[2021] JMSC Civ 74

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2016HCV02802

BETWEEN	**ACKELIE BURRELL**	**CLAIMANT**
AND	**RAYMOND MCLEOD**	**DEFENDANT**

IN OPEN COURT

Ms. Marion Rose Green and Ms Andrea Lannaman instructed by Marion Rose Green and Co. for the Claimant.

Ms Peter-Gaye Bromfield instructed by Kalima Bobb-Semple for the Defendant.

HEARD: February 16 and April 30, 2021

Motor vehicle Accident - Negligence - Breach of Duty of Care.

Assessment of Damages - Special Damages - Medical Expenses - Whether the Claimant is entitled to claim portion of expenses paid by his Health Insurance - Future Medical Expenses - No mention of this item in the Particulars of Claim or the Claimant's evidence - First Time it is mentioned is in the Supplemental Submissions - Whether the Claimant is entitled to an award.

General Damages - Pain and Suffering and Loss of Amenities - Handicap on the Labour Market.

THOMAS, J

INTRODUCTION

The Claim

[1] The Claimant in this case is seeking damages in negligence arising from a motor vehicle accident which occurred on the 20th of May 2014 in Cross Roads in Kingston. In his Amended Particulars of Claim filed on the 11th of December 2020 the Claimant alleges that on the date in question he was driving his motor vehicle registered 3629GE along the Cross Road Square when on reaching the vicinity of Scotia Bank, having stopped to give way to another motor vehicle travelling in front of him, the Defendant who was driving motor vehicle registered 5632GC along the said road, caused his motor vehicle to collide in the rear of the Claimant's motor vehicle which was stationary at the time. The collision caused personal injury to the Claimant and damage to his vehicle.

The Defence

[2] The Defendant in his Defence filed on the 29th of May 2019 has not denied the fact of the collision. He however alleges that the accident was caused by the Claimant stopping suddenly in front of him without any warning or indication. The Defendant also avers that he took reasonable care and skill so as to avoid the collision but he could not.

LIABILITY

The Claimant's Evidence

[3] The Claimant has provided further details of the accident in his statement dated the 16th of October 2020 that was permitted to stand as his evidence in chief. He states that along Slipe Road in Cross Roads in the vicinity where the accident occurred, there are four 4 lanes. Two going in the direction of Downtown Kingston,

and two in the opposite direction. He states that in his travel towards Downtown Kingston he was travelling in the lane nearer to the middle of the road. He further states that a taxi was travelling in the same direction ahead of him but in the lane closer to the side walk. The taxi stopped to let off passengers then cut across in front of him in the middle lane. The taxi then stopped in front of him to allow persons to cross the road.

[4] The Claimant further states that he immediately signalled that he was about to stop, applied his brakes and then stopped. He then felt an impact to the rear of his motor car. He discovered that the Defendant who was driving behind him collided in the back of his motor vehicle causing the rear bumper of his vehicle to fasten to the rear right wheel causing his motor vehicle to collide with the taxi in front of him.

[5] On Cross examination he agreed that the taxi that was in front of his vehicle stopped suddenly. This he said was because pedestrians were at the time crossing in front of the taxi. He however insists that when the taxi stopped suddenly in front of him, he did not stop suddenly. He maintains that he applied his brakes and gave indication by hand that he intended to stop.

The Defendant's Evidence

[6] The Defendant Mr. Raymond McLeod states that on the relevant date and time he was driving his "Mitsubishi Pickup Truck" along Slipe Road in St. Andrew. The road he says, was wet but the visibility was good. He says that on reaching the vicinity of the Singer Store in Cross Roads the Claimant's vehicle was travelling ahead of him. He states that a taxi came from the left lane to the middle lane without any warning or indication and as such his pickup truck and the Claimant's motor car were unable to come to a stop. He says that it was in those circumstances that he collided in the rear of the Claimant's motor car. He also states that he observed damage to the rear bumper, trunk lid and rear light of the Claimant's motor car. He however asserts that he could not have avoided the accident as the taxi came suddenly into the middle lane.

[7] On cross examination he states that he has been driving for approximately 40 years and is familiar with the provision of the road code that requires him to drive at least one (1) car length behind the vehicle in front of him. He does not recall seeing the provision that says on a wet road, that distance should be two (2) car lengths; to his knowledge the provision says "proceed cautiously". He agrees that he would need a greater stopping distance on a wet road than on a dry road. He accepts that the reason for the road code requiring that there ought to be a reasonable distance between cars travelling on the road, is so that there is ample time for the motor vehicle travelling behind, to stop. He agrees that when the taxi stopped in front of the Claimant, he, (the Claimant) was able to stop but said that the Claimant stopped very close to the bumper of the said taxi.

[8] The Defendant further states that when he first saw the taxi, it was in the left lane. He cannot recall whether it was stationary or moving. He does not know when it reached in the middle lane. He admits seeing two ladies crossing the road**.** He however states that he was not looking at the ladies; he was looking straight ahead of him. He further states that when he first saw the Claimant's vehicle, he was about 1½ car-length away. He also asserts that at the time, he was travelling slowly at approximately 20-25 km per hour. He also agrees that it maybe, that he was not travelling at a sufficient distance behind the Claimant's motor car for him to avoid the collision

[9] He then went on to say that when he applied his brakes his motor truck skidded. He however states that he cannot recall if he told this to his attorney-at law but he accepts that this evidence is not in his witness statement**.** He agrees that he was wrong that day because the "rule of the road is that once you hit someone in their back you are wrong". He contends that when he observed that the taxi stopped in the middle lane to allow persons to cross the road. Mr Burrell did not signal to him to stop but accepts that the brake light of Mr Burrell's car was on. He then restated his earlier contention that he was not driving too closely to Mr. Burrell's car and insists that he did not fail to pay attention to what was going on around him, and that he tried his best to avoid the collision.

[10] In answer to questions on re-examination and in response to questions posed by the court for the purpose of clarification he states the following:

> It was the right side of the bumper below the right back light of Mr. Burrell's car that was dislodged. When the accident occurred he saw the two ladies in the middle of the road in front of the taxi. When he first saw them they were walking towards the middle of the road. Mr. Burrell was driving at that time. In seeing them crossing the road he was expecting Mr. Burrell to stop, but he would still describe that expected stop as a sudden stop.

ISSUES

[11] The main issues in this case surround the principle of negligence. These are:

(i) Whether the Defendant owed a duty of care to the Claimant;

(ii) If a duty of care is found to be owed to the Claimant, whether he breached that duty of care; and

(iii) Whether the Claimant suffered damage as a result.

[12] However, the central issue in this case is really one of causation. That is, whether the accident occurred as a result of the Defendant failing to pay due care and attention to the safety of other road users, by keeping a safe distance from the vehicle in front of him, or, whether the accident occurred as a result of the Claimant, as a road user, stopping suddenly without any warning to the Defendant.

THE LAW

[13] The court in the case of ***Bourhill v Young*** [1943] AC 92, laid down the principle that" the driver of a motor vehicle must exercise reasonable care, which an ordinary skilful driver would have exercised under all the circumstances, including the avoidance of excessive speed, keeping a proper look out and observing traffic rules and signals, to avoid causing injury to persons or damage to property". Additionally, the court in the Jamaican case of ***Esso Standard Oil SA Ltd &***

Another v Ian Tulloch [1991] 28 JLR 553 expounded on the principle by stating that all users of the road owe a duty of care to other road users (See also ***Leighton Samuels v Leroy Hugh Daley*** [2019] JMCA Civ 24). Therefore, as it relates to the law of negligence, a Defendant will be held liable in damages for any damage he causes to another road user in failing to exercise his duty of care.

ANALYSIS

[14] In civil proceedings the Claimant bears the responsibility to prove on a balance of probabilities, that he is entitled to the remedies sought. I have assessed the evidence of both parties to include their demeanour and have found the Claimant to be a more credible and reliable witness than the Defendant as it relates to the events that led to the collision. I find that his evidence remained consistent on cross examination. In any event I find that there is no significant divergence of facts between the parties as it relates to the circumstances of the collision.

[15] I find that the established facts on the evidence are that while the Claimant was travelling in the middle lane along Slipe Road, a taxi was travelling in the same direction ahead of him but in the lane closer to the left. The taxi came across in front of the Claimant's vehicle in the middle lane. The taxi then stopped suddenly in front of the Claimant's car to allow pedestrians to cross the road.

[16] I accept Mr Burrell's evidence that he signalled that he was about to stop, applied his brakes and then stopped I accept his evidence which is not denied by the Defendant that while he was stationary the Defendant who was travelling behind him collided in the back of his vehicle causing damage to his vehicle and damage to him.

[17] Counsel for the Defendant submits that "it is more likely that a taxi that cuts across the path of a driver and stops, would have done so suddenly and that that driver would have had no time to signal then brake in such an instance". However the issue which arises in my view is this: In the event that it was found that the Claimant was unable to give a hand signal prior to breaking as a result of the taxi coming in

front of him and stopping suddenly, would this absolve the Defendant of his duty of care. That is whether the Defendant can rely on this excuse in order to escape liability for the damage that occurred by virtue of his vehicle colliding in the back of the Claimant's motor vehicle.

[18] The Defendant admits that the was aware of the presence of the Claimant's vehicle being driven on the roadway in front of him. It is also his admission that he was aware that the taxi stopped suddenly in front of the Claimant to allow pedestrians to cross the road. However I notice that in his evidence in chief he offered no reasonable explanation as to why he was unable to come to a stop in sufficient time in order to avoid the collision.

[19] I find it very impactful that the Claimant who was immediately behind the taxi and before whom the taxi not only crossed paths without warning but also stopped suddenly, was able to come to a stop without colliding in the taxi, prior to being hit by the Defendant's pickup. The Defendant on the other hand was faced with no obstacle in his path. I also take into account the fact that it is only on cross examination that the Defendant introduced the element of the skidding of his motor vehicle as an explanation for his inability to come to a stop in order to avoid the collision. I find this to be a significant omission that affects his credibility.

[20] Moreover, it is my view that, the duty of care by one road user to another requires paying attention to the vehicle in front of you, observing the break light in the event that if for some reason the vehicle stops, you will be able to stop without causing a collision. The fact is, in our daily commute we come upon unexpected obstacles where the best signal we can give at the particular time is our break light. Such hazards include potholes, animals suddenly darting across the road and in this case, pedestrians crossing the road especially in areas where there are no pedestrian crossings. Essentially, on the evidence I find that there is every indication that if the Defendant himself was paying attention and was travelling at a safe distance behind the Claimant's vehicle he could have avoided the collision.

The Cause of the Collision

[21] Having assessed all the evidence, I find that the accident was caused by the Defendant Mr. McLeod driving too closely to Mr. Burrell's car. His defence is that Mr Burrell stopped suddenly without any warning. However, even if I were to accept that Mr. Burrell gave no other warning than applying his brakes, in light of the circumstances, as described by both the Claimant and the Defendant, Mr. Burrell could not be faulted for the actions he took. He was properly positioned on the road and was not only faced with the hazard of the taxi driver suddenly crossing in front of him but the taxi driver also stopping suddenly on the occasion of the pedestrians crossing the road.

[22] Therefore, if in order to avoid colliding in the taxi Mr. Burrell had to apply his brakes suddenly, without the opportunity or even the presence of mind to give an additional signal, in those circumstances it is perfectly excusable. As indicated earlier, I find that the Defendant's admission that he saw the break light of the Claimant's motor car come on, would have been sufficient warning in the circumstances. However I accept the evidence of Mr Burrell that he also used his hand to signal to the Defendant that he intended to come to a stop.

[23] Additionally, I find that the Defendant, being the motorist travelling behind the Claimant, had a duty to pay attention to what was going on ahead of him and to travel at a safe distance behind the Claimant. In fact, he should have anticipated that the Claimant would have come to a stop even before his break light came on and he himself should have prepared to stop by breaking. This is in light of the fact that he admitted that he observed the movement of the taxi and also the pedestrians and the fact that he admitted that he expected the Claimant to come to a stop.

[24] **Section 95(3)** of the **Road Traffic Act** states that any failure on the part of any person to observe any provision of the Road Code may be:

"relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings,' be they criminal or civil".

[25] ***Part 2 of the Road Code (1987)*** mandates the manner in which a motorist is expected to drive on the road. That is:

"not exceeding the speed limit; keeping as near to the left as is practicable; always being able to stop one's vehicle well within the distance for which one can see the road to be clear; not travelling too close, to the vehicle that is in front of one's vehicle."

[26] However, of special significance is the aspect of rule which states:

"Always leave enough space between you and the vehicle in front so that you can pull up safely if it slows down or stops. A good rule of thumb in good conditions is to allow at least one vehicle length for each 10 miles per hour you are travelling"

[27] At this juncture I must state that I am acutely aware that:

"*the mere fact that an individual breaches the Road Traffic Act or the rules of the road, does not, inexorably, mean that the person should be held to be liable in the event of the occurrence of an accident."*

(See **Leighton *Samuels v Leroy Hugh Daley*** [2019] JMCA Civ 24, (Paragraph 7) and ***Powell v Phillips*** [1972] 3 All ER 864)

[28] However in light of the fact that the Defendant, on his own case, observed that it was raining, that is condition of the road was wet, and the further fact, that he observed not only that another motorist had crossed into the path of the Claimant but also that pedestrians, that is other road users, were crossing the road, I find that his failure to keep a safe distance in observation of the Road Code in these circumstances would also amount to a breach of his duty of care**.**

[29] Additionally, both the Defendant and the Claimant would have been affected by the same wet condition on the road. I find therefore that the Defendant's assertions that he applied his brakes and his vehicle skidded does not exonerate him. On this point, the principle in the case of ***Richley (Henderson) v. Faull Richley,*** **Third Party)** [1963] 3 All.E.R. 109, is applicable. In that case there was a collision between a car that was being driven by the Defendant and a car in which the plaintiff was a passenger. The road was wet. In the vicinity of a bend in the road the Defendant's car skidded across the road into the path of the car in which the plaintiff was travelling resulting in a collision in which the plaintiff sustained injuries.

[30] The Court found that:

> *"the fact of the defendant's car having moved to the wrong side of the road into the path of the third party's car created a prima facie case of negligent driving by the defendant which was not displaced by merely proving that the defendant's car had skidded. That fact was only proof that the skid had occurred without the defendant having failed to prove that the skid occurred through no fault of his or that the driver of the car in which the plaintiff was travelling had contributed to the collision by negligent driving he alone was liable* "(See also ***Albourne Matthews and Winston, Morrison v The*** **Attorney General and Gregg Gardener** Claim No. 2007 HCV04547)

[31] Further, the Defendant in the instant case admits to being an experienced driver of motor trucks. Additionally, he states that when he first saw the pedestrians they were walking in front of taxi. He also states that at that time Mr. Burrell was still driving but he expected him to stop. Therefore, I find that if the Defendant was in fact paying due regard to Mr. Burrell and the pedestrians who were other road users, he should have started breaking from the moment he saw the ladies crossing in front of the taxi. This is in light of his admission that he expected Mr. Burrell to stop.

[32] Essentially, I find that it was his failure to keep a safe distance that would have caused him to apply his brakes sharply on a wet road, placing him **in** the predicament of his car skidding. In these circumstances even if I found that he did try to avoid the collision by apply his brakes and the car skidded, that does not absolve him of liability. I therefore find that the collision was as a result Defendant's failure to keep a safe distance behind the Claimant's motor vehicle.

Contributory Negligence

[33] The defence of contributory negligence is one that should have been specifically raised by the Defendant. This was not done. However I find that even if it were raised the Defendant would not have succeeded. Incidentally where the defence is raised the burden of proof rest of the Defendant to prove 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, taking into account the possibility of others being careless. Once this defence succeeds the Claimant would be found partially responsible for his injuries/damage, resulting in a reduction of damages awarded (See **Denning,** ***L.J. in: Jones v Livox Quarries Ltd.*** - [1992] 2 Q.B. 608, at 615),

[34] In the instant case it is evident that there was nothing that Mr. Burrell could have done to prevent the Defendant's motor truck from colliding with his motor car. In fact, in fulfilling his duties to pay due regard to the other road users who were in front of him, namely the occupants of the taxi and the pedestrians, he would have been obliged as best as possible to come to stop, in order to avoid colliding with them. This is in spite of the fact that the taxi driver would not have acted as a prudent driver when he crossed over suddenly in front of him. Therefore the Claimant could not be faulted or found to be contributory negligent in stopping so as to avoid a collision with other road users. Consequently, I find that the Defendant is 100% liable in negligence for the damages arising from the collision.

DAMAGES

Special Damages

Medical Expenses

[35] In support of his claim for this item of special damages the Claimant has tendered receipts for medical reports, doctor visits, X-rays, radiology, physiotherapy and pharmaceutical documentation/receipts totalling $285,995.00. Some of these receipts, in addition to reflecting the total expense, also reflect the portions that were paid by the Claimant's health insurance. For example, there is a receipt from **Krsdale Pharmacy** dated May 13, 2016. This receipt reflects that the total bill was for $4690.00. It also indicates that $3752.00 was paid by Medecus Insurance Company and $750.00 was paid by Sagicor Insurance Company**.**

[36] At this juncture I find it convenient to address Defence Counsel's legal submissions as it relates to the compensation for medical expenses. The Defendant's position is this:

> "...Sums paid by the Claimant's medical insurance company, rightfully are not recoverable by him as those are not "out of pocket expenses" and special damages seeks to reimburse a Claimant for sums he would have expended out of pocket. The dynamic of a health insurance policy is that a premium is paid to cover a risk. If there is no claim made by the Claimant, the premium is not returned or recoverable by the Claimant. It is the Defendant's position that the Claimant would therefore not have been disadvantaged in that regard or be out of any sums. The only sums the Claimant would have been put out of are any balances he had to covered after the sum his health insurance company covered was deducted. Only the Claimant's health insurance would therefore have locus standi *to* recover sums paid by them in connection with the tort."

[37] Though not specifically stated, this submission by Counsel for the Defendant seems to raise this as an issue of unjust enrichment. However I do not share the view of Counsel on this issue. I find that this argument is not sustainable in law. Essentially, it is my view that the Defendant as a third party cannot seek to benefit from the contractual relationship between the Claimant and his health insurers. In fact, there is no evidence before the court supporting the position put forward by the Defendant as to the details of contractual arrangement between the Claimant and his health insurers.

[38] The principle of privity of contract is quite germane to this issue. That is unless the contract was specifically created for the benefit of the Defendant he cannot seek to rely on the contractual arrangement between the Claimant and his insurers for their mutual benefit.

[39] In any event the total sums for these expenses may not have been immediate out of pocket expenses but they were not free of cost to the Claimant. Under his contract he would have been paying his weekly, monthly or annual premiums which in essence are expenses to him. Additionally, there is no legal justification for allowing the Defendant to benefit from his negligent acts by seeking to take advantage of payments made on behalf of the Claimant whether by his insurers or any other third party. The issue of reimbursement would be a matter between the Claimant and his insurers. This should not concern a third party such as the Defendant, nor should it concern the court, unless a separate action is brought by the insurers seeking reimbursement.

[40] This is essentially akin to the subrogation rights that exist between insurance companies and their insured. This nature of this kind of relationship was aptly explained in **Halsbury's Laws of England**, 4th edition, Volume 25, paragraph 196. The author stated:

> *"In the strict sense of the term, subrogation expresses the right of the insurers to be placed in the position of the insured so as to be entitled*

to the advantage of all the rights and remedies which the insured possess against third parties in ***respect of the subject matter…"***

[41] This principle was also explained in the case of ***Burnand v Rodocanachi Sons & Co***. (1882) 7 A.C. 333. At page 339, the court stated:

"The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hand of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

[42] However, the High Court in St Lucia in case of ***Lascelles De Mercado & Co. Ltd v King et al*** LC 1968 HC 35, made a bold pronouncement on the very similar issue that was raised by defence counsel in that case. Justice Bishop said at paragraph 31:

"*The right of subrogation is in my view not available as a defence by a third party. The effect of payment by the insurers is to subrogate them to the rights of the assured in respect of the subject matter and the insurers become entitled to stand in the shoes of the assured. An action may be brought on behalf of the insurers to enforce the rights to which they are subrogated. The third party who remains responsible to the assured for the resulting loss, cannot avoid or defend his liability on the ground that the assured had already been fully indemnified by the insurer. If this could be a good defence then the third party would be reaping the benefit of a policy without having paid "*

[43] He continued

> "*I cannot agree that the plaintiff has no locus standi in his case on the grounds that the claim has been satisfied by the insurance company. The submission of counsel for the defendant must fail on this point.*"

[44] Additionally, in the case of ***Caledonia North Sea Ltd v Norton (No 2) Ltd (in liquidation)*** [2002] 1 All ER (Comm) 321, there was an explosion on an oil platform that resulted in the death and injury of employees of the operator of the platform and its contractors. The operator and its insurers settled the claims of the victims. Subsequently, the operator brought actions against the contractors. In reaching its findings, the House of Lords stated at paragraph 13 of the judgement that:

> *"The operator was not obliged to insure itself against adverse claims. Thus the existence of such insurance, prudent though no doubt it was in business terms, is irrelevant to the mutual obligations of the operator and the contractor; in technical language, it was strictly res inter alios acta. It would be wholly anomalous if the operator's voluntary decision to insure itself against the risk to which it was exposed should operate to the advantage of the party against whom its contractual claim for indemnity lay (a party not involved in the decision to insure and not responsible for payment of any part of the premium)."*

[45] In the case at bar, Counsel for the Defendant also submits that:

> "there is no evidence of any doctor's visit, purchase of medication and/or between January 2015 and September 2020 but for one doctor's visit in May 2016 after which he did an x-ray and purchased medication and one in August 2019. Dr. O'Reggio's September 2020 report alleges seven further visits since his May 2016 report but unlike his previous reports the dates of these visits were not itemised. The Claimant has furnished evidence to support two further visits in relation to the accident, the one in May 2016 and the one in August 2019. It is likely that Dr. O'Reggio would have

included in his count visits extraneous to this incident". She submits that the court should find that the "Claimant only made the number of visits for which documentary evidence is provided in the relation to injuries allegedly sustained in this accident**."**

[46] However, I cannot subscribe to this position put forward by counsel. Despite the absence of seven (7) specific receipts pointing to seven (7) other visits to Doctor O'Reggio subsequent to the examination in May 2016, there is no evidence to contradict the evidence of Doctor O'Reggio in his report that since that date the Claimant visited him a total of seven times. Therefore there is no reason for me to conclude that these visits were in relation to matters extraneous to the injuries sustained in the accident. Consequently, I accept the evidence of the doctor in this regard. Therefore, in all the circumstances I find that the Claimant is entitled to recover the total medical expenses in relation to his injuries as evidenced by the receipts submitted into evidence.

Mitigation

The effect of the Claimant's failure to attend physiotherapy sessions from the time this was recommended by his Physician.

[47] Counsel for the Defendant submits that the fact that the Claimant raised the issue of impecuniosity "is not sufficient and must be qualified". She further submits that:

> "It would have been sufficient had evidence been led that he inquired of his doctor of any alternatives available to him, or checked any prices at different entities to determine his inability to afford same. It is of note that despite inflation, the cost he paid for each physiotherapy session in 2020 was less than the one he paid for in 2014 and at a different location. Additionally, in paragraph 21 of his witness statement, he indicated that in December 2014 he was able to afford a replacement vehicle, an expense that would have been significantly greater than the treatment he was referred to complete."

[48] She takes the position that the court should infer from this:

> "that the Claimant's failure to complete the course of physiotherapy in 2014 and anytime between then and 2020 had very little if anything to do with his inability to pay. A more plausible explanation the Defence would suggests is that the Claimant's injuries were not as severe as he would like the court to believe".

[49] However, Counsel seems to have missed the fact that both sets of expenses would have been expenses created by the accident. Clearly without specifically saying so, the inference from the evidence is that the Claimant could not have afforded both the replacement cost of his motor vehicle and the expenses for physiotherapy at the same time. Surely counsel cannot in all reasonableness expect that the fact that the Claimant chose to mitigate in relation to a particular expense over the other as a result of impecuniosity, he should not be compensated for both.

[50] The law on mitigation of damages was clearly stated in **Pearl Smith v Conrad Graham and Lois Graham** (1996) 33 JLR 189 in which Langrin J as he then was, said:

> *"It is a general principle that a person who has been injured by the acts of another party must take reasonable steps to mitigate his loss and cannot recover for losses which he could have avoided but has failed through unreasonable inaction or action to avoid. The person who has suffered the loss therefore does not have to take any step which a reasonable and prudent man would not take in the course of his business."*

[51] It is trite law that the onus of showing a failure to mitigate lies on the Defendant, and he must do so in a way that effectively demonstrates what the Claimant failed to do, that he could reasonably have done. Nonetheless the Court of Appeal in **Sinclair v Taylor** [2012] JMCA Civ. 30, relying on the case of **Lee James Leonard Samuels, TG Motors Ltd v Michael Benning** [2002] EWCA Civ 858) stated:

> *"The failure to mitigate does not of course bar any claim at all for damages under the particular head in question."*

[52] In the case of ***Jagaroo v Jarrett*** [2016] JMSC Civ. 111, on which Counsel for Defendant in her submissions relies, Tie J noted that the medical report stated that the Claimant did not fully comply with the instructions given by the doctor, having completed only a couple physiotherapy sessions, and not continuing because of financial constraints. In addressing the submission of Counsel that this failure to complete physiotherapy amounted to a failure on the part of the Claimant to mitigate her losses, she relied on the following statement made by Lord Collins in ***Clippens Oil Co v Edinburph and District Water Trustees*** [1907] 1 AC 291:

> *"In my opinion the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortuous act."- page 303*

[53] With that case in mind the judge stated that:

> *"I am of the view that the claimant should not be regarded as having failed to mitigate her loss given that her inability to continue physiotherapy was due to financial constraints and bearing in mind her evidence that her inability to work was as a result of the defendant's negligent act."*

[54] These principles are directly relevant to the case at bar. Mr. Burrell's failure to attend physiotherapy on account of financial constraints cannot be seen as a failure to mitigate. There is no evidence to suggest that if he had done the therapy earlier, that is in 2014, or any time prior to July 2020 he would have required a smaller number of sessions. Additionally, counsel herself made the observation that "despite inflation, the cost he paid for each physiotherapy session in 2020 was less than the one paid for in 2014". Therefore there is no evidence to suggest that

the fact that the Claimant delayed the therapy for reasons he explained, points to an increase in expenses.

[55] An additional issue to be resolved is whether the Claimant is entitled to be compensated for medical expenses incurred in 2020 to include his visit to Doctor Dundas. The law is that an award for damages must be fair, just, commensurate with the injury sustained and sufficiently adequate to put the injured party, so far as money can place him, in the same position as if he had not been wronged. (See ***Roach v. Yates*** [1938] 1 KB 256)

[56] Therefore this issue is determinant on whether these expenses represent the actual financial loss to the Claimant from the accident to date. That is whether they are necessary expenses creating a nexus between the injuries and treatment.

[57] The evidence of the Claimant, which is supported by Doctor O'Reggio, is that the Claimant continued to suffer pain in his neck and back up until 2020. In that regard, the Claimant would have been entitled to continue to seek medical attention to include the services of a specialist. Therefore regardless of whether or not I place complete or no reliance on Doctor O'Reggio's report of 2020 or Doctor Dundas' report, I find that their services were sought as a result of unresolved injuries from the accident. Therefore any expenses arising from the Claimant being attended to by these medical professionals as a result of the accident, would essentially amount to necessary expenses for which the Claimant is entitled. to be compensated. I therefore find that in terms of medical expenses, the Claimant has proven the total sum of $285,995.00.

Damage to Motor Vehicle and Cost of Transportation

[58] In support of his claim for damage to his motor vehicle the Claimant submitted the report of Assessor, Ivan Lewis of Orion Loss Adjusters Limited dated the 25th of June 2014 which was admitted into evidence. In his report Mr. Lewis states that he observed damage to the trunk lid, right tail lamp, left quarter panel, right rear chassis, rear bumper, trunk lock, right quarter panel, trunk locking panel, left tail

lamp, rear bumper support, left rear chassis, and trunk flooring of the motor vehicle. He indicates that based on the cost of labour and parts it would have been uneconomical to effect repairs to the vehicle. He assessed the total cost of repairs at $112,3700.00, while he assessed the total loss at $110,000.00.

[59] On cross examination the Claimant admits that at the time of the accident the vehicle was still drivable after the assistance of Mr. McLeod and that he drove it from the scene of the accident. He did not, however agree that the damage to his vehicle was minor. He also states that he did some repairs but Advantage General Insurance Company refused to insure the vehicle because it was a" write off" and that due to financial constraint he was unable to get a replacement until December 2014.

[60] Counsel for the Defendant submits that:

> "The evidence before the court is that the Claimant's vehicle was driven from the scene The Claimant has in his witness statement at paragraph 22 state that he did some repairs on his vehicle, but was unable to reinsure as it was a "write off. No evidence or information was led as to why an insurance company would not offer coverage for a motor vehicle that based on the description of the Claimant and the Assessor's Report was still functional".

[61] However, I find that the assessor's report is consistent with the Claimant's evidence regarding the damage to the vehicle. Additionally, I find that on the evidence of the Defendant there is no significant challenge to the Claimant's evidence as it relates to the area of the vehicle that received damaged occasioned by the collision. He accepts that on impact his vehicle collided in the rear of the Claimant's motor vehicle. In spite of his denial that after the collision the rear right bumper was fastened to the rear wheel he agrees that the rear bumper was dislodged. Consequently, I accept the content of the assessor's report as it relates to the damage to the Claimant's motor vehicle. I accept his valuation in terms of

cost of repair and also replacement cost and I accept that the cost of repair is greater than the total replacement value.

[62] As it relates to Counsel's contention that no evidence was led as to why the insurance company would not offer coverage for the motor vehicle, it is my view that the Claimant has provided that reason: that is "the car was a write off". This write off is supported by the assessor's report. There is no evidence contradicting this evidence of the Claimant. Additionally, the insurance company as a free contracting party has the right to refuse to enter into contract with another party which it does not consider to be beneficial. It is common knowledge that the insurance premium for a motor vehicle is dependent on the value of the vehicle. Therefore, where it is evident that the premium for the insurance would be so low that it would be apparent from the outset to the insurance company that it is highly unlikely that the premium paid by the Claimant could ever cover the cost of repairs in the event of an accident claim, the insurance company would be perfectly within its right to refuse to enter into such a contract from which it would derive no benefit.

[63] Consequently, I find that the Claimant is entitled to the replacement value of his motor vehicle that $110,000.00. However, the sum of $7000.00, claimed for the cost of the assessor's report is not supported by a receipt or other supporting document. Therefore, this sum will not be awarded.

[64] The Claimant also states he was out of use of a vehicle for 35 days. His vehicle, he says was used to travel to and from work and to transport his family. He has submitted 29 copy receipts which were admitted into evidence He has provided the reason for the unavailability of the original receipts. He explained that he submitted the original receipt to the lawyer he had before he engaged Marion Rose Green and Company and they were not returned to him.

[65] The Claimant also states that these copy receipts, evidence twenty-nine (29) round trips he had to make in a chartered vehicle after the accident. However, the content on one of these receipts was not visible. The total expenses as reflected on the

twenty-eight (28) receipts reflects twenty-eight (28) round trips at a cost of $4000 per trip amounting to $112,000.00.

[66] On cross examination the Claimant states that he made more than 5 visits between 2014 and 2020 to Dr. Orregio, his General Practitioner. He rejected the suggestion that his visit in 2020 was unrelated to the accident.

[67] Counsel for the Defendant submits that the Claimant has expended, on transportation, more that it would have costed him to repair his vehicle. She is asking the Court to finds that "the Claimant would have incurred unnecessary transportation expenses or exorbitant transportation fee".

[68] However I find that the Claimant has not been discredited in relation to the evidence he has adduced in relation to his claim for transportation expenses There is no evidence challenging the fact that these were necessary travel for the period for which the Defendant was out of use of his motor vehicle as a result of the collision. Additionally, there is no evidence challenging the evidence of the Claimant that these were actual costs incurred or that there was any lower cost available to him. Consequently, I find that he has proven that he is entitled to an award for this item of Special Damages, in the sum of $112,000.00.

Total Special Damages

[69] As it relates to special damages I find that the Claimant has proven the following:

Medical Expenses	$285,995.00
Damage to Motor Vehicle	$110,000.00
Transportation expenses	$112,000.00

Pain and Suffering and Loss of Amenities

The Medical Evidence

Dr. Michael O'Reggio MBBS

[70] Doctor O'Reggio in reports dated January 14, 2015 and May 13, 2016, states that he first treated Mr Burrell on the 21st May 2014. He states that on that said date Mr. Burrell complained of pain in his back and neck since being involved in the motor vehicle accident on the 20th of May 2014. On interview and examination, he noted the following:

- Tenderness on palpation of the lower back and neck back.
- Reduced ability to bend at the waist or turn the neck due to pain.

[71] He diagnosed Mr. Burrell as having sustained a whiplash or muscular strain with spasm of the lower back and neck**.** He prescribed the analgesic medications Cataflam and Mydocalm and recommended bed rest. On the 14th July 2014 he reviewed Mr. Burrell. He states that Mr. Burrell still complained of low back and neck pain. On interview and examination, he noted the following:

- Tenderness on palpation of the paraspinal muscles at the mid to lower back and also of the neck back.

[72] He prescribed the analgesic medications Voltaren and Mydocalm and referred Mr Burrell for physical therapy. On the 24th January 2015 Doctor O'Reggio again reviewed Mr. Burrell. He states that Mr. Burrell complained of recurring back pain especially on bending at the waist. He states that Mr. Burrell reported that he did have some physical therapy. Analgesics were prescribed and Mr. Burrell was advised to complete the physical therapy. He found that Mr. Burrell "***suffered temporary disability of his neck and back and will continue to have episodes of pain in these areas for several months to come"***.

[73] In his report dated September 10, 2020 Doctor O'Reggio states that Mr. Burrell attended his office on seven occasions after the last report for further treatment of his injuries He states that Mr. Burrell:

> "repeatedly complained of recurring neck and back pain worse on bending at the waist or neck. X-rays of his lumbar and cervical spine and CT scan of his cervical spine were requested. The results showed normal lumbar spine and several bulging discs with minimal spinal cord compression at the neck level Physical therapy and anti-inflammatory analgesics were again prescribed".

[74] In that report, Doctor O'Reggio further stated that he**:**

> "cannot conclude that Mr. Burrell sustained any permanent irreparable deformity or disability. *His temporary periods of disability due to pain in the neck and back may require several courses of physical therapy and analgesics over a period of years*. In light of his injuries he has a good chance of full recovery though this may take a prolonged period of time."

[75] Doctor O'Reggio concluded that Mr. Burrell's condition was not expected to deteriorate as he gets older but back pain can be bothersome if not managed properly as one ages. Overall his general prognosis is good but recovery will be over an extended period.

The evidence of Doctor Dundas

[76] In his report dated the 13th of October, 2020 Doctor Dundas, Consultant Orthopaedic Surgeon states that he attended to Mr Burrell on the 5th of October 2020. He states that Mr. Burrell complained of:

- *Neck pain continuously for the past six years;*
- Low back pain intermittently over the past six year

[77] Doctor Dundas also states that he viewed the medical reports of O'Reggio dated January 24, 2015, May 13, 2016 and September 10, 2020. He also viewed the MRI report from KRIS MRI and Imaging Services over the signature of Dr. R. Bullock dated June 24th 2020, relating to the cervical spine MRI study. He also stated that Mr. Burrell provided him with a history of his injuries He related that:

> "Radiographic imaging studies were requested but he could not afford them at the time. He denies having either CT or X-Rays prior to Dr. O'Reggio's referral to physiotherapy. He was seen by Dr. O'Reggio on many occasions in the past six years, He gives no history of having any road traffic accident. There is also no prior history of neck or back injury"

[78] As it relates to medical history, Doctor Dundas indicates that the Claimant related that surgically, he had an appendectomy in December of 2014. He also states that the Claimant reported that:

> "He is not currently on medication. His physical therapy is on-going. His physical therapy currently is directed at his neck only. The back pains are intermittent whereas the neck pains are continuous. There is no disturbance of sleep. There is tingling in the fingers of his right hand but no symptoms on the left hand. His back pains do not allow prolonged standing or sitting for more than an hour. The back pain is often associated with tingling in the right lower extremity".

[79] Doctor Dundas states that his examination revealed:

> "A well-nourished male who could lie comfortably flat in bed. In the cervical spine he had no torticollis but mild tenderness at the spinous processes of C6, C7 and Tl and the interspinous ligaments from C6 - Tl. There was neither Scalene nor Trapezius tenderness nor spasm. Range of motion of the cervical spine was measured as:

Flexion	*40°*
Extension	*20°*
Left side bending	*20°*
Right side bending	*20°*
Left rotation	*60°*
Right rotation	*70°*

Spurling's sign was negative and he had no pain with resisted motion. There was no brachial plexus root tenderness.

In the upper extremities there was no wasting. The Supinator deep tendon reflexes were depressed but biceps and triceps jerks were normal. His grip was slightly depressed on the right side being rated at 4+ on a scale of 0-5. Muscle power was 5/5 in all other groups. There was blunting of sensation to light touch in the C6/C7 and Tl dermatomes on the right side. Tinel's test at the wrist for median nerve irritation was negative.

In the thoracolumbar spine he had normal contours with normal mobility and no tenderness. He had mild right sacrospinalis and ilio-lumbar pain induced by rotation to the left and to the right but the area was not tender.

In the lower extremities he could straight leg raise to 90° bilaterally. He had normal power, tone and deep tendon reflexes. There was no sensory deficit. Trendelenburg sign was negative".

[80] Doctor Dundas also reported that the MRI scan done on June 24, 2020 was available to him for review as well as the accompanying report. He noted that

> "The images confirm a disc bulging between C4 and CS with indentation of the thecal sac but no evidence of myelomalacia in the spinal cord. There was also a bulge between C5/C6 which indents the anterior aspect of the theca and abuts on the anterior surface of the cord**".**

[81] In summary he found that the Claimant presented:

> "with symptoms, signs and imaging studies indicating injury at C4/5 and C5/6 in the cervical spine. Peripheral, physical manifestations are considered in a very mild category".

[82] His diagnoses were as follows:

(i) Cervical strain. Query disc protrusion

(ii) Lumbar strain.

[83] He however stated that:

> "Notwithstanding the absence of other prior or subsequent injury to his neck or back one cannot unequivocally ascribe changes in the cervical spine to injuries sustained in the road traffic accident under discussion. It would be reasonable however to assume there is a greater than fifty percent (50%) chance the accident is associated with the pathologies noted."

[84] Nevertheless, he found that the Claimant suffered a six percent (6%) Whole Person Impairment.

The evidence of the Claimant

[85] The Claimant states that after returning home he started to feel pain in his neck and back. He states that on the night of the accident he took pain killers to help him to sleep. The following morning, he was attended to by Doctor O'Reggio. The pain persisted and he was forced to make five (5) other visits to the Doctor O'Reggio who gave him prescription for medication and recommended physiotherapy, x-ray and a cervical collar. On the recommendation of his doctor he also did an X- Ray of his of his lumbar spine on June 20, 2020. He also did an MRI on June 24, 2020.

[86] He also states that prior to the accident he was in good health but now he still experiences pain and stiffness in his neck and back. The neck pain gets worse

when he has to make sudden movements or when he sits or stands for long periods. He is an examination coordinator at his school and the pain gets worse during exam period as he is required to attend meetings and sit or stand for long periods**.**

[87] It is also his evidence that prior to the accident he used to assist his wife with house work and playing football was part of his exercise routine. However, since the accident he is unable to do these things. On cross examination, he states that Dr. O'Reggio referred him to Physiotherapy in 2014 but because he was the sole provider in the family, he did not have the financial resources to do the physiotherapy at the time. He explains that he was in college between 2014 and 2019. He admits that he owned and operated a taxi but this was after 2019. From 2014 he used a credit card which ran him into debt. He also accepts that he did an x-ray, at the request of Dr. O'Reggio in 2016. He also agrees that in his line of work he would have to stand for long periods but does not know if standing for long periods causes aches and pains.

Submissions by Counsel for the Defendant

[88] Counsel for the Defendant submits that:

> "The Claimant was diagnosed by Doctor O'Reggio with whiplash or muscle strain with spasm of the lower back and neck on May 21,2014, closer in time to the date of the incident. His last visit to Doctor O'Reggio was six years after the incident which at the time there is a notable manifestation of new injuries. That is disc bulge. Doctor O'Reggio doses not ascribe this as an injury flowing from the accident and gives a favourable prognosis."

[89] She also submits that: Dr. O'Reggio in his report fails to comment on the nexus of his new findings six years post collision and gives a favourable prognosis and makes no further recommendations outside of prescribing anti-inflammatory analgesics.

[90] She is of the view that the court should place little or no weight on Dr. O'Reggio's September 2020 report, specifically the new findings as sufficient nexus has not been established with those new findings and the collision which occurred six years prior".

[91] She also makes the point that

> "very little if any weight should be given to the medical report of Doctor Dundas who saw the Claimant six years after the collision and on one occasion". She opines that: "Lapse of time presents a real and likely possibility of intervening factors thus breaking the causation between the accident, and the impairment rate of 6%. She further submits that the court should consider the Claimant's injury "at most as a severe whiplash injury".

ANALYSIS

[92] In his report dated September 10th, 2020. Doctor O'Reggio did state that the Claimant attended on him seven times after the last report. The last report was dated May 2016. This would therefore suggest that in 2016 the Claimant would have been attended to by Doctor O'Reggio. However, a material fact is that, Doctor O'Reggio reports that in all the previous examinations, the Claimant, "repeatedly complained of recurring neck and back pain worse on bending at the waist or neck".

[93] Nevertheless, I also note that in relation to the 2016 X-rays, Doctor O'Reggio's report indicates that X-rays of the Claimant's lumbar and cervical spine, and CT scan of his cervical spine, in addition to revealing several bulging discs with minimal spinal cord compression at the neck level, also showed a normal lumbar spine.

[94] It is of particular significance that the disc bulge is in the area of the neck, that is the site of the injury from the accident. This essentially means that the disc bulge is not necessarily as a result of a new injury to the neck, but a reflection of the severity of the whiplash injury.

[95] Counsel has conceded in her submission that the Whiplash was in fact severe. There is nothing in Doctor O'Reggio's report of 2020 indicating that the disc bulge revealed in the 2016 X-ray is a new injury. There is equally nothing in his report indicating that it is unconnected to the accident. It is apparent that his pervious finding was based on physical examination in the absence of a radiographic assessment.

[96] It is common knowledge that the purpose of the radiographic examination is to provide detailed imaging as to the cause of discomfort not only at the site of the injury but any other complications arising therefrom. Therefore I do not agree with Counsel for the Defendant that the disc bulge is a new injury in Doctor O'Reggio's report for which there is a necessity to indicate a nexus to the accident.

[97] Additionally, the MRI imaging conducted in 2020 as reported by Doctor Dundas did not necessarily reveal a new injury as it relates to the neck but confirmed the findings in the X-Ray of 2016. Therefore, when I examine the evidence of both Doctors there is consistency in the site of the injury to the neck. However, I also note that Doctor Dundas' report did indicate that the Claimant was suffering from a lumbar strain. This stands in contradiction to Doctor O'Reggios report of 2020 which indicates that the X-ray of 2016 revealed that the Claimant's lumbar spine was normal.

[98] Additionally, Doctor Dundas, despite saying that there is a more than a 50% chance that the injuries to the Claimant's cervical spine were as a result of the accident, he has ascribed no nexus between the Lumbar strain and the accident.

[99] However Counsel for the Claimant submits that, the Court, on these findings of Doctor Dundas, should conclude that "it is more probably than not that changes to both the Claimant's cervical spine and lumbar spine resulted from the motor vehicle accident". She also takes the position that in September 2020 when the Claimant was examined by Dr. O'Reggio, his injuries flowing from the accident were not by any indication resolved but continue to gradually deteriorate. She is

also of the view that as the standard of proof in these proceedings is on a balance of probabilities, the court should rely on Dr. Dundas' report in making a finding that the Claimant's current condition resulted from the motor vehicle accident.

[100] Nonetheless, it is my view that the issue poses some complexity and is not as easily resolved as suggested by Counsel. The court could in fact have drawn the inference posited by counsel had there been no evidence pointing to the contrary. In the case of ***Snell v. Farrell*** (1990), 72 D.L.R. (4th) 289, for example, the plaintiff underwent an eye operation to remove cataracts. Some months after the surgery, he became blind in the eye on which the surgery was performed. He brought a claim against the surgeon. The medical evidence was that one of the "possible" causes of the blindness was the Doctor's negligent decision to continue the surgery despite the fact that there was bleeding during the operation. However, since it was found the blindness could have occurred anyway, it was found that the surgery could not have been described as the probable cause of the blindness. The Supreme Court of Canada in this case and decided that it could draw an "inference" from the evidence that the negligence was a probable cause. It must be stated, however, that on the facts of the case, as found by the trial judge, this had not been established.

[101] Similarly, when I examine Doctor Dundas" finding in the face of the X-ray conducted in 2016, as reported on by Doctor O'Reggio the injury to the lumbar spine as reflected in Doctor Dundas' report appear to be a new injury. In light of the fact that the Claimant bears the burden of proof, he has the responsibility to adduce sufficient evidence to dispel this notion. That is, to resolve the discrepancy that arises on the medical evidence adduced in support of his case. However, I find that the Claimant has failed to adduce sufficient evidence to explain the difference in findings relating to his lumbar spine between 2016 and 2020.

[102] Consequently, I find that there is insufficient evidence connecting the lumbar strain to the accident. I therefore rule that the lumbar strain referred to in Doctor Dundas' report did not arise from the accident.

[103] As it relates to the Disability Rating, Doctor Dundas has made no apportionment with regards to PPD as it relates to the Cervical and Lumbar Spine injuries. That is what portion if any of the 6% is connected to the Lumbar Spine injuries. Additionally, I examine this in face of the evidence of Doctor O'Reggio in his report dated May 13, 2020, that he cannot ascribe any permanent disability to the Claimant's injuries. Therefore, as it relates to the injury arising from the accident I cannot conclude that the Claimant suffered a PPD of 6%. I will therefore refrain from ascribing a PPD of 6% to the Claimant in assessing the appropriate award for pain and suffering and loss of amenities.

[104] Both Counsel have commanded a number of authorities for the Court's consideration in the award of damages for pain and suffering and loss of amenities However, in light of the fact that some are of some vintage, and there are more recent authorities that are equally comparable to the injuries suffered by the Claimant, I will highlight only those in the latter category. I will first proceed to highlight those recommended by the Claimant.

[105] The case of ***McLean, Evoni* v *Pepsi Cola Bottling Co. Ltd and King, Kirk Anthony*** [2014] JMSC Civ. 55 is one such case. In that case the injuries suffered by the Claimant were:

(i) Mild whiplash injury;

(ii) Mild soft tissue injury right shoulder;

(iii) Mild mechanical lower back pains;

(iv) Resolved triggering of fingers both hands.

[106] In the medical report of June 13th, 2013, the doctor indicated that the Claimant reported only occasional tingling sensation in the fingers and that she was able to perform "all activities of daily living at home and at work". He stated that examination of the cervical spine revealed "no localized tenderness and there was full active range of motion of the cervical spine and the neurovascular status was

intact in both upper extremities". An award of $2,000,000.00 was made for pain and suffering and loss of amenities in April 2014 which updates to $2,618,581.90.

[107] Another case is that of **Cecelia Buchanan v Seacoast Trucking Service Ltd & Brian Thompson** Claim No. 2008 HCV000638. In that case the Claimant's injuries included:

- Cervical lordosis,
- mild whiplash injuries,
- neck pains,
- mechanical lower back pains,
- mild contusion to left shoulder
- mild parallel headaches
- mild intermittent pains along the medical aspect of the left knee
- 5% Whole Person Disability

[108] The Claimant returned to work three months after the accident but had to stop working again. At the time of the award, she was not working. Up to the time of trial she continued to have pain in her back and knee and when she sat low she had to be assisted up. An award of $2,000,000.00 was made in May 2009 which now updates to *$3,996,267.00*

[109] The case of ***Gary Reid v Kern Paul Anthony Braham*** Claim No. 2011 HCV 04669 is also another of the cases submitted on behalf of the Claimant***. Reid's*** injuries included:

a) Injuries to his lower part of his back
b) Excruciating pain to his right ankle and knee
c) Whiplash injury
d) Traumatic lumbago

[110] The Claimant suffered no permanent disability. The Doctor reported that that the Claimant had recuperated satisfactorily and had returned to work after 21 days. However in his findings Justice Batts accepted the evidence of the Claimant that he was still feeling pain and not able to play scrimmage football. In this case the Claimant awarded 1.9 million dollars on the 10th of December, 2012 which updates to $2,761,058.34

[111] Counsel for the Defendant has asked the court to place reliance on the undermentioned cases; ***Michael Baugh v Juliet Ostemeyer & Ors*** [2014] JMSC Civ. 4; **Richard Rowe v Joseph Lloyd Thompson** [2017] JMSC Civ. 90; **Mavis Jagaroo v Geoffrey** [2016) JMSC Civ. 111 and ***Pete Russell v Patroy Whitley and Anor*** [2019}] JMSC

[112] In the case of ***Michael Baugh v Juliet Ostemeyer & Ors*****, t**he Claimant is said to have suffered the following injuries:

a) Cervical strain

b) Permanent lumbar spondylosis

c) Mildly desiccated and a mild posterior disc bulge at disc L2-3

d) Posterior annular tea4r at disc L3-4

e) At L4-5 disc narrowed and desiccated and a diffuse posterior disc protrusion with associated mild facet hypertrophy.

f) At L5-51 a central posterior disc protrusion

g) Permanent partial disability of the whole person of 4%

[113] In that case B. Morrison J. distinguished cases submitted by Counsel for the Claimant on the basis that the medical reports did not list the injuries suffered by Baugh as “acute” or “severe”. An award of $1,200,000.00 was made for general damages which updates to $1.554,050.78.

[114] *In the case of* ***Richard Rowe v Joseph Lloyd Thompson*** the Claimant’s medical report stated that he sustained the following injuries:

a) Chronic Mechanical Lower Back Pain
b) Chronic Cervical Strain/Whiplash Injury with Muscle Spasm;
c) Chronic Left Knee Sprain & Abrasion;
d) Sub-concussive Blunt Head Injury with Abrasion to Forehead & Post-trauma
e) Headache;
f) Musculoskeletal Chest Pain

[115] Permanent impairment was not expected. An award of $925,000.00 was made for general damages in June 201 6 which now updates to $1,119, 406.78

[116] In the case of ***Mavis Jagaroo v Geoffrey*** the Claimant's injuries were:

a) Acute cervical strain/sprain secondary to trauma
b) Whiplash Injury, evidenced by neck muscle spasm associated with soft tissue tenderness on both sides of the neck extending down to the inter scapular region.

[117] The Judge also noted that the medical report stated that the Claimant did not fully comply with the instructions given by the doctor, having completed only a couple physiotherapy sessions, and not continuing because of financial constraints. A sum of $800,000.00 was awarded for general damages in June 2016 which updates to $968,135.59

[118] In the case of ***Pete Russell v Patroy Whitley and Anor***, the injuries the Claimant suffered were, injuries to the neck and back, tenderness to the left side of neck muscle, severe muscular spasm to the left side of his neck and tenderness over the cervical and lumbar spine with decreased range of motion. He was diagnosed with whiplash injury and soft tissue injury to the skeletal ligament and paravertebral muscles in the thoracic lumbar region. Two years post injury he was still feeling pain. He was awarded $1,777,000.00 up dates to ***$1,837,033.73***.

[119] However, having reviewed the cases submitted, it is evident that the cases that are most comparable with the injuries suffered by the Claimant arising from the accident are ***Russell v Patroy Whitley and Anor (supra)*** and ***Mavis Jagaroo v***

Geoffrey (supra). While in the other cases the Claimants suffered several other injuries in addition to injury to the neck, the major injuries in these cases are to the neck, and also as in the case of ***Russell*** mild injuries to the back, as indicated in the Doctor's finding of a soft tissue injury to "paravertebral muscles in the thoracic lumbar region".

[120] However, I find that that the Claimant's injury in the instant case is far more serious than those of the Claimants in the aforementioned cases due to the presence of the disc bulge and the fact that he is still suffers from the effects of the injury seven (7) years post-accident. Consequently, it is my view that he should receive an award much greater than that awarded in ***Russell v Patroy Whitley and Anor*** (supra). The award therefore which I consider appropriate for the Claimant in the instant case for pain and suffering and loss of amenities is $2, 500,000.

Further Medical Expenses

[121] Counsel for the Claimant in her supplemental submissions submits that in light of the Claimant's evidence that he continues to experience pain, has difficulty sitting for long periods of time, his indication to Dr. Dundas that he was unable to sit for a period longer than an hour and Dr. O'Reggio's assessment that he would benefit from continued physiotherapy and analgesics for several years, the Claimant is entitled to an award for future medical expenses for the cost of 14 annual physiotherapy sessions. She suggests that the court should rely on the sum paid per session up to September 2020, that is, $4,000.00. She also recommends that the court applies a multiplier of nine (9). She relies on the case of ***Merdella Grant v. Wyndam Hotel Company (trading as Wyndham Rose Hall Beach Hotel and Country Club)***, Suit No. CL. 1989 G045 reported at Khans Volume 4. She also submits that the Claimant should be awarded $98,000.00 for future transportation costs which she argues would be incidental to attending the aforementioned future physiotherapy care.

[122] It is in fact my observation that Doctor O'Reggio has stated in his final report that the "temporary period of disability due to pain in the neck and back may require several courses of physical therapy and analgesic over a period of years", However this is without stating the precise, or even an approximate number of years that these treatments would be required.

[123] In any event, there is nothing from the Claimant himself neither in his Particulars of Claim nor his evidence, to include his witness statement, to suggest that he is making a claim under this head of damages. In fact, the inference from his witness statement dated the 16th of October 2020 is that he completed the physiotherapy treatment recommended by Doctor O'Reggio. At paragraph 17 of that statement he stated that Doctor O'Reggio recommended another course of physiotherapy which he did at Med Rehab Professionals. He stated that he did 14 sessions and from his evidence, the last being two days after the date of Doctor O'Reggio's final report. Apart from the aforementioned sessions and the sessions he did in 2015, the Claimant has made no indication that Doctor O'Reggio has recommended any further sessions nor has he made claims for any future sessions in his evidence or claim.

[124] This issue was only mentioned lately in the supplemental submissions of Counsel for the Claimant. However, it is my view that the Defendant is entitled to be aware of the case he is expected to meet. It is appreciable that there are times when the Claimant is unable to produce evidence of precise or total pecuniary value of a claim for future expenses, such as future medical expenses. As such the item cannot be completely particularized. In such instances once the evidence is sufficient to form the basis for an award, a lump sum award can be made (see ***Willbye v. Gibbons*** [2003] EWCA Civ 372).

[125] However any award being sought, must be indicated in the Claimant's statement of case, that he is seeking an award under this head. It cannot be that it suddenly appears in Counsel's supplemental submission as an afterthought, especially in

circumstances where the Defendant had no opportunity to raise any challenge. In light of the foregoing, I make no award under this head.

Handicap on the Labour Market

[126] Counsel for the Claimant submits, again in her supplemental submission. that the Claimant is entitled to an award for handicap on the labour market. She points to the evidence of the Claimant that "he continues to suffer from the effects of the accident, that his ability to work as a teacher is severely compromised, he experiences severe pain and stiffness in his neck and back, which are aggravated by sudden movements, long sitting and standing. He is unable to sit for any appreciable period due to severe pain in his neck and back. "

[127] She further submits that "the Claimant's ability, to compete on the labour market as a teacher, has been compromised as he would be less able to contend for a similar or higher position. As such he would be entitled to handicap on the labour market, as is demonstrated in the case of ***Moeliker v. A Reyrolle and Company Limited*** *1977*, 1All E R 9". She suggests that a sum of Five Hundred Thousand Dollars ($500,000.00) be awarded under this heading.

Discussion

[128] As it relates to any award for damages under this head, the court in the case of ***Moeliker v A Reyrolle & Co Ltd*** [1977] 1 All ER at page 16 stated that:

> *"what has somehow to be quantified in assessing damage under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market". (per Browne LJ)*

[129] In that case it was established that the court will have to apply a two stage test when making a determination under this head of damages. Namely:

(i) Is there a substantial risk that a plaintiff will lose his present job at some time before the estimated end of his working life?

(ii) If there is (but not otherwise), the court must assess and quantify the present value of the risk of financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job.

[130] The evidence of the Claimant is that he continues to be employed as a school teacher. Therefore in order to qualify for an award for damages under this head, the Claimant being currently employed ought to present sufficient evidence before the court, that (i) he is at risk of losing his present employment at some time in the future, and (ii) and that if that risk materializes he will be thrown on the labour market and will be placed at a disadvantage of getting another job, or if he does get another it will be at a reduced pay.

[131] However, when I examine the evidence of the Claimant I find that he has failed to satisfy the necessary requirements for an award under this head. No evidence has been presented from which it can be inferred that the Claimant is at risk of becoming unemployed, whether in the near or distant future. In this regard, I find that the Claimant does not qualify for an award under this head.

Orders

[132] I make the following orders.

The Claimant is awarded Damages as follows:

Special Damages

Medical Expenses	$285,995.00

Damage to Motor Vehicle	$110,000.00
Transportation expenses	$112,000.00
Total	**$507,995.00**

Interest is awarded on the Special Damages at the rate of 3% from the date of accident to the Date of Judgment i.e., May 20, 2014 to April 30, 2021

General Damages

Pain and Suffering and Loss of Amenities **$2,500,000.00**

Interest is awarded on General Damages at the rate of 3 % from the 3rd of April 2017 to April 30, 2021

Cost to the Claimant to be agreed or taxed.