IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010 HCV 00578

BETWEEN	**GLENROY GILMORE**	**CLAIMANT**
AND	**HORACE CHRISTIE**	**1st DEFENDANT**
AND	**MOYA HUSSEY**	**2nd DEFENDANT**

Mr. David Henry instructed by Winsome Marsh for the claimant

Mrs. Stacia Pinnock Wright for the defendants

Heard: November 5 and 8, 2013

NEGLIGENCE – MOTOR VEHICLE ACCIDENT – NEGLIGENT OPENING OF DOOR BY PASSENGER - PERSONAL INJURIES

SIMMONS, J

[1] On the 5th day of December 2008, the claimant who was employed as a bearer at the British Caribbean Insurance Company rode motor cycle registration # 3263 F into a parking lot situated on Grenada Way, Kingston 5 in the parish of Saint Andrew.

[2] The first defendant's motor car registration # 2591 DF stopped and the claimant attempted to pass that vehicle. An accident occurred when the second defendant who was a passenger in the first defendant's vehicle opened the front passenger door. The bottom corner of the door is alleged to have come in contact with the top of the claimant's right foot resulting in injury.

[3] On the 11th February 2010 the claimant filed an action for damages. The particulars of the first defendant's negligence are as follows:

i.) Improperly stopping his vehicle in the driving lane of the parking lot;
ii.) Failing to keep any or any proper lookout or to have any or any adequate regard for other users of the parking lot including the claimant;
iii.) Failing to heed and/or observe the presence of the claimant who was at all material times lawfully riding through the driving lane of the said parking lot;
iv.) Failing to warn the second defendant of the claimant's approach;
v.) Permitting the second defendant to open the front passenger door at a time when, at a place where and in a manner in which it was manifestly dangerous and reckless; and
vi.) Failing to howsoever manage and control his motor vehicle and/or its occupants so as to have avoided the collision.

[4] The particulars of negligence of the second defendant are as follows:

i.) Failing to keep any or any proper lookout or to have any or any adequate regard for other users of the parking lot including the claimant;
ii.) Failing to heed and/or observe the presence of the claimant who was at all material times lawfully riding through the driving lane of the said parking lot;
iii.) Failing to warn the claimant of her intended actions;
iv.) Opening the front passenger door at a time when, at a place where and in a manner in which it was manifestly dangerous and reckless so to do thereby causing the said door to collide with the claimant; and
v.) Failing to have due regard to the fact that the first defendant had improperly stopped/parked along the driving lane and to have increased her vigilance accordingly.

[5] The first defendant in his defence admitted that the second defendant was at the material time his servant and/or agent. The particulars of negligence were denied.

[6] The first defendant's case is that on the day in question he stopped in the said parking lot and the second defendant after ensuring that it was safe to do so, opened the left front passenger door of his vehicle. The claimant proceeded to pass to the left and caused his motor cycle to collide with the left front passenger door of the first defendant's vehicle.

[7] The first defendant asserted that the claimant was either wholly or substantially responsible for the accident. The particulars of the claimant's negligence are stated to be as follows:-

i.) Failing to effect any or any proper or effective control of motor bike registered 3263 F;
ii.) Riding at an excessive and/or improper rate of speed;
iii.) Failing to see motor vehicle registered 2591 DF which at all material times had stopped in a parking area;
iv.) Failing to observe the passenger who was exiting the said motor vehicle registered 2591 DF and had already opened the front passenger door;
v.) Failing to warn the defendants of his approach;
vi.) Failing to take extreme care in riding through a space in which motor vehicles occupy both sides; and
vii.) Failing to sound his horn;

Claimant's evidence

[8] Mr. Gilmore's evidence is that on the 5th December 2008 between 10:00 and 11:00 am he rode into the Digicel Car Park on Grenada Way in the parish of Saint Andrew.

[9] He described the area as active with people driving in and out. The driving area was in the shape of an upside down horseshoe with vehicles parked down the middle, one behind the other. Vehicles were also parked to his left. In examination in chief he stated that they were parked beside each other. In cross examination he said that about three vehicles were parked beside each other and the others one behind the other. He also said that to his extreme right there were vehicles parked one beside the other.

[10] He observed the first defendant's vehicle when he was approximately thirty five (35) feet away. His evidence is that he was travelling at approximately ten (10) miles per hour. He also stated that he saw when the first defendant's vehicle stopped in the driving path beside the middle lane of parked vehicles.

[11] He decided to pass to the left of the first defendant's vehicle and as he reached by the left front passenger door it opened *"with a vexation".* He stated that it happened so suddenly that he had no time in which to react. The bottom left corner of the door is said to have connected with the top of the claimant's right foot.

[12] In cross examination he stated that he did not blow his horn to warn the first defendant that he was about to overtake his vehicle. He also stated that the car park was active but not congested on the morning in question. He also gave evidence that he did not stop when he observed that the first defendant's vehicle had stopped because he had a clear path ahead of him.

[13] The claimant stated that approximately eight or nine vehicles were parked on the left as one enters the car park. Of that number about three (3) of them were parked side by side whilst the others were parked one behind the other. Mr. Gilmore also said that the width of the driving path was approximately five (5) feet and the first defendant's vehicle was about four (4) to four and one half (4½) feet wide. He also indicated that when the driving path is clear it was wide enough to accommodate a truck.

The first defendant's evidence

[14] Mr. Christie's evidence is that on the day in question when he drove into the car park it was full. He was accompanied by the second defendant. There were cars in front of him and he stopped as the traffic had come to a standstill.

[15] He stated that after looking in his side and rear view mirrors, he told Miss Hussey that it was safe for her to alight from the car. His evidence is that when she started to open the door he heard a collision and saw that the claimant had ridden his motor cycle between his vehicle and the cars which were parked to the left side of the car park.

[16] In cross examination, he indicated that after checking his mirrors he told the second defendant that she could open her door and exit the vehicle. He said that the door was open for about one minute before the accident occurred. Mr. Christie also stated that he did not observe the claimant on his motor cycle before the collision and that the first time that he saw him was after the impact. He also indicated that there was nothing obstructing his view and he did not hear the motor cycle before the impact.

[17] Mr. Christie also maintained that there were about three (3) vehicles ahead of him and others behind him.

Claimant's submissions

[18] Mr. Henry submitted that the driver of a parked vehicle when opening his door has a duty to ensure that it was safe to do so. He asked the court to reject the allegation that the claimant rode into the door of the first defendant's vehicle. He also asked the court to be mindful of the fact that it was the bottom left corner of the door that caused the injury to the top of the claimant's foot. This he said should be considered in order to assess the evidence given by the parties.

[19] Mr. Henry further submitted that the defendants owed a duty of care to ensure that it was safe to open the passenger door of the first defendant's vehicle before proceeding to do so. Reference was made to the first defendant's evidence that the door had been open for minutes before the collision. In those circumstances it was stated that the claimant had a duty of care to ensure that the door was not opened in a driving lane and if it was necessary to do so, to ensure that it was safe so to do. Additionally, there was a duty to ensure that exit from the vehicle happened in a timely manner.

Defendants' submissions

[20] Mrs. Pinnock Wright asked the court to find that the claimant failed to take reasonable care for his own safety when he passed on the offside of the first defendant's vehicle. Reference was made to ***Clarke v. Winchurch and others*** [1969]

1 All ER 276 and ***Joshua Tucker v. Lascelles Chin and Neil Chin*** SCCA no. 30 of 2000 delivered May 21, 2001.

[21] In ***Clarke v. Winchurch and others*** (supra), a bus stopped to give way to a car which was facing oncoming traffic and intended to travel to the other side of the road. The bus driver flashed his lights to indicate to the driver of the car that it was safe to proceed. The driver of the car relied on this signal and collided with a moped that had passed a line of traffic and overtook the bus. The Court of Appeal agreed with the trial judge that the moped rider had caused the accident.

[22] Counsel made specific reference to the following passage:-

> *"The judge said this in regard to the moped rider in his judgment:*
>
> > *"It seems to me that the basic cause of this accident really must lie with the [moped rider], who chose to ride his moped along the offside of a stationary or very slow moving stream of traffic, overtaking cars one after the other. He knew, of course, that there was a whole series of motor cars parked on his nearside of the road, some of which would want to go in the direction of Rotherham, some would want to cross the line of traffic through gaps (if they could find a gap), and all of us know it is the habit of motor cyclists and cyclists to ride up the offside of a long line of slow moving motor cars. It is perfectly understandable that nobody wants to stay behind if they do not have to. If you have a small vehicle like a bicycle or motor cycle, you are in the fortunate position of taking up so little road space that you can slide along the offside, but, if you choose to do this, it does seem to me to warrant a very, very high degree of care indeed because you are blinded, to a great extent, to what goes on on the left-hand side of the road. You must, therefore, continue to ride or drive in such a way that you can immediately deal with an emergency."*

> *The judge then went on to say that when he saw this bus stopped in between regular stops, the moped rider ought to have realised that there was something going on in front of it..."*[1]

[23] She also submitted that the injury suffered by the claimant is more consistent with the first defendant's account of how the accident occurred. Mrs. Pinnock-Wright argued that if the claimant's account is accepted one would expect that his thigh which would have come in contact with the door and not his foot.

[24] Counsel also referred to the discrepancies in the claimant's evidence in relation to how the vehicles on the left side of the car park were situated, and urged the court to find that he was not a credible witness.

[25] Mrs. Pinnock-Wright also submitted that the claimant's overtaking of the first defendant's vehicle was contrary to sections 51 (1) (a), (c) and (g) of the ***Road Traffic Act*** (***the Act)*** which deal with the manner in which a vehicle may be overtaken. The Act defines a road as:

> "…any main or parochial road and includes bridges over which a road passes, and any roadway to which the public are granted access and any roadway declared to be a road …."

[26] Mr. Henry in his reply submitted that ***Clarke v. Winchurch and others*** (supra), can be distinguished on the basis that the accident occurred on a roadway and involved a vehicle that was in the process of turning. He also stated that ***Joshua Tucker v. Lascelles Chin and Neil Chin*** (supra) could also be distinguished as certain rules apply when one is using a roadway and the accident in this matter took place in a car park.

[27] He also submitted that a car park is not a road as defined in the ***Road Traffic Act*** and as such, the circumstances of this case are to be considered according to the principles of negligence.

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[1] Page 277 paragraph F

[28] Mr. Henry also indicated that there is no reference in the pleadings to ***the Act*** and as such any alleged breach of it could not be dealt with at this stage. He also submitted that a car park without more does not fall within the definition of a road and as such ***section 51*** would not apply.

The Law

Is the car park a road as defined in the Road Traffic Act?

[29] It is a well-known principle that a party to an action is bound by his pleadings. There is no mention of any breach of ***the Act*** in the pleadings and as such it is my view that counsel for the defendant cannot raise this issue at this stage. I will however resolve this preliminary issue.

[30] ***Section 2*** of that ***Act*** defines a road as:

> *"any main or parochial road and includes bridges over which a road passes, and any roadway to which the public are granted access and any roadway declared to be a road pursuant to the provisions of subsection (2)".*

Under subsection 2 the Minister is empowered to declare any roadway to be road.

[31] This issue was dealt with in ***Griffin v. Squires*** [1958] 3 All ER 468 where the effect of a similar provision to that in the Jamaican Act was considered. In that case an unlicensed and uninsured driver was prosecuted under the Road Traffic Act 1930 (UK) after she drove a vehicle in a car park. That car park had two entrances, one of which led to a private footpath which led to a bowling club and council buildings. The car park was owned by the local authority and was could be used by members of the public without payment. The matter for the court's determination was whether the car park as part of the footpath was a road as defined by the Act. It was held that the car park did not fall within the definition of a road.

[32] Lord Parker, C.J. had this to say:

> *It was said in Harrison v Hill (1932 SC (J) 13), a case in Scotland, by the Lord Justice-General, Lord Clyde, that, as is quite clear, "road" means something other than a highway; in other words it is intended to include a wider class of road. He said this (ibid., at p 16):*
>
> > *"It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user. A road may therefore be within the definition (1) although it belongs to the class of private roads, and (2) although all that can be said with regard to its availability to the public is that the public 'has access' to it."*
>
> *Then he goes on to say this (ibid.):*
>
> > *"I think that, when the statute speaks of 'the public' in this connexion, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the … "*
>
> *premises in that case. Everything that Lord Clyde said there applies absolutely to the car park as part of the footpath leading to the bowling green and allotments, and I think that the justices were perfectly right.*
>
> *The second question is: Is the car park, as a car park, a road within the definition? One thing is perfectly clear; it is at any rate a place to which the public generally, to whom Lord Clyde referred, have access and which they habitually use. Therefore, that part of the definition is amply fulfilled in this case. The question is: Is there*

> *anything else that remains to be fulfilled, in other words, is it enough if you find a place to which the general public have access to say that you then have a road within the definition, or must you have something which as a matter of common sense and ordinary meaning is a road? A number of cases have been referred to. I do not propose to go through them. It has been said many times that it is eminently a question of fact for the justices to say whether a certain space is a road. Having decided that the general public have access to it they must then go further and ask: Is this place to which the public have access a road? On this matter I need only refer to quite a recent decision of this court in Heath v Pearson ([1957] Criminal Law Review 195). The facts are quite immaterial, but it was held, dismissing the appeal, that although the yard in question, Brunswick Yard, might well be a place to which the public had access, that was not enough to bring it within the definition of "road" in the Act for it also had to be a road. The justices had found that Brunswick Yard was not a road and, since the question whether or not a place was a road was primarily a question of fact, the court had no right, even if they had not agreed with it, to interfere with the justices' decision.*

[33] In any event, whilst it is acknowledged that the car park is a place to which the public had access, no evidence has been led as to the terms of such access. There is also no evidence that it was used as a route to access any other place. It is therefore my opinion that the car park is not a road as defined by ***the Act***.

Liability

[34] In order to establish liability the claimant must prove that he was injured as a result of the defendants' negligence. He must first establish that the defendants owed a duty of care to him and that there was a breach of that duty. It must also be proved that the said breach caused him to suffer injury and loss. This principle was expressed by Lord Atkin in ***Donoghue v. Stevenson*** [1932] A.C. 562, in the following terms:-

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who then in law is my neighbor? The answer seems to be- persons who are 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 into question".*

[35] Where the actions of a passenger in a motor vehicle are concerned, the driver is not liable unless some negligence can be attributed to him. In ***Brown v. Roberts and another*** [1963] 3 All ER 75 the plaintiff whilst walking along a pavement when she was struck by the door of a van which had stopped at the kerb to allow its passenger to alight. The van was being driven by its owner. The plaintiff brought a claim for damages for negligence against both the owner and the passenger. She alleged that the owner of the van was negligent in that he failed to prevent the passenger from acting carelessly in opening the door as well as failing to warn pedestrians that the door was about to be opened. Megaw J. found that there was no negligence on the part of the plaintiff and that the passenger had opened the door without taking due and care for pedestrians who may have been using the pavement.

[36] With respect to the owner of the vehicle the learned judge said:-

> *"The case against the second defendant is put on two grounds. The first ground is that the second defendant was personally negligent in failing to prevent his passenger, the first defendant, from acting carelessly in opening the door, and in failing to give warning to pedestrians that this was going to happen. I can find no evidence to support that allegation. There was no evidence that the second defendant knew, or should have known, that his passenger was likely to behave in this way. Even if he saw, when it happened, that the first defendant was flinging the door open suddenly and carelessly, he had no opportunity to stop her or to warn anyone*

before the accident happened, almost instantaneously. The claim on that ground fails."

[37] In this matter there is no dispute that the defendants owed a duty of care to the claimant. The defendants have however denied that they breached that duty. The claimant has asserted that the second defendant opened the door in his path. On the other hand, the defendants have alleged that it was the claimant who rode his motor cycle into the said door.

Analysis

[38] The resolution of this case therefore rests on the court's assessment of the credibility of the witnesses. The claimant and the first defendant were extensively cross examined and as such the court has had the opportunity to hear their evidence, observe their demeanour and assess their credibility.

[39] Where the claimant is concerned I find that his evidence was clear and for the most part unshaken by cross examination. There was however an inconsistency in his evidence pertaining to the way that the vehicles to the left hand side of the car park were positioned. He did however, seek to explain this discrepancy when he said that about three cars were parked side by side and the rest one behind the other.

[40] His evidence in relation to the space between the parked cars and the first defendant's vehicle was also not as clear as would be desired in cases such as this. However, he also gave evidence that the driving path was wide enough to accommodate a truck. This in my view does not go to the root of the case as the defendant has not alleged that the claimant attempted to pass through a space that was too small.

[41] Having assessed the evidence I find the claimant's account as to how the accident occurred to be more credible. I am unable to agree with Mrs. Pinnock Wright's submission that the bottom left corner of the front passenger door would have connected with the thigh of the claimant and not his foot. I reject the first defendant's

evidence that the front passenger door had been open for at least one minute and that the claimant rode into the said door.

[42] I accept the claimant's evidence that the second defendant opened the door suddenly *"with a vexation".* I also find that the injury suffered by the claimant is consistent with his account of how the accident occurred.

[43] In the circumstances I also find that the first defendant :

i.) Failed to keep a proper lookout or to have any or any adequate regard for other users of the car park including the claimant;

ii.) Failed to heed and/or observe the presence of the claimant who was at all material times lawfully riding through the driving lane of the said car park;

iii.) Failed to warn the second defendant of the claimant's approach; and

iv.) Permitted the second defendant to open the front passenger door at a time when, at a place where and in a manner in which it was manifestly dangerous and reckless.

[44] In this matter, the first defendant has accepted responsibility for the second defendant's actions and as has stated that it was he who told her that she could open the door at the material time. There is therefore no need to make a determination as to whether it was she who may have been negligent.

[45] I also find that the defendants are solely responsible for the accident.

General Damages

[46] The particulars of the claimant's injuries are as follows:-

i.) Swelling of the right foot with a laceration over the dorsum of the mid foot;

ii.) Open comminuted fracture of the third metatarsal;

iii.) Pain in the right foot.

He was placed in a Short Leg Walking Orthosis and put on eleven (11) weeks sick leave. The Medical Report of Dr. Akshai Mansingh was admitted in evidence in support of his claim. That report states that the claimant was seen on December 9, 2008. He was seen again on January 23, 2009 and his sick leave was extended for one month.

[47] Two Leave Certificates were submitted in support of the claim and were admitted in evidence. The first of these speaks to the claimant being unfit to carry out his occupation for four (4) weeks as of the 9th January 2009. The second covers a period of our (4) weeks commencing on the 23rd January 2009.

[48] Counsel for the claimant urged the court to accept that the sum of nine hundred thousand dollars ($900,000.00) would be an appropriate award in light of the claimant's injuries. The following authorities were presented to the court for its consideration:

a.) ***Errol Finn v. Herbert Nagimesi and Percival Powell,*** suit no. C.L. 1991/F 117;

b.) ***Cecil Gentles v. Artwell's transport Co. Ltd. & Joslyn Chambers,*** suit no. C.L. 1998/G 113.

[49] In ***Errol Finn v. Herbert Nagimesi and Percival Powell*** the claimant had a compound fracture of the fifth metatarsal of the left foot and a wound at the fracture site. He was totally disabled for twenty five (25) days and had a 30% disability of his extremity for one month and 10% for a further month. There was no significant permanent disability. An award of sixty four thousand three hundred and sixty five dollars ($64,365.00) was made in May 1994. When updated this amounts to five hundred and twenty thousand dollars ($520,000.00).

[50] In ***Cecil Gentles v. Artwell's Transport Co. Ltd. & Joslyn Chambers*** the claimant sustained a bimalleolar fracture of the left ankle on the 27th August 1995. He was placed in a plaster of paris cast for seven (7) weeks and spent approximately two (2) weeks in hospital. He had follow - up visits at the clinic and by the 14th December 1995 he could walk without assistance and was pain free. The prognosis was that he was likely to have arthritis of his left ankle. In February 2000 an award of three hundred thousand dollars ($300,000.00) was made for pain and suffering and loss of amenities.

When updated this amount to one million one hundred and seventy three thousand seven hundred and sixteen dollars ($1,173,716.00)

[51] Counsel for the defendants submitted that the injuries suffered by the claimant in the latter case were much more serious than those suffered by Mr. Gilmore. She urged the court to find that the injuries suffered in the ***Finn*** were more similar to Mr. Gilmore's injuries and submitted that an award of five hundred thousand dollars ($500,000.00) would be appropriate in the circumstances.

[52] Having compared the injuries suffered by the claimant with that in the Finn case I am of the view that they are more serious in that the period of incapacity was longer. I do not however, consider them to be as serious as that in the ***Gentles*** case where the claimant was hospitalized for two weeks and was at risk of developing arthritis. In addition the period of incapacity was longer than in the instant case.

[53] In the circumstances I am of the view that an award of seven hundred thousand dollars ($700,000.00) would be appropriate for pain and suffering and loss of amenities.

Special Damages

[54] Special damages were agreed as follows:-

a)	Medical expenses	$30,650.00
b)	Transportation	$6,000.00
c)	Shoes	$2,000.00

[55] The claimant has also claimed the sum of fifty two thousand dollars ($52,000.00) for loss of earnings for work usually undertaken by him on weekends. His evidence is that prior to working for his present employer, British Caribbean Insurance Company, he was engaged as an electrical welder on a full time basis. He stated that he used to insure his tools with that company until it became too expensive for him to do so.

[56] Mr. Gilmore gave evidence that he would do grill work and make iron flower pots and plant stands. The flower stands would be sold for seven hundred ($700.00) to one

thousand dollars ($1,000.00) each depending on the pattern. He would earn three thousand ($3,000.00) to four thousand dollars ($4,000.00) for welding gates. His weekly earnings were stated to be approximately four thousand dollars ($4,000.00). No documentary evidence was submitted to the court as proof of those earnings.

[57] The claimant indicated that at the time of the accident he did not have any jobs pending but during the period of his incapacity he "*missed calls to do smaller on the spot things".* His evidence is that he lost fifty two thousand dollars ($52,000.00) over a period of thirteen weeks.

[58] Mr. Henry submitted that the period of incapacity has been proved by the Medical Report of Dr. Mansingh and the Sick Leave Certificates that were presented to the court. In addition, he stated that the claimant gave detailed evidence in respect of this issue.

[59] Mrs. Pinnock Wright on the other hand, submitted that the claimant has failed to present sufficient evidence to the court to substantiate the sum being claimed. She stated that he was throwing figures at the court and that such an approach ought to be met with a denial of this aspect of the claim. Reference was made to the cases of ***Devon Fenton v. Leonard Anthony Blair and the Attorney General*** C.L. 1995/F 181 (delivered May 14, 2004) and ***Murphy v. Mills*** (1976) 14 J.L.R. 119 in support of that submission.

[60] There is no dispute that special damages must be proved by evidence. In ***Bonham-Carter v. Hyde Park Hotel*** 91948) TLR 177 at 178 Lord Goddard C.J. said:

> *"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and , so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."*

[61] This approach was adopted by the court in ***Murphy v. Mills*** (supra). In ***Harris v. Walker*** SCCA 40/90 (delivered on the 10th December 1990), Rowe P said:

> *"Plaintiffs ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned. Courts have experience in measuring the immeasurable to borrow a phrase of Carberry, JA in United Dairy farmers Ltd. v Lloyd Gouldbourne delivered 27th January, 1984, but where they have so acted their determination ought not to be unreasonably attacked…"*

[62] However in the case of ***Desmond Walters v. Carlene Mitchell*** (1992) 29 J.L.R. 173, the court adopted a more flexible approach to this issue. In that case the claimant who was a sidewalk vendor was unable to provide documentary proof in support of her claim for loss of earnings. An award was made and on appeal, the court agreed with the general principle in ***Ratcliffe v. Evans*** [1892] 2 Q.B. 524 where Bowen, L.J. stated:

> *" As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist on more would be the vainest pedantry."*

However Wolfe, J.A. was of the view that *"…to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen, L.J. referred to as 'the vainest pedantry'.*

[63] In ***Owen Thomas v. Constable Foster and the Attorney General of Jamaica*** suit no. C.L. 1999/T 095 delivered on the 6th January 2006, Sykes, J. examined the local case law in this area in some detail. In that case the claimant unlike the push cart vendor in ***Desmond Walters*** paid income tax. The court was of therefore of the view that he would have kept a proper record of his earnings. The learned Judge stated that the issue of whether or not the requirement of strict proof should be relaxed is dependent on the circumstances of each case. He stated:-

> *"In my view justice demands that the claimant, in this case, strictly proves his claim for special damages if the circumstances suggest he is able to do so. I do not share the view that judges ought to conjure up some appropriate figure in the name of justice where the claimant has a legal obligation to prove his case and fails to do so without satisfactory explanation."*

[64] A similar view was expressed by Rattray, J. in ***Beardsley v. Young and others*** claim no. 2002/B 262 (delivered on March 23, 2010). At paragraph 51 the learned Judge said:

> *"The circumstances of each case must be carefully considered by the court and a determination made on the facts of the particular case. While I accept that Bruce Beardsley was a frank witness, I do not believe that the reward for such frankness ought to be a disregard of the rules of evidence and procedure. A Claimant is obliged to prove that which he alleges and mere say-so does not amount to proof to the standard required by law. The Claimant was not a pan chicken vendor or a side walk salesman, who was unlikely to have had or maintained books of accounts reflecting the income and expenses of his daily transactions".*

[65] It is clear from the above cases that although special damages are required to be strictly proved the court may in the interest of justice and depending on circumstances of each case adopt a less stringent approach.

[66] The claimant in this matter has failed to provide any documentary proof of his income and has invited the court to make an award based on his bald assertions. No explanation was given in his evidence in chief for his failure to present any documentary proof in support of his claim and Counsel for the defendant did not challenge his evidence.

[67] However, it must always be borne in mind that the burden of proof is on the claimant. In ***Attorney General of Jamaica v. Tanya Clarke (nee Tyrell)*** SCCA No. 109 of 2002, Cooke, JA stated that a court is not obliged to *"… accept unchallenged prima facie evidence in all circumstances".* The learned Judge of Appeal went on to state that the failure of a defendant to challenge the evidence of a claimant is a factor which is to be taken into account when considering whether the claimant has discharged his burden of proof.

[68] In that case the court was of the view that although the evidence in relation to the special damages was deficient justice demanded that an award should be made.

[69] The question which needs to be answered at this stage is whether a departure from the general principle would be appropriate in the circumstances of this case. The claimant in his evidence stated that he earned approximately four thousand dollars ($4,000.00) per week. This estimate seems to take into consideration the range of jobs that he may undertake over a period of time.

[70] He also stated that whilst he was incapacitated he *"…missed calls to do smaller on the spot things".* He has however, failed to indicate the approximate number of jobs that he had to turn down and the nature of those jobs. In these circumstances, he seems to be inviting the court to "pluck" a sum from the air. When coupled with his failure to explain the absence of any records of his earnings the justice of the case in this instance demands that no award should be made.

[71] In light of the foregoing, there will be judgment for the claimant as follows:

i) General Damages for pain and suffering and loss of amenities in the sum of $700,000.00 with interest at the rate of 3% per annum from the 7th April 2010 to the 8th November 2013.

ii) Special Damages in the sum of $42,650.00 with interest at the rate of 3% per annum from the 5th December 2010 to the 8th November, 2013.

iii) Costs to the claimant to be taxed, if not agreed.