



[2024] JMSC Civ. 57

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2019 CV 04574

BETWEEN	ROMARNE BUDDINGTON	CLAIMANT
AND	JAMAICA URBAN TRANSIT COMPANY LTD.	1ST DEFENDANT
AND	WINSTON ALLISON	2ND DEFENDANT

IN OPEN COURT

**Christine Mae Hudson and Judaska Shaw instructed by K. Churchill Neita and Co.
for the Claimant.**

**Allison-Gaye Bryan and Latoya Kelly instructed by Miss Kimberlee Dobson for the
1st and 2nd Defendants.**

Heard: February 5-6, 2024; March 21-22, 2024, and May 17, 2024.

***Negligence - Motor vehicle accident - Breach of duty of Care - Assessment of
Damages***

THOMAS A, J.

INTRODUCTION

[1] This is a claim in negligence arising out of a motor vehicle accident that occurred on the 14th of November 2018 along the Port Royal Main Road in Kingston. The Claimant, Mr. Romarne Buddington has brought an action against the Defendants seeking to recover damages for personal injury and consequential loss The

unchallenged evidence is that at the material time the Claimant, Mr. Romarne Buddington, an engineer, was a motorcyclist, riding motorcycle registered 4644 L travelling along the Port Royal Main Road. The 1st Defendant, Jamaica Urban Transit Company (JUTC), was the owner of bus being driven by the 2nd Defendant Mr. Winston Allison along the Port Royal Main Road.

PARTICULARS OF NEGLIGENCE

[2] The Particulars of Negligence as pleaded by the Claimant are as follows:

- (i) Driving at excessive and/or improper speed;
- (ii) Failing to have any regard for other road users and in particular that of the Claimant;
- (iii) Failing to negotiate a corner without encroaching on the correct driving side of the Claimant;
- (iv) Failing to heed the presence of the Claimant travelling in the opposite direction;
- (v) Driving too fast around a corner without due care, attention for other users including the Claimant;
- (vi) Failing to see the Claimant within sufficient time or at all;
- (vii) Failing to properly and effectively negotiate a corner so as to avoid colliding with the Claimant.
- (viii) Failing to keep a proper look out or have any sufficient regard for other road users in particular the Claimant.
- (ix) Failing to slow down, swerve, stop or so to control the motor truck as to avoid colliding with the Claimant.

The Defence and Counter Claim

[3] The Defendants have denied the particulars of negligence and by Amended Defence and Counterclaim filed on July 6, 2023, contend that the collision was wholly or partly a consequence of the Claimant's own negligence in the operation of his motorcycle. The 1st Defendant counterclaims for property loss and damage. The Defendants aver that on or about the 14th day of November 2018, the 2nd Defendant who was the servant/agent of the 1st Defendant was travelling in his correct lane along Port Royal Main Road heading towards the direction of Port Royal from Harbour View, when on negotiating a bend in the vicinity of the Port Royal Cemetery, the Claimant approaching in the opposite lane, heading in the opposite direction to the 1st Defendant bus, so negligently navigated the bend, entering into the lane of the 1st Defendant's agent, thereby colliding into the right side of the 1st Defendant's bus. The collision was wholly caused and/or alternatively contributed to by the negligence of the Claimant. As a result of the negligence of the Claimant, the 1st Defendant suffered property damage, loss, and costs.

[4] The particulars of negligence of the Claimant as alleged by the 1st Defendant are as follows:

- a) Driving at an excessive and/or improper rate of speed;
- b) Driving at an excessive and/or improper rate of speed while negotiating a corner;
- c) Failing to drive on his correct side of the road;
- d) Failing to properly negotiate a corner without encroaching on the 2nd Defendant's correct side of the road;
- e) Failing to keep a proper lookout;
- f) Failing to have any sufficient regard for other road users, in particular, the 2nd Defendant and the passengers travelling in the 1st Defendant's motor vehicle;
- g) Failing to stop, slow down, swerve or otherwise manoeuvre his motor cycle so as to avoid the collision.

h) Driving recklessly and dangerously

Liability

The Evidence of the Claimant

- [5] In his evidence-in-chief, the Claimant Mr. Romarne Buddington states that he is a 27-year-old engineer and that on the 14th of November, 2018 at approximately 12.30 pm to 100pm, he was a helmeted motor cyclist travelling along the Port Royal Main Road in the direction of the Caribbean Maritime University.
- [6] He states that the road was wide enough for two vehicles to pass without touching and that on each side of the road, there was sand with small shrubs. He says he was travelling in the middle of his correct lane going around a left-hand corner when he observed a JUTC bus, the front of which was in the middle of the road on his correct driving side.
- [7] The Claimant states that he attempted to swerve to the left as the bus was also in his lane, but notwithstanding, the bus hit his right hand. He says after the impact the bike continued to move in a sliding motion. As a result, he fell from the bike which landed on his right leg. He states that he used his left hand to remove the bike from his leg and attempted to stand but could not do so. He then realized that the bone was pushing out of his right hand, he was bleeding, in severe pain, and unable to move his right hand.
- [8] He asserts that he was not travelling at an excessive speed and that he did not veer into the right lane into the path of the JUTC bus. He is adamant that he did not cause the collision as at all times he was riding in his correct lane at about 35-40 kmph and that it was the 2nd Defendant who encroached on his side of the road causing the collision.
- [9] On the courts' visit to the locus he states that the condition of the road is the same as it was on the date of the collision. At the location he was first asked by his

attorney at law to point out the left-hand corner and his point of rest after the impact.

- [10]** He pointed out the left-hand corner but walked along the left soft shoulder as one faces Harbour View, saying, he wanted to make sure, before pointing out the point of rest in the sand on the left soft shoulder facing Harbour View. He identified the point of impact on the left of the road as one faces Harbour View which measured three and a half (3 ½) feet from the left soft shoulder.
- [11]** During cross-examination the Claimant's testimony is that the accident happened in the vicinity where there was a continuous unbroken line. He maintains that he was riding at about 35-40 kmph. When asked him if he was going at that speed, why was he not able to take evasive action, he responded by saying, it was not easy to take evasive action as he was driving an open motor vehicle which was affected by the wind as well.
- [12]** He also asserts that the bus was in both lanes, and it was a much bigger vehicle than his motorcycle. He says he did swerve, but even though he shifted, he still could not have avoided the impact.
- [13]** He agrees that his lane was big enough to hold big units. He states that he did not lose control of the motor bike until he fell. He maintains that the bus hit him on his right side. He says further that he could not have been speeding as he did not have much petrol and intended to stop. He states that there was no other vehicle traveling on the road at the time of the collision. He denies that he was speeding or that the JUTC bus was travelling in its correct lane.
- [14]** He affirms that he was travelling in the middle of his lane going around a left-hand corner. He says that it was as he came around the corner, he observed the JUTC bus with the front of the bus being in the middle of the road in his, the claimant's correct driving lane. He strongly disagrees with the suggestion that it was because he was speeding and took the corner wide that caused the collision.

[15] Mr. Buddington insists that at all times he was positioned in his correct lane. He admits that he gave a statement to a JUTC investigator, the next day after the accident. That is on the 15th of November 2018.

[16] To the suggestion of Defence counsel that in his statement to the JUTC investigator, he did not make mention of the bus being in the middle of the road, and having been shown that document, he admits that, the said information was absent from that statement, but insists that he did tell the JUTC investigator that the bus was in the middle of the road. At the Locus on cross-examination, he pointed out the point of rest as being on the soft shoulder about 15 feet from the point of impact.

The Defendants' Case

[17] Mr. Winston Allison in his evidence-in-chief states that on the 14th of November 2018 at approximately 12:40 in the afternoon, he was assigned a JUTC bus to operate on route 98, which travels between Downtown, Kingston, and Port Royal. He also states that he was driving along the Port Royal Main Road towards the direction of the Port Royal cemetery in the left lane.

[18] He also states that the road was not narrow and could accommodate two buses passing each other freely at any given time. He says he was travelling at a normal speed on the roadway. When going around a corner and about to complete it he saw a bike rider coming in the opposite direction, coming very fast and wide around the bend towards the left side of the road on which he was travelling.

[19] He further states that, on seeing this, he veered further to the left to the side of the road that had sand, to avoid a head-on collision with the biker. He says that even though he veered left, the biker slammed into the front section of the right side of the bus by the wheel arch. After the accident, he looked through his mirror and saw the bike rider getting up to his feet. He then opened the doors of the bus and

passengers exited from the bus to assist the biker. Mr. Allison says that it seemed that the biker's hand was broken thus no particulars were exchanged at the time.

[20] He further states that after the collision, he inspected the bus and he realized that the side light of the bus was broken and the handle of the bike got damaged and that there were scratches to the side of the bus by the wheel arch where the biker collided into the bus. He says that at all times he was in his proper driving lane and it was the Claimant that was speeding around the corner and carelessly riding his bike which caused him to lose control of the bike and collide into the bus.

[21] At the locus Mr. Allison pointed out the point of impact on the soft shoulder to the left as one faces Port Royal, diagonal to, but about approximately 1ft beyond the point, the Claimant identified as the point of impact. This point of impact, he marked with a stone. He was asked by his counsel to indicate which wheel of the bus would have been at that point. He hesitated. He was asked if he understood the question. He answered in the affirmative. Afterwards the same question was repeated 3 times before he responded that, it was the left front wheel. He was also asked to point to where the bus had reached when he first saw the Claimant, prior the impact. The distance he pointed out measured 12 feet before reaching the point of impact.

[22] On cross-examination, Mr. Allison states that when he first saw the bike it was approximately 40 feet away and at that time the Claimant was positioned in his, Mr. Allison's left lane, coming towards the bus. He says, when he saw the Claimant, he slowed down, pulled to the left and swerved to the left into the sand on the soft shoulder. He says that he was about four feet from the middle of the road. Mr. Allison added that he travelled 10 to (12) feet after first sighting the Claimant before the impact.

[23] Counsel for the Claimant gave to the 2nd Defendant a Toy Bus and Toy bike and requested that he display a makeshift reconstruction of the accident scene. He was asked to position the bike, on the point of impact. He indicated that the bus was approximately 4 feet from the white line on the left facing Port Royal. He

placed the bike in a slant position towards the right front wheel arch of the bus. He placed the bus in a straight position facing Port Royal.

[24] Mr. Allison further states that after the impact the bike did not stop, immediately, the bike went up a little bit and stopped on the ground in the middle of the road. He says the bus travelled approximately 18 ½ feet after the impact. Mr. Allison states that he did not see any blood and does not remember seeing any.

[25] He denied the suggestion that it was he who took the corner wide and came on the Claimant's side. He denied that he was speeding. He denied that he was not paying attention to the road. He states that he did not see any other vehicle on the road at the time. He also states that the motorcycle was travelling at a great speed from the time he saw the motorcycle to the time of impact.

[26] At the locus, Mr. Allison was asked to demonstrate certain points of observation by driving the same bus towards the direction of Port Royal. (The court, the Claimant and the attorneys-at-law also boarded the bus for this observation) During this demonstration Mr. Allison agrees that he would have been able to see the Claimant from a distance of 70 ft away.

Mr. Dennis Bogle

[27] In his evidence in chief Mr. Bogle's states that he is an accident investigator employed to the 1st Defendant company. His duties include interviewing witnesses, victims and drivers involved in any accident involving a JUTC bus, take pictures and measurements of sites and buses involved, with a view of assisting the company to defend itself.

[28] He further states that on November 14, 2018, his senior instructed him to investigate the circumstances of the accident. He went on the scene about an hour or less after the collision. He observed that the roadway, was asphalted, and dry. He says that he also observed small splatter of blood in the middle of the roadway

more on the left side of the road, in the lane the bus would have occupied. He says also that he saw a reflector covering, from the bike, on the side of the roadway. He states that he took pictures of the roadway.

[29] Mr. Bogle further says that after doing checks on that road, he attended the Port Royal Police Station where he examined the bus and saw splatters of blood on the right side of the bus in the vicinity of the wheel arch. He also observed scratches and minor indentations by the right front wheel arch.

[30] At the locus Mr. Bogle was asked to point out where he saw the blood splatters. He pointed to the left side of the Road as one faces Harbour View, about 1 foot from the white line. When he was asked to point out where he saw the reflector, he pointed to the left side of the road as one faces Harbour View in close proximity to the left soft shoulder that the Claimant pointed to as the point of rest.

[31] During his cross-examination, Mr. Bogle states that his objective as an investigator is to collect statements, process accident scene and persons. It was suggested to him that his evidence is partial towards the 1st Defendant Company. He asserts that his objective is to provide the truth.

[32] He further asserts that he saw two (2) blood splatters, one in the middle of the road and one on the left towards Port Royal. The splatters he saw, he says he knew were blood because they were fresh, and because when he touched them the blood came on his fingers. He further states that a reflector was on the left side facing east. He denied the suggestion that “he was not honest and fair, and took a position to defend JUTC at all cost”.

[33] At the locus Mr. Bogle was asked, based on his observations, to point out the possible point of impact. He put the the point of impact at 7 feet beyond where the Claimant indicated as the point of impact, but one inch from the white line on the right facing Harbour View.

Witness Erica Young

- [34]** In her evidence in chief Ms Young states that on the 14th of November 2018, she was a passenger in the JUTC bus seated behind the driver for the duration of her journey. She says she had a clear view of the roadway; and that the driver of the bus was travelling in the left lane and was not going fast.
- [35]** She says she recalls the accident involving a bike rider and the bus on that afternoon. She said further, that she was sitting in her seat staring through the window as the bus was driving along Port Royal Road. She testifies that there is a corner on that road, and while the bus was going through the corner and about to finish it, she noticed a bike rider in the opposite direction riding at a very fast speed. As the bike went around the corner it started to come wide towards the bus over in the left lane.
- [36]** She states that she felt the bus swerve to the left as the bike continued to come in their direction at a very fast speed. She says, soon after, the bike slammed into the side of the bus. She further says that the bus stopped in its lane and some of the passengers rushed outside to help the biker. She said that the JUTC driver was always in the left lane that day. The biker was travelling at a very high speed, as it went around the corner wide, coming into the lane of the bus causing the accident.
- [37]** On cross-examination, Ms. Young admits that she knew the driver Mr. Allison before the date of the accident. She agreed, there was a slight corner where the accident occurred. She says that when she first saw the motor cycle it was a finger length from the bus. She also says that when the bus got hit it was on the left soft shoulder.
- [38]** She further states that the bike ended up in the middle of the road where the white line is, on the left while going towards Port Royal. She demonstrated that after the impact, the bus was in a slant position with the front towards the white line and the

back towards the soft shoulder. She maintains that the bus was always in the left lane and that the bike was coming at a high speed around the corner.

The Issues

[39] The issues for the determination by the court are as follows:

- I. Whether the 1st Defendant through its agent, the 2nd Defendant its permitted driver, owed a duty of care towards the Claimant, a motorcyclist.
- II. Whether the first Defendant through its agent, the 2nd Defendant has breached any duty of care owed to the Claimant.
- III. Whether Claimant sustained injuries and damage caused by the 2nd Defendant's breach of a duty of care owed.
- IV. Whether the accident was contributed to by the Claimant's failure to take care for his own safety and as such whether liability should be apportioned, and if yes, to what extent?

The Law

[40] The law on negligence is stated thus “One *must take reasonable care to avoid acts or omissions which can be reasonably foreseen would be likely to injure your neighbour. One’s neighbour in law, is a person who is “so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”*

[41] This principle was laid down in the Locus Classicus of ***Donoghue v Stevenson*** - [1932] A.C. 562, by Lord Atkins.

[42] As it relates to the movement of motor vehicles and pedestrians on the road, the duty is outlined as follows “*All road users owe a duty of care to other road users. The driver of a motor vehicle must exercise reasonable care to avoid causing injury to persons or damage to property. Reasonable care is the care which an ordinary skilful driver would have exercised under all the circumstances and includes avoiding excessive speed, keeping a proper lookout, and observing traffic rules and signals.* (See **Esso Standard Oil SA Ltd & Anor v Ian Tulloch, (1991) 28 JLR 553**; Bourhill v Young [1943]1 AC 92 a **Ena Pearl Nance v. British Columbia Electric Railway Company, British Columbia Electric Railway [1951] AC 601** and **Glenford Anderson v. George Welch [2012] JMCA Civ.43**)

Submissions

On behalf of the Claimant

[43] Ms Hudson submits that:

“It is trite law that a driver of a motor vehicle on a public road has a duty to other road users to so manage and/or control his motor vehicle in order to prevent hurt, harm or damage to each other. This duty of care can be breached by a positive act of omission or by an omission”. (She relies on the cases of, Blyth v Birmingham Waterworks Co [1856], 784; Donoghue v Stevenson [1932] UKHL 100; Glenford Anderson v. George Welch [2012] JMCA Civ.43)

On Behalf of the Defendant

[44] Ms Bryan’s submission is quite lengthy. In the interest of time I will highlight only the salient points on the issues that I am required to determine. Counsel submits that the evidence given by the Defendant’s witnesses is credible as they were never impeached on cross-examination. Having observed their demeanour the court should treat them as witness of truth.

[45] She contends that the testimony of the Claimant when tested under cross-examination was impeached and should not be relied upon as evidence of truth.

She points out that in his statement to Mr. Bogle, Mr. Buddington failed to mention that the 1st Defendant's unit was positioned in the middle of the road during the incident. This omission she says is critical regarding his credibility. It is her view that by neglecting to include this in that statement, the Claimant has introduced ambiguity and raised questions regarding the accuracy and reliability of his current account of the incident.

[46] Counsel urges the Court to reject his explanation contending that the Claimant's testimony during the trial exposed significant inconsistencies regarding the sequence of events leading to the collision. It is her view that he had difficulty providing a clear and definitive account of when and where he first saw the bus. She says initially, he indicated that he noticed the bus while navigating the corner, but later expressed uncertainty about whether he saw it while entering or exiting the corner. Eventually, he settled on the assertion that he noticed the bus approaching while negotiating a "very deep corner."

[47] She also submits that:

"in his witness statement the Claimant states he "attempted to swerve to my left" and stated on amplification that he did try to swerve further to his left' but states on cross examination that "the wind does affect you. It is not easy to take evasive action." On further cross examination he was asked if all he had to do was shift to the left or right to avoid a collision, the claimant responded by saying "the bus was in both side of the roadway so even if I had shifted more to my side, there still would have been an impact, a collision." On further cross examination questions he stated, "I did take evasive action, the swerve was an evasive action."

[48] Counsel argues that these are inconsistencies that should lead the Court to reject the Claimant's assertion that he swerved to avoid the collision.

[49] Counsel urges the Court to consider that during cross-examination, the Claimant admitted that "the lane was wide enough for two units, he had room to his left to swerve, and there were no other vehicles nearby or in front of him at the time of the accident". This she suggests indicates that the Claimant had ample opportunity to avoid the collision, especially since he claimed to have seen the bus driving in two lanes before impact.

- [50]** She further submits that at the locus in quo, the Claimant exhibited a notable lapse of memory regarding the precise location of the collision. She suggests that the Claimant appeared unsure and fumbled for answers. She posits that “the Claimant's evasiveness about the point of impact undermines his credibility. His reluctance to admit that the collision occurred on the right side of both vehicles suggests an attempt to mislead the court that the collision was a head-on one”.
- [51]** She also submits that this is a deliberate obfuscation suggesting a lack of candor on the part of the Claimant and raises questions about the integrity of his testimony. In summary counsel asserts that “the inconsistencies, memory lapses, and evasiveness demonstrated by the Claimant during his testimony cast doubt on the reliability and credibility of his version of events.” She argues that these discrepancies raise doubts about the accuracy of the Claimant's account. Counsel contends that there are parts of the Claimant's evidence which align with the Defendant's case and as such this Court should accept the Defendant's version of events.
- [52]** She posits that the acknowledgment by the Claimant that, Mr. Allison swerved the bus, indicates Mr. Allison's awareness of the imminent danger and his prompt evasive action to avert the collision. This evidence she says indicates that Mr. Allison demonstrated a duty of care towards other road users, including the Claimant on the bike, by making a conscious effort to avoid the accident.
- [53]** She submits that the evidence of the defendants' witnesses, Erica Young and Dennis Bogle, corroborates that of the Defendant Mr. Allison and presents a cohesive account of the events, indicating that the bus driver's actions were not reckless or negligent but is rather indicative of a responsible and responsive approach to ensuring road safety.
- [54]** She points out that Mr. Winston Allison, has extensive driving experience spanning over 23 years as of March 2024, as also a history of safe driving practices and competence. These she views as adherence to prescribed speed limits, commitment to safe driving practices and enhance the credibility of his testimony.

[55] She mentions that during cross-examination, when asked to demonstrate the position of the bus in court, using the toy bus and the use of rock at the locus in quo, he confirmed on both occasions that the direction of travel and point of rest of the bus was straight. She submits that Mr. Allison's testimony regarding the point of impact aligns with his actions to avoid a head-on collision. It is her view that this testimony provides a cohesive narrative of the unfolding events.

[56] Counsel further submits that the driver's visibility of 27 feet from his position in the bus supports his assertion of having an adequate line of sight to anticipate oncoming vehicles, emphasizing the importance of clear visibility in accident prevention. It is her submission that there was consistency between Mr. Allison's evidence and the visual depiction at the locus in quo, reinforcing his reliability.

[57] Mr. Bryan takes the view that the evidence of Mr. Bogle, supports the testimony from the other witnesses for the Defendants, particularly regarding details like the speed limit and that the impact occurred with the right side of both vehicles. This she submits is supported by his photographic evidence showing damage to the right wheel arch and sections of the bus and the right side of the motorcycle, as also blood streaks on the right front wheel panel.

[58] She further submits that Erica Young's testimony is crucial in that it corroborates the testimony of the 2nd Defendant, providing a clearer picture of the accident. She submits that Ms Young's account is impartial and aligns with the assertion that the motorcycle was on the 2nd Defendant's side of the road before impact, traveling at high speed around the corner, and hitting the bus on its right side.

[59] Her submissions continued as follow;

"Ms Young's observation that the bus was forced onto the soft shoulder suggests the driver took evasive action. Ms. Young's testimony that the motorcycle was in the middle of the road after impact indicates on a balance of probabilities that the bus was not in the Claimant's lane. Considering this evidence, it appears the motorcyclist was in the wrong at the time, he was unable to properly negotiate the corner at the speed he was going, going wide into the bus, while the bus driver reacted responsibly, potentially saving lives"

- [60] Ms. Bryan also submits that the pauses observed during the testimonies of witnesses Winston Allison and Erica Young should not be viewed negatively as they reflect the natural response of individuals in the courtroom environment, which can be intimidating. These pauses, she says demonstrate a conscientious effort to provide accurate statements rather than hasty or inaccurate information.
- [61] She also urges this court to place little emphasis on the answers and demonstration given by the witnesses with the use of the toy bus and bike. Counsel asserts that the 1st Defendant's witnesses demonstrate credibility and consistency throughout cross-examination, reaffirming their status as witnesses of truth. She asserts that their oral testimonies offer first-hand insight into the events, which should be prioritized over visual aids and supported by the visit to the locus in quo.

Analysis

Whether a Duty of Care was owed by the Defendants to the Claimant

- [62] It is trite law that in civil proceedings the Claimant bears the responsibility to prove on a balance of probabilities that he is entitled to the remedies sought. Considering, the unchallenged evidence, that at the time of the collision, Mr. Buddington was a motorcyclist and Mr. Allison, the second defendant, was a bus driver, driving as the servant and or agent of the first Defendant, JUTC. there is no doubt, that the 1st Defendant through their agent, Mr. Allison had an obligation to exercise a duty of care towards the Claimant. Essentially Mr. Buddington has discharged his burden in establishing that the Defendants owed him a duty of care.
- [63] However, the court is further tasked with the responsibility of deciding whether this duty of care was breached. That is whether the Claimant has proven on a balance of probabilities, that the 2nd defendant failed to demonstrate the requisite duty of care and attention expected of a reasonably competent driver towards him as motorist; and if such a breach occurred, whether the Claimant sustained injuries as a consequence.

Whether the Defendants breached the duty of care

- [64] There are essentially two contending versions in this case as to how the accident occurred. The Claimant is alleging that the accident occurred because the 2nd Defendant encroached on his side of the road, with the bus belonging to the 1st Defendant. The 2nd Defendant on the other hand is alleging that it was the Claimant who encroached on his correct side of the road with his motor cycle.
- [65] The determination of liability therefore rests on which side of the road the impact occurred. That is whether it was on Mr. Buddington's correct side or Mr. Allison's correct side. Consequently, the major issue in this case is causation, the resolution of which rests on the credibility of the parties.

Visit to the Locus in Quo

- [66] On March 22nd, 2024, the court conducted a visit to the locus in quo, with a view to acquiring a clear understanding of the evidence, by direct observation of the actual scene of the accident. Upon visiting the locus, the Claimant's evidence is that the condition of the road remains the same as on the day of the accident. This evidence is not challenged. Therefore, I accept this as a fact.
- [67] At the locus it is also observed by this court that the vicinity of the Port Royal Main Road, where the parties indicate that the accident occurred, consists of two lanes divided by a continuous white line. Adjacent to each lane, that is on the soft shoulder, there are sections containing shrubs, sand, and gravel. However, the sand and gravel extend on to a portion of the surface of the roadway of the left lane facing Port Royal. At the Locus also, both the Claimant and the 2nd Defendant as also Mr. Bogle pointed out key points of interest relating to the issue of causation.

[68] However, if I accept the evidence of the Claimant that the point of impact was three and a half feet from the left soft shoulder as one faces Harbour View, there would have been significant encroachment by Mr. Allison on the Claimant's side of the road. Consequently, he would have to be faulted for causing the collision. Conversely, If I accept Mr. Allison's evidence that the point of impact, was at the point he indicated at the locus, that is the left soft shoulder as one faces Port Royal, this would suggest that the Claimant would have left his correct side of the road completely and collided with the bus while it was on the soft shoulder. In this regard Mr. Buddington would be completely at fault for the cause of the collision.

[69] Nevertheless, having assessed the evidence of both parties, and having taken into account the burden and standard of proof, I find that the Claimant has been consistent and forthright in his account as to how the collision occurred. I do not share the view of Counsel for the Defendants that the Claimant appeared unsure and fumbled for answers. I find the version presented by the Claimant to be more credible than that of the Defendants. I find that his version remained consistent both in examination in chief and cross examination and his demonstrations at the locus.

[70] He maintained that at all times, he remained on his correct side of the road. He was not speeding but it was the bus that was speeding and coming wide on his side. He did not lose control of the motorcycle until he fell. Counsel sought to contradict him on an omission in a statement that he gave to the JUTC inspector, the Defendants' witness Mr. Bogle. It was suggested that he did not tell Mr. Bogle that the bus was in the middle of the road. He insisted that he did. Counsel for the Defendant is asking this court to treat with this, as an omission that affects the credibility of the Claimant. However, I find that this omission has no serious impact on the credibility of Mr. Buddington regarding the material issues in this case.

[71] Mr. Bogle, by his own evidence, has admitted that in this case his role is to assist the Defendant, JUTC to defend itself. It would therefore be in the interest of the Defendants to exclude this statement. Consequently, I do not draw any negative

inference relative to the Claimant's credibility arising from this omission. Moreover, the evidence of Mr. Bogle at the locus as to the point on the road surface where he observed the blood splatter would be more consistent with the Claimant's position that the impact occurred while the bus was in the middle of the road.

[72] When questioned by his attorney-at-law at the locus Mr. Buddington did take a few seconds to identify the general point in the bend where the accident occurred. However, he did say he wanted to be sure as it happened a long time ago. I observed that his hesitation was not in relation to the point of impact but to the point along the soft shoulder that he came to rest after the impact. I do not share the view that there was inconsistency on his evidence as to whether he swerved or attempted to swerve. My appreciation of his evidence is that, despite his attempt to avoid the accident by swerving, it was more difficult for him, as being on an open vehicle, he was also being impacted by the wind in his effort to swerve away from the bus.

[73] Nonetheless in my assessment of the evidence, I find that there are significant discrepancies on the Defendants' account of the accident which renders it far less credible than that of the Claimant. Having observed the demeanour and the presentation of the evidence, in my view it was in fact the Defendant Mr. Allison, who fumbled for answers and who appeared to lack candor, in his evidence.

[74] Additionally, in her submission counsel Ms. Bryan asserts that the Claimant's evidence painted a picture of a head on collision. However, there is nothing on the evidence of Mr. Buddington that would allow me to form such an impression. In fact, Mr Buddington did testify that on the initial contact that the bus hit his right hand. On cross examination he referred to his right side.

[75] Nonetheless, as I have previously indicated, I find that there are significant credibility issues with the account provided by the 2nd Defendant. Prior to the visit to the locus Mr. Allison gave evidence that the first time he saw the Claimant he was approximately 40 feet away. However, at the locus the distance he pointed to when he first saw the Claimant was measured to be 12 feet from the point of

impact. The actual line of sight, that is the distance from which he could have clearly observed the Claimant was 70 feet away.

[76] Additionally, Mr. Allison would have travelled forward 39 feet from the line of sight before impacting with the Claimant. In my view, therefore, if Mr. Allison was keeping a proper lookout, he should have seen the Claimant from 70 feet away and not the 12 feet that he pointed out.

[77] Furthermore, the fact that he travelled 39 feet from the line of sight to the point of impact suggests that that he would travelled 27 feet more from the line of sight to impact than the distance travelled from actual sighting to impact. Yet again, in my view, if Mr. Allison was keeping a proper lookout, he would have recognized that he needed to take evasive steps, and should have taken those steps from at least 27 feet further than the actual distance of 12 feet that he attempted to take such steps.

[78] Mr. Allison agrees in his witness statement that the lanes are wide enough to accommodate two buses passing at the same time. In his cross-examination, he states that the first time he saw the Claimant Mr. Buddington he was on his Mr. Allison's side of the road. Additionally, it is Mr. Allison's evidence that in an attempt to avoid a head on collision he veered further to the left side of the road that had sand on it. However, on my observation of the layout of the locus in quo, it was apparent that going towards Port Royal, the hardened sand and gravel extended from the left soft shoulder on to a significant portion of the road.

[79] Additionally, whilst at the locus, I observed several motorists, to include at least one bus, who were travelling towards Port Royal, veering across the unbroken line into the right lane, in a bid to avoid the sand and gravel. However, I observed no oncoming traffic from the opposite side while these motorists were veering to that side.

[80] Consequently, my analysis of the evidence, in light of my observations at the locus, and the unchallenged evidence of the Claimant that the locus has remained

unchanged, lead to some compelling conclusions. Since on Mr. Allison's own evidence it was the veering of the bus further left that placed it on the sand, it is an inescapable inference that prior to veering to the left the 2nd Defendant was driving on the portion of the road surface that was free from sand. As such, considering the size of the bus, and my observations at the locus, for Mr. Allison to have driven the bus on the portion of the road that is free from sand, he would have had to drive the bus at least partially over on his right going towards Port Royal.

[81] In this regard it is more probable, than not, that the collision occurred while Mr. Allison veered on to the side of the Claimant to avoid driving on the sand. It is also noteworthy, that prior to the visit to the locus Mr. Allison indicated that at the point of impact the bus was about 4ft from the white line on his left. However, at the locus Mr. Allison indicated that the point of impact was to the extreme left edge of the road close to the left soft shoulder.

[82] Moreover, Mr. Allison's evidence is that the Claimant slammed into the front section at the right of the bus. Yet on the scene it is clear that his version became quite convoluted. Having placed the point of impact at the extreme left of the road as one faces Port Royal, he realizing his blunder was reluctant to respond to his own counsel when he was asked which wheel of the bus was at this point. He had to be asked the question several times before he said the left wheel.

[83] However, if this evidence is in fact truthful the impact would have been with the left and not the right wheel. It is clear to me, in light of his demeanour and the conflict on the evidence that Mr. Allison was not being truthful. I infer that this is in fact, his attempt to put the point of impact as far left on his side as possible so as to avoid liability, while not recollecting that his case was that the impact was with the right wheel of the bus.

[84] Additionally, it is my view that the evidence of Mr. Bogle and Ms. Young do not add any credence to Mr. Allison's account of the accident I take note of the fact that Mr. Bogle is not holding himself out as an expert witness. Neither is he treated as such. He not being a witness to fact, the value of his evidence is relevant as it

relates to certain observations, he made having visited the scene a short time after the accident.

[85] In his evidence prior to the visit to the Locus Mr. Bogle states that he observed two blood splatters. He said he observed one splatter, in the middle of the road and the other on the left side of the road facing Port Royal. However, at the Locus he placed the blood splatters on the left as one faces Harbour View. This in my view supports the evidence of the Claimant that the impact occurred on his side of the road.

[86] As it relates to Ms. Young, in my view, in addition to appearing incredulous, her evidence also contradicts the evidence of the 2nd Defendant and the Defence witness Mr. Bogle in the material particulars. In her evidence in chief Ms. Young did give the impression that she had a clear view of the Claimant and the manoeuvre of the motor bike leading up to the collision. She states that her position was behind the driver and that she was staring through the window. She also says that she noticed that the Claimant was riding at a fast speed and that the bike was coming wide in the bus lane.

[87] Nonetheless, on cross-examination, Ms. Young indicates that the first time she saw the bike, it was a finger length from the bus. It is therefore apparent that she could not have observed the speed at which the Claimant was travelling, as based on her evidence she would only have observed the bike at the point of impact.

[88] Additionally, Ms. Young's evidence is that when the bus got hit it was on the soft shoulder. This contradicts the initial position that Mr. Allison had placed the bus at, on impact. That is 4 feet from the white line. She further states that the bike ended up in the middle of the road where the white line is, over to the left while going towards Port Royal. However, this is in contradiction to Mr. Bogles' observation of the scene where he states that he observed the reflector on the right facing Harbour View. As already indicated Mr. Bogles' observation in this regard supports Mr. Buddington's evidence regarding the point of rest. Additionally, on impact she positioned the bus with the front slanted towards the white line and the back

towards the soft shoulder while Mr. Allison maintain that that the position of the bus was straight.

[89] Accordingly, I reject the evidence of Mr. Allison and Ms. Young that the Claimant came over on Mr. Allison's side of the road. I find that Mr. Allison was the one who veered over onto the Claimant's side of the road. I assess Mr. Romarne Buddington to be a truthful witness, who was straightforward in the presentation of his evidence. I have identified no notable inconsistencies, nor deficiencies in his case that would cast doubt on his credibility. Therefore, I accept his evidence that on the the 14th of November, 2018 while he was driving his motor cycle along the Port Royal Main Road and positioned in his correct lane, the 2nd Defendant Mr. Allison, while operating the bus of the 1st Defendant, drove the bus, without due care and attention over on the Claimant's correct side of the road thereby causing a collision from which the Claimant suffered damage and injuries.

[90] On the contrary, I find that on the Defendants' case there are unexplained discrepancies and inconsistencies. I find Mr. Allison to be an evasive unreliable and unconvincing witness. I find that the evidence of Mr. Bogle to be more supportive of the Claimant's account of the accident. I find the evidence of Ms. Young, unreliable as to the cause of the accident. Consequently, I find that Mr. Buddington has proven on a balance of probabilities that the collision was caused by Mr. Allison driving the bus on Mr. Buddington's side of the road when it was not safe to do so. As such I find that Mr. Allison failed to exercise due regard for the safety of Mr. Buddington as a road user.

Contributory Negligence

[91] The next issue for me to consider is whether the Claimant should bear some responsibility for the injuries and damages he suffered. **Section 3 (1) of *The Law Reform (Contributory Negligence) Act*** makes provision for a reduction in the

award of damages to a Claimant where it is found that the Claimant is partially responsible for his injury or damages. The section reads:

“Where any person suffers damages as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.”

[92] Where the defence of contributory negligence is raised the burden of proof rest on the Defendants. They must prove on a balance of probabilities that the Claimant failed to act as a reasonable and prudent man in circumstances where he ought reasonably to have foreseen that if he did not act as a reasonable and prudent man, he might cause damage to himself, considering the possibility of others being careless. In the event that this is proven the Claimant would be found partially responsible for his injuries/damage. Consequently, the damages to be awarded will be reduced. (See **Denning, L.J. in: Jones v Livox Quarries Ltd.** - [1992] 2 Q.B. 608, at 615), **Nance v British Columbia Electric Co. Ltd.** [1951] 2 All ER 448)

Submissions

[93] On this issue Counsel for the Defendants, Ms Bryan submits as follows;

“Based on the evidence and the facts of the case, the Claimant, Romarne Buddington, contributed significantly to the accident. The Claimant’s contributory negligence is evident in his failure to acknowledge the presence of an unbroken white line and subsequent overtaking in the Defendant’s lane. His disregard for regulations and failure to manoeuvre when overtaking around corners exacerbates his contribution to the collision. These actions demonstrate a lack of care for other road users and conflict with the standard duty of care expected, further highlighting his share of responsibility in the incident”

[94] Counsel concludes that, “Romarne Buddington’s testimony consistently indicates contributory negligence through disregard for safety regulations, lack of due care, and violation of road traffic laws, contributing to the accident. Thus, a reduction in

damages under the **Law Reform (Contributory Negligence) Act** is warranted, with a greater portion attributed to the Claimant. (She also relies on the case of The case of **Nance v British Columbia Electric Co. Ltd.**)”

Discussion

- [95] Mr Buddington’s evidence is that he was riding in the middle of his lane. Consequently, he would have positioned himself at a safe distance from any oncoming vehicle. I accept the evidence of the Claimant that he did swerve to his left in an attempt to avoid the collision but could not escape the impact. I find that Mr. Buddington was maintaining his lane and was properly positioned on his correct side of the road.
- [96] Despite the fact that, in her submissions counsel for the Defendants referred to the Claimant overtaking as a cause of the accident, there is no evidence from Mr. Allison or the witness Ms. Young that Mr. Buddington was overtaking any other vehicle. In fact, Mr. Allison and Mr. Buddington in their evidence, both testify that there was no other vehicle on the road at the time. As such there would be no basis for concluding that Mr. Buddington was overtaking.
- [97] I find that Mr Buddington could not have reasonably anticipated the actions of the 2nd Defendant encroaching onto his lane, given the fact that both parties agree that the lanes are wide enough to accommodate vehicles passing at the same time. Considering all the circumstances presented, I find that the Claimant did all he could do to avoid the accident. In this regard I find that there is no basis for me to apportion liability between the Defendants and the Claimant. Essentially, I find that the Defendants have not proven that Mr. Buddington could have done anything more to avoid the accident. I find that the 2nd Defendant is one hundred percent responsible for the collision. On account of this I also I find that the Claimant is not liable in Damages to the 1st Defendant for the damages to the bus. Consequently,

the counterclaim inevitably fails. Therefore, on the Claim and Counter Claim I enter Judgment for the Claimant Mr. Buddington.

Assessment of Damages

Special Damages

Special Damages was agreed at \$156,440,00

General Damages

Pain and suffering and Loss of Amenities

The Medical Evidence

The Medical Report of Dr. Chindepalli Hemachandria

[98] The Claimant was seen and examined at the Kingston Public Hospital by **Dr. Chindepalli Hemachandria** and the following findings were noted, in medical report dated April 2, 2019:

- i. "Pain and swelling to right forearm;
- ii. Right forearm in above elbow POP with a window;
- iii. Laceration over proximal forearm.

Investigations

- i) X-Rays – fracture shaft radius

Diagnosis

- ii) **Open fracture radius right forearm**

Treatment

- iii) **Hospitalization for twelve (12) days**
- iv) **Surgery by way of open reduction internal fixation;**
- v) Physiotherapy;
- vi) Discharged as an outpatient to the Kingston Public Hospital

Outcome/Prognosis

- vii) Follow-up in the Orthopaedic Clinic

The medical report of Doctor Grantel Dundas

The medical report of Doctor Grantel Dundas is dated March 3, 2023. Dr. Dundas states that he attended to Mr. Budding March 1, 2023. He itemized his complaints as loss of:

1. Range of motion of his right wrist
2. Range of motion of his right forearm
3. Some movements of the right thumb

[99] Other complaints were over-sensivity and shock sensation in the right forearm and hand. The duration of these complaints was four (4) years and four (4) months. Doctor Dundas also indicates in his report that;

“He has lost some range of flexion and extension of his wrist, he cannot rotate his right forearm fully. He has a bony swelling at the base of his right thumb and this impedes free or controlled motion of the thumb. He has hypersensitivity along the radial border of the distal third of his right forearm in the vicinity of the laceration and abrasion. This abnormal sensation extends to the first interosseous space between thumb and index finger. He experiences a sticking sensation when the area is touched or percussed. There is no other area of sensory impairment. He was incapacitated for six (6) months”.

[100] Doctor Dundas states that his examination of Mr. Buddington revealed:

“A fit intelligent young man in no cardiorespiratory distress. The focus was mainly on his right upper extremity. There was a 12cm volar scar commencing 3cm proximal to the distal wrist crease and extending proximally. There was an oblique curvilinear 11 cm scar which was inflicted by the perforation from his fractured radius. There was hyper-pigmented scar measuring 8 cm x 1.5-2 cm proximal to the trauma- induced laceration. All the scars were hypertrophic. His first dorsal interosseous muscle was weak. Thumb adduction was weak. There was prominence of the head of the right ulna with a click at the inferior radioulnar joint on motion and pressure. He exhibited a positive tinel sign in the surgical scar in the laceration scar. He was tender in the anatomical snuff box. The range of motion of his wrist and forearm were as follows:

<i>Ulnar deviation right 22°</i>	<i>left 34°</i>
<i>Radial deviation right 10°</i>	<i>left 20°</i>
<i>Wrist flexion right 28°</i>	<i>left 100°</i>
<i>Wrist extension right 70°</i>	<i>left 78°</i>

[101] Doctor Dundas also found that;

“Mr. Buddington had lost 5° of supination and 20° of pronation. His grip strength measured on an average of 37 kg on the right and 58 kg on the left. His right mid-arm circumference was 34cm compared to 36 cm on the left. Right mid- forearm circumference was 27.5 cm compared to 28.5 cm on the opposite side. Power in his wrist extensors and flexors were rated at 4+ on a scale 0-5 and pronation/supination was 4+ on a scale of 0-5”.

[102] Doctor Dundas revealed that his diagnosis of Mr. Buddington were as follows;

“a healed fracture of the right radius following open reduction and internal fixation, inferior radio-ulnar joint dislocation and a residual radial neuralgia/neuroma.”

[103] Radiographs done at Medical X-ray Institute show that he had a small fragment dynamic compression plate applied to the junction of the distal and middle thirds of the right radius. The bone was well healed. The screws, however, were somewhat overlong and protruded toward the extensor surface. He had residual foreign bodies (sand/gravel) in the soft tissues of his right forearm. The inferior radio-ulnar joint was dislocated with a significant gap between the bones and there appeared to have been a healed fracture of the head of the ulna.

[104] According to Doctor Dundas Mr. Buddington's impairment rating is as follows;

13% of the upper extremity or 8% of the whole person.

Submissions

[105] Ms. Hudson commends the following cases for the court's consideration.

(i) **Leroy Robinson v James Bonfield and Conroy Young** cited in Khan 4 at page 99

Leroy White v Winston Waldron cited in Khan 5 at page 103.

(ii) **Lora Hinds v Robert Edwards and Reginald Jankie** cited in Khan 4 at page 100

(iii) **Michael Jolly vs Jones Paper Co. Ltd and Christopher Holness**, cited in Khan 5 at page 120, Khan 5.

[106] In the case of **Leroy Robinson v James Bonfield and Conroy Young** the Claimant sustained multiple abrasions-to the left hand, tender swelling to left elbow, abrasions to eyebrows and fracture of right wrist. He was treated by way of dressing, medications, and plaster cast. The fracture healed satisfactorily after six (6) weeks. He was incapacitated for a period of eight (8) weeks. He had no impairment rating. He received an award of \$269,438.00 for General Damages in September 1996. This is revalued to \$2,303,865.43, using the most recent CPI.

[107] In the case of **Leroy White v Winston Waldron** the Claimant suffered swelling and tenderness to the left elbow, displaced fracture of olecranon process at left elbow. He had open reduction surgery, internal fixation and above elbow plaster cast. He had mild restriction in the movement, restriction in the movement of the elbow and increased stress when lifting heavy objects. He was assessed as having a 4% whole person impairment. In May of 1999 he received an award of

\$500,000.00 for General Damages. This is revalued to \$3,597,368.42, using the most recent CPI.

[108] In the case of Lora **Hinds v Robert Edwards and Reginald Jankie**, the Claimant sustained:

- Injuries to her the right elbow and right hand'
- She was incapacitated in her right hand for one (1) month and ten (10) days.
- She was assessed as having a 30% disability of the hand, and a 6% whole person impairment.
- In May 1987 she received an award of \$674,414.12. This is revalued to \$5,553,579.65, using the most recent CP1.

[109] In the case of **Michael Jolly vs Jones Paper Co. Ltd and Christopher Holness**, the Claimant sustained:

- a) laceration along the dorsal ulnar aspect of the forearm,
- b) laceration of right forearm and hand.
- c) Severed extensor tendons of right middle right
- d) and little fingers at their musculo-tendinous junction.

[110] He underwent 2 surgical procedures, and physiotherapy was recommended. He did not complete the programme of therapy due to financial constraints. His disabilities were assessed as follows:

- (i) Difficulties writing and using in knife;
- (ii) Reduced range of movement of the fingers and wrist;
- (iii) Grade 5 power in the hand;
- (iv) Impairment rating was 7% of the whole person.

He was assessed in November 1998. The award was \$800,000. This revalue to \$5,779,679.14 using the most recent CPI

[111] Ms Hudson submits that in terms of the nature of the injuries suffered, treatment undergone, together with the protracted period of rehabilitation, and the whole person impairment rating the Claimant's injuries in the instant case are graver than those suffered by the Claimants in the aforementioned cases. Further, she posits that the functionality of the Claimant's hand is significantly diminished. As such she asserts that the Claimant at bar is deserving of a higher award than those in the **Lora Hinds** and **Leroy Whyte cases**, as in neither of the aforementioned cases were there any significant compromise of functionality of the hand disclosed on the medical evidence, as oppose to the Claimant at bar, wherein Dr Dundas's medical report outlined in details the significant deterioration of the Claimant's right forearm and wrist.

[112] With respect to the **Michael Jolly** Case, it is Ms. Hudson's submission that the Claimant in that case complained only of pain, to the affected hand after a day's work as a sideman. She submits that:

*"This is not so with the Claimant at bar, who in his Witness Statement, and his history to Dr Dundas, details the continuing nature and extent of his pain and which is not limited to use of the hand, in that the pain, hypersensitivity and swelling comes on without any warning signs. In this regard, it is submitted that the effects of the injuries on the Claimant at bar impacts much greater, when compared to Claimant **Michael Jolly**"*

[113] She suggests that an award of \$8,000,000 would be adequate for general damages to the Claimant.

[114] The Defendant commends the following cases to the court

- (a) **Dennis Brown v Jamaica Pre-Mix Limited (Suit C.L. 1991 /B 118)**
- (b) **Byron Bailey v A.J. Webb & Moses Morris (Suit No. C. L. 1990)**
- (c) **Glen Syblies v Richard Lyn & Constantine Wong [Suit No. C.L 1990/\$ 187]**

[115] In the case of **Dennis Brown v Jamaica Pre-Mix Limited:**

The plaintiff sustained severe injuries in an accident resulting in fractures of the left humerus, left radius, and ulna. After immediate surgery, the plaintiff underwent a 21-month treatment period, which included multiple surgeries, skin grafting, and complications such as infections. The initial surgery revealed extensive damage, with swelling, bleeding between muscle fibers, and weakness in the radial nerve.

The plaintiff experienced recurrent infections, leading to additional surgeries and physiotherapy. The final assessment on March 19, 1999, showed persistent deficits, including a 35-degree range of motion deficit in the left elbow, limited palm movement, and muscle atrophy. Dr. Dundas determined a permanent partial disability of 31 % for the left arm, equivalent to 19% of the whole person. The plaintiff's recovery was marked by challenges and ongoing physical limitations. He was awarded \$850,000.00 in March 2001, which updates to \$5,291,935.48, using the most recent CPI.

[116] In the case of **Byron Bailey v A.J. Webb & Moses Morris**

The injuries suffered by the Claimant were:

- fracture of the left ulna and radius and of the right parietal bone.
- He was hospitalized for one (1) week and two (2) days. His left wrist was set and put in plaster paris. He was treated as an outpatient after.
- The disabilities were severe scarring to the face with pronounced cosmetic deficit requiring plastic surgery.
- There was ulna deformity. Permanent functional impairment amounting to 10% disability of the upper left limb.
- The damages were assessed as at June 24, 1992 to be \$126, 250.00 which is revalued to \$2,751,028.23, using the most recent valuation.

[117] In the case of **Glen Syblies v Richard Lyn & Constantine Wong**. The Plaintiff was injured in a motor vehicle accident on the 4th of February, 1990. The injuries were anterior dislocated lunate and scaphoid of the right wrist with puncture wound over the ulna aspect. He also had superficial lacerations and a deformed and swollen wrist with restrictive movement. A surgical decompression of the wrist and

reduction to nerves were done under anesthesia. At surgery it was noted that there was a soft tissue that was severely ruptured. The wrist was splintered and maintained for 4 weeks with physiotherapy instituted thereafter. This was followed up for over one (1) year showing gradual improvement. The disability rating was a permanent partial disability of 14% of the whole person. The Plaintiff was awarded pain and suffering and loss of amenities of \$65,000.00 on the 27 February, 1992. This updates to \$1,645,462.96 using the most recent CPI.

[118] Counsel submits that in comparing the injuries, of the Claimant in the case at bar with the injuries sustained by the Claimants in the afore-mentioned cases, it is evident that the damages suffered by the Claimant are less severe.

[119] It is also her view that in the cases submitted by the attorney-at-law for the Claimant, the injuries suffered by the Claimants in those cases are more serious when compared with the injuries suffered by the Claimant in the case at Bar. As such she takes the view that the court ought not to rely on these cases. She submits that an appropriate range for an award for General Damages would be between \$2,000,000.00 to \$2,500,000.00.

Discussion

[120] When I compare the cases submitted by both counsel I find that there are disparities in the award when compared with the seriousness of the injuries. For example, in the **Bryon Bailey** case the Claimant's most severe injuries were the scarring to his face and ulna deformity, resulting in a permanent functional impairment amounting to 10% disability of the upper limb. However, there was no mention of restrictive movement in his wrist. His updated award values \$2,751,028.23

[121] However, in the case of **Glen Syblies v Richard Lyn & Constantine Wong** the injuries and disability of the Claimant appear to be more serious than in the **Bailey case**. There was restricted movement of the wrist. There was follow up

physiotherapy that lasted for one (1) year and at the time of the award his functional deformity was 14%, yet the updated award is \$1,645,462.96 which is far less than that in the **Bailey** case.

[122] Moreover, I observe that these cases are from a much earlier era where the awards were inconsistent. However, I find that the cases submitted by Ms. Hudson are more consistent in terms of award as compared with the seriousness of the injuries. Additionally, when I compare the nature of the injuries and the quantum awarded, they are also consistent with a more recent case. In this regard I refer to the case of **Jehoida v Adrain Smith and Phyllis Hinds** [2013] JMSC Civ. 117, where in September 2013 the Claimant was awarded \$1,875,000.00. This updates to \$3,206,863.97 using the most recent CPI.

[123] In that case the Claimant suffered fracture of the **right wrist** and lumbar spine, decreased flexion of the right wrist, and was incapacitated for 4 months. He also had laceration to the scalp, swelling on the ankle, pain to right thigh, buttock and wrist. He was expected to have recurring back pain, but the fracture of right wrist was undisplaced and he was not expected to experience any significant complication with the fracture. His impairment rating was assessed to be 6 percent of whole person.

[124] I find it more prudent to rely on this recent case as in recent times the awards have become more consistent. Nonetheless, though the instant case compares with the **Jehoida case** in terms of the nature of the injuries. I observe that the injuries of The Claimant and the impact on his daily life are more serious than those of the Claimant in the **Jehoida case**.

[125] In the **Jehoida case** the Claimant was not expected to experience any significant complication with the fracture of the right wrist. In the instant case the Claimant is still having problems moving his hands freely. He is still unable to make a full fist. He has difficulty lifting objects. He is still experiencing shocking sensation in his right hand, and he is unable to write properly. He is also unable to exercise as he is accustomed to. I also take into consideration the fact of the reduced range of

motion of the Claimant's right wrist flexion which is significantly less than that of the left wrist that is 72 percent. Consequently, it is my view that he should receive an award that is significantly higher than the award in the **Jehoida case**. In this regard I find that an award of \$5, 750,000 for pain and suffering and loss of Amenities is an appropriate award. Consequently, I make the following orders.

Orders

Special Damages

- i) Special damages is awarded in the sum of \$156,440,00;
- ii) Interest is awarded on the special damages at the rate of 3 percent from the 14th of November 2018 to the date hereof.

General damages

Pain and Suffering and Loss of Amenities

- i. Award ----- \$5,750,000.00
- ii. Interest at the rate of 3% from the 21st of November ,2019 to the date hereof.
- iii. Cost to the Claimant to be agreed or taxed.

.....
Andrea Thomas
Puisne Judge