the one part and Mr. and Mrs Clarke on the other part.

**General Damages - Mr Ellis**

**[72]** Mr. Ellis was diagnosed by Dr. Sangappa on the 9th day of May, 2011 with whiplash injury to the neck lower back and left shoulder. The evidence of the doctor is that the injuries are consistent with the mechanism of the accident. The doctor's report refer to the fact that Mr. Ellis had met in a motor vehicle accident in June 2010 in which he sustained injury to his lower back, neck and shoulder. He sought medical attention but received no treatment for his injuries.

**[73]** Ms. Graham for Mr. and Mrs. Clarke submitted that his 2010 injuries were unresolved, that he failed to mitigate his loss by following the doctor's advice to visit a physiotherapist and to consult an orthopaedic specialist.

**[74]** Counsel also submitted that the fact that Mr. Ellis waited five (5) months to go back to Dr. Sangappa after the second visit suggests that Mr. Ellis injuries were not as serious as he claimed.

**[75]** For these reasons Ms. Graham who represents the Clarkes, submitted that an appropriate award for Mr. Ellis would be $600,000.00, which the Court considers to be on the lower end of the spectrum for soft tissue/whiplash injuries.

**[76]** The Court notes that Dr. Sangappa's report did not indicate that the 2010 injuries were unresolved or that they in any way contributed to the injuries sustained in the accident.

**[77]** Ms. Facey representing Mr. Ellis on his claim, sought to rely on the case of **Trevor Benjamin v. Henry Ford and others** claim no. HCV 02876 of 2005, in which the Claimant suffered a whiplash injury. He was awarded $700,000 in March 2010 which when updated using the August 2015 Consumer Price Index ("**CPI**") equates to

$1,023,627.08. Counsel submitted that Mr. Ellis' award should be adjusted upward to take into account his more extensive injuries.

**[78]** Counsel also sought to rely on the case of **Kavin Pryce v. Raphael Binns and Michael Jackson** [2015] JMSC Civ. 96 in which Mr. Pryce's dominant injuries were cranial strain, lower back strain, soft tissue injury to his left thigh and left knee sprain. He was awarded $1,500,000.00 in May 2015. Counsel submitted that a similar sum should be awarded.

**[79]** it is perhaps appropriate in this case and at this juncture to heed the often repeated admonition that judges should strive for consistency in awards where possible and remind myself that while there ought to be consistency in personal injury awards this must not outweigh the fact that the Court is compensating the claimant who is actually before the Court and must have regard to his particular injuries and circumstances.

**[80]** I therefore remind myself that in **Braham v. Donaldson** 2012HCV02211 a contested assessment of damages on 18th September, 2015 this court awarded the sum of $900,000.00 for pain and suffering in a case of a mild whiplash injury. In **Green v. Myrie** 2011HCV03997, following a trial this court award damages $1,000,000.00 for the Claimant who had suffered mild whiplash injury (although the award was discounted having regard to the Court's findings on liability).

**[81]** In this case I am of the view that that the injuries to Mr Ellis as disclosed by the medical evidence and his conduct indicate that he suffered only a mild whiplash injury, and accordingly consistent with the authorities considered by the Court including the relatively recent awards by this particular Court, an award of $900,000.00 for general damages is sufficient to compensate him for his pain and suffering.

**General damages- Mr. Thompson**

**[82]** Mr. Thompson was examined by Dr. Sangappa on or about the 9th May, 2011 and was diagnosed as having a whiplash injury to the neck. His special damages claim is for $68,600. That sum is agreed and is awarded.

**[83]** Ms. Graham for the Clarkes submitted that he did not do the physiotherapy as advised by Dr. Sangappa and that his evidence was inconsistent in that he referred to an injury to his leg which is not supported by the medical evidence. Counsel submitted that an award of $400,000.00 would be appropriate.

**[84]** Ms. Facey submitted that Mr Thompson be awarded a sum of $1,600,000.00. Counsel placed reliance on the case of **Claudius Hamilton v. Kevin Marshall and Geovaughnie Holness** [2014] JMSC Civ. 81 in which the Claimant suffered a sub-concussive blunt head injury with large scalp laceration and soft tissue swelling, acute cervical strain/whiplash injury and chronic post traumatic headaches. In April, 2014 the Claimant was awards $1,700,000.00. However I do not find this case to be of any assistance given the significant differences between the injuries in that case and that suffered by Mr. Thompson.

**[85]** Mr. Thompson's injuries appear to be very mild as far as whiplash injuries are concern and for that reason I am of the view that his award should be on the lower side of the continuum of awards made by our Courts for these injuries.

**[86]** In the circumstances I am of the view that an award of $700,000.00 is significant to compensate Mr. Thompson. The cause of treatment of Mr. Thompson and his evidence does not support a finding that this was anything but a minor mild case of whiplash injury and I find that his evidence in his witness statement about pain to his lower back is an attempt to exaggerate the extent of his injury, no such complaint having been made to the doctor.

**The ancillary claim in Claim No. 2011HCV03946**

**[87]** As it relates to the ancillary claim by Mrs. Clarke as First Ancillary Claimant and Mr. Clarke as Second Ancillary Claimant, judgment is awarded in favour of Mrs. Clarke against Mr. Wilson and Mr. Ellis in the sum of $21,900.00 that was agreed (subject to the Court's finding on liability). The Court will of course have regard to the apportioning of liability for the Primary Accident as outlined earlier in this Judgment.

**Claim No. 2013HCV01474. The claim by Ms. Brown - The Secondary Accident**

**[88]** The evidence of Mr. Clarke is that after the Primary Accident, he did not apply his brakes until the Van hit Ms. Brown, because he was frightened.

**[89]** The Court finds that the Primary Accident and the Secondary Accident are so closely connected that they form part of the same incident.

**[90]** The Primary Accident is therefore not so divorced from the Secondary Accident that the Court could reasonably find that Mr. Ellis is completely absolved from all liability for the injuries sustained by Ms. Brown. Notwithstanding this finding the Court has to take into account Mr. Clark's reaction after the primary impact as an additional factor for separate consideration.

**[91]** The Van travelled approximately 40 feet after the Primary Accident before it struck Ms. Brown. Considering that the Court has found that at the time of the Primary Accident Mr. Clarke was travelling at about 35 – 40 kph, I find that he did have sufficient time to apply his brakes before hitting Ms. Brown.

**[92]** In light of the speed that Mr. Clarke was travelling at the time of the Primary Accident, it does not appear to the Court that this was a case where on that impact the Van was propelled towards Ms. Brown with no reasonable opportunity for Mr. Clarke to slow the Van before the impact with Ms. Brown.

**[93]** In failing to apply his brakes before Ms. Brown was struck, I find that Mr. Clarke did not react as a driver of ordinary skill would have done and did not discharge his duty of care to Ms. Brown.

**[94]** In these circumstances I also find that there ought to be an apportionment of the liability for the injuries to Ms. Brown and it is my view that an apportionment of 75% to Mrs. Clarke (the First Defendant) and Mr. Clarke (the Second Defendant) and 25% to Ms. Wilson (the Third Defendant) and Bervin Ellis (the Fourth Defendant) is fair. This finding takes into account the greater responsibility Mr Clarke has for causing the Secondary Accident by failing to apply his brakes earlier than he did.

**Damages- Ms. Brown**

**Special Damages**

**[95]** Special damages have been agreed in the sum of $118,344.00 (subject to liability being established) and the Court awards this sum to be apportioned $88,758.00 to the First and Second Defendants and $29,586.00 to the Third and Fourth Defendants.

**General Damages**

**[96]** Ms. Brown's injuries when she was first examined at the Linstead Hospital, included tenderness at the left of the 7-9th right ribs, abrasion to the forehead, 2 lacerations to the lower hip, a laceration to the exterior aspect of the same hip, abrasions to the right arm, elbow and forearm, abrasions to the right thigh and leg and abrasions to the left thigh.

**[97]** She was subsequently examined on 4th May, 2011 by Dr. Sandra Marie Nesbeth ("**Dr. Nesbeth**") whose medical report (which was admitted as Exhibit 5) indicates that Ms. Brown presented with injuries including "*severe spasm and swelling in the neck – whiplash – worst on the right than the left. A cervical collar was given to stabilize the injured neck muscles"*.

**[98]** Ms. Brown in her witness statement also stated that she lost three (3) of her teeth after a month and that this was due to the accident.

**[99]** Heavy weather has been made of the fact that on Ms. Brown's visit to the Linstead Hospital immediately following the accident there appears to have been no complaint of an injury to the neck. Questions were forward to Dr. Nesbeth in writing as to whether Dr. Nesbeth can objectively state that Ms. Brown had a whiplash injury, having regard to the fact the records from the hospital at which Ms. Brown was first treated makes no mention of injury to the neck or back. Dr. Nesbeth's response was that due to the mechanics and physics of motion, it can be concluded that those injuries are consistent with the accident. Dr. Nesbeth in her response did not seek to explain why the whiplash injuries might not have been evident on first examination.

**[100]** Notwithstanding the difficulty in Dr. Nesbeth's response, there is insufficient evidence before the Court which could cause the Court to properly question the finding by Dr. Nesbeth of whiplash injury as Ms. Graham and Mr. McDermott have both urged the Court to do.

**[101]** Mrs. Gordon, Counsel for Ms. Brown submitted that the whiplash injury "*manifested itself*" after the hospital visit. Counsel referred the Court to Ms. Brown's evidence of the whiplash injury as she herself puts it in paragraph five (5) of her witness statement:"*the pain was terrible that night. My neck swell up, and couldn't turn it and it hurt me...*"

**[102]** Ms. Gordon sought to rely on the case of **Dalton Barnett v. Poncianna Brown** Claim No. 2003HCV01358 in which the claimant was awarded $750,000.00 in 2006 for whiplash injuries which updated using the September CPI of 230 equates to $1,731,000.00.

**[103]** Counsel also commended for the court's consideration the case of **Earl Lawrence v. Dennis Warmington** Suit No. C.L. 1998 C 138 in which the Claimant was assessed as having a moderate whiplash injury and the doctor in assessing his injuries had given a prognosis that the plaintiff would continue to have severe pains for a nine (9) weeks with total disability for that period following which he would have pains of diminishing severity for seven (7) months resulting in partial disability followed by intermittent pains for at least five (5) months. The Court awarded general damages of $450,000.00 which updated using the September, 2015 CPI of 230 equates to $1,923,000.00.

**[104]** Counsel in her oral argument submitted that the award of general damages to Ms. Brown should fall somewhere between $1,731,000.00 and $1,923,000.00; although it is noted that in Counsel's written submissions a slightly more conservative figure of $1,400,000.00 was advanced.

**[105]** Ms. Graham for the Clarke's submitted that although Ms. Brown's visits to the doctor spanned a period of fifty six (56) weeks the actual treatment and medication

administered was not over this entire period, Counsel submitted that a rather an award of $500,000.00 to Ms. Brown would be fair since the **Earl Lawrence** case was not a contested decision and the injuries in the **Dalton Grant** case were more serious and included lower back pain.

**[106]** Mr. McDermott relied on the letter of Ms. Ann-Marie Ricketts, the employer of Ms. Brown to prove that Ms. Brown was only away from her job for two (2) months. Counsel supported Ms. Graham's submission that the period of 56 weeks over which Ms. Brown visited the doctor is to be treated by the court with a degree of circumspection.

**[107]** Unlike Ms. Graham however, Mr. McDermott was more reasonable and pragmatic in his submissions as to what ought to be a reasonable sum to be awarded to Ms. Brown for general damages, pain and suffering. Counsel submitted for the Court's consideration two cases. The first was **Peter Marshall v. Carlton Cole & Alvin Thorpe** Claim No. 2006 HCV 01006. In that case, in an assessment on October 17, 2006 the Court awarded general damages of $350,000.00 where the Claimant had moderate whiplash sprain, swollen and tender left wrist and left hand. The Claimant also had moderate lower back pain and spasms. He was treated by Dr. Sandra Nesbeth and had no residual pain or suffering after 16 weeks. That amount updated (Counsel indicated that the August 2015 CPI was used) equates to $783,000.00.

**[108]** The second case relied on was **Gilbert McLeod v. Kirk Lennard** which had damages assessed on 20th March, 1996. In this case the Claimant suffered pain and tenderness to the right side of the chest, multiple scattered abrasions to the right thigh, knee and leg, a 4 cm laceration to the right side of the forehead, a 5cm laceration to the right foot. He lost consciousness and was hospitalized for two (2) days. He was awarded $100,000 for general damages which updated equates to $573,000.00.

**[109]** Counsel submitted that those two cases together cover all the injuries that Ms. Brown suffered and an award of $1,200,000.00 is reasonable.

**[110]** Having considered all the cases to which I have been referred and taking into account the recent awards made by this Court for mild whiplash injuries. I am of the

view that the sum of $1,400,000 will provide Ms. Brown with adequate compensation for her pain and suffering general damages.

**[111]** This sum is to be divided in accordance with the Court's earlier findings as to the respective percentages on the apportioning of liability for the injury caused to Ms. Brown.

**[112]** For the reasons given above, the Court makes the following orders.

**Claim No. 2013 HCV 01474**

1. **JUDGMENT** is given for the Claimant Elizabeth Brown with liability to be apportioned as follows:

(i) 75% liability against Daphne Clarke, 1st Defendant and Wilton Clarke, 2nd Defendant.

(ii) 25% liability against Carrol Wilson, 3rd Defendant and Bervin Ellis, 4th Defendant.

2**.** **SPECIAL DAMAGES** awarded in the sum of $118,344.00 to be apportioned as follows:

(i) $88,758.00 to be paid by the 1st and 2nd Defendants.

(ii) $29,586.00 to be paid by the 3rd and 4th Defendants.

Interest is awarded at 3% per annum from 02/05/2011 to 04/11/2015.

3. **GENERAL DAMAGES** awarded in the sum of $1,400,000.00 to be apportioned as follows:

(i) $1,050,000.00 to be paid by the 1st and 2nd Defendants:

(ii) $350,000.00 to be paid by the 3rd and 4th Defendants.

Interest is awarded at 3% per annum from 13/03/2013 to 04/11/2015.

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

**Claim No. 2011 HCV 03945**

5. **JUDGMENT** is given for the Claimant, Bervin Ellis against Daphne Clarke, 1st Defendant and Wilton Clarke, 2nd Defendant with liability to be apportioned as follows:

(i) 50% liability against the Claimant.

(ii) 50% liability against the 1st and 2nd Defendants.

6. **SPECIAL DAMAGES** in the sum of $68,600.00 but having regards to the apportionment of liability the amount of $34,300.00 is to be paid by the 1st and 2nd Defendants.

Interest is awarded at 3% per annum from 02/05/2011 to 04/11/2015.

7. **GENERAL DAMAGES** in the sum of $900,000.00 but having regard to the apportionment of liability the amount of $450,000.00 is to be paid by the 1st and 2nd Defendants.

Interest is awarded at 3% from 13/07/2011 to 04/11/2015.

8. Fifty percent (50%) cost is awarded to the Claimant to be taxed if not agreed.

**Claim No. 2011 HCV 03946**

9. **JUDGMENT** is given for the Claimant Andrew Thompson against Daphne

Clarke, 1st Defendant and Wilton Clarke, 2nd Defendant on the Claim, with liability being found to be 50% against the 1st and 2nd Defendants.

10. **SPECIAL DAMAGES** in the sum of $65,000.00 but having regard to the Court's determination as to liability the amount of $32,500.00 is to be paid by the 1st and 2nd Defendants.

Interest is awarded at 3% per annum from 02/05/2011 to 04/11/2015.

11. **GENERAL DAMAGES** in the sum of $700,000.00 but having regard to the Court's determination as to liability the amount of $350,000.00 is to be paid by the 1st and 2nd Defendants.

Interest is awarded at 3% per annum from 13/07/2011 to 04/11/2015.

12. Fifty percent (50%) cost awarded to the Claimant to be taxed if not agreed.

**ANCILLARY CLAIM in Claim No. 2011 HCV 03946**

13. **JUDGMENT** to Daphne Clarke, 1st Ancillary Claimant and Wilton Clarke, 2nd Ancillary Claimant against Carrol Wilson, 1st Ancillary Defendant and Bervin Ellis, 2nd Ancillary Defendant with liability to be apportioned as follows:

(i) 50% liability against the 1st and 2nd Ancillary Claimants.

(ii) 50% liability against the 1st and 2nd Ancillary Defendants.

14. **SPECIAL DAMAGES** in the sum of $21,900.00 but having regard to the apportionment of liability the amount of $10,850.00 is to be paid by the 1st and 2nd Ancillary Defendants.

15. Each party to bear his own cost of the Ancillary Claim