IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2006 HCV 01820

BETWEEN	VELMA RICHARDS	CLAIMANT
A N D	GEORGETTE BURNETT	DEFENDANT

CONSOLIDATED WITH

CLAIM NO. 2007 HCV 03680

BETWEEN	KARL McDERMOTT	CLAIMANT
A N D	GEORGETTE BURNETT	DEFENDANT

AND

CONSOLIDATED WITH

CLAIM NO. 2007 HCV 04436

BETWEEN	MARLON BROOKS	CLAIMANT
A N D	GEORGETTE BURNETT	DEFENDNAT

AND

CONSOLIDATED WITH

CLAIM NO. 2008 HCV 0051

BETWEEN	NICOLE LINTON	CLAIMANT
A N D	GEORGETTE BURNETT	DEFENDANT

AND

CONSOLIDATED WITH

CLAIM NO. 2010 HCV 03478

BETWEEN	DWAYNE NUGENT	CLAIMANT
A N D	GEORGETTE BURNETT	DEFENDANT

AND ALL WITH

BETWEEN	GEORGETTE BURNETT	ANCILLARY CLAIMANT
A N D	MYRTLE LINTON	1ST ANCILLARY DEFENDANT
A N D	DELROY TAYLOR	2ND ANCILLARY DEFENDANT

Appearances

Mr. S. Kinghorn instructed by Kinghorn and Kinghorn for all Claimants.

Mr. S. Codner instructed by Lightbourne and Hamilton for the defendants and Ancillary Claimant.

Heard: February 23, 2011 and March 30, 2012

Road Traffic – Motorvehicle colliding with stationary taxi – Negligence – Onus of proof – Damages

P. A. Williams, J.

Factual Background

[1] On the 18th of November 2004, Velma Richards, Nicole Linton and Dwayne Nugent were passengers in a taxi registered 8114 PP being driven by Karl McDernott. The taxi had stopped along the Ewarton main road in the vicinity of Charlemont Housing Scheme in St. Catherine. A passenger had disembarked and was paying his fare when a motor vehicle registered 8593 BK being driven by the defendant Georgette Burnett collided with the stationary taxi.

[2] The passengers and driver of the taxi were injured and assisted to hospital where they received treatment. Marlon Brooks was a passenger in the motor vehicle registered 8593 BK and he too was injured and taken to hospital for treatment. The defendant received no injuries.

[3] By way of claim form dated the 17th of May 2006 Velma Richards claimed damages against the defendant for the injuries she suffered.
Karl McDermott filed his claim on the 17th of October 2006.
Marlon Brooks commenced his claim on the 2nd of November 2007.
Nicole Linton commenced her action of the 8th January 2008.
Dwayne Nugent was the final claimant to file a claim and did so on the 19th of July 2010.
The claims were consolidated by way of an order made by Master Lindo on January 26, 2011.
The owner and the driver of a third vehicle alleged by the defendant to have been involved in the accident were named by her as ancillary defendants in the matter. However, there is no indication that they were served or in any way pursued to be party to the proceedings and therefore did not participate.

[4] The trial of the matter was completed on the 23rd of February 2011, at which time it was adjourned for the attorneys to have their written submissions before the court by April 8, 2011. It was also agreed that the attorneys would prepare an index to the agreed exhibits. They were requested to submit a photograph of the locus in quo either agreed or by each side if there could be no agreement.
The submissions on behalf of the claimants were finally submitted on October 9, 2011 after several requests.
To date no submissions have been received on behalf of the defendant. Numerous attempts have been made to obtain submissions until finally the attorneys on records for the defendant were advised that a judgment in the

matter would be delivered even without their submissions and they were given one final week to respond to the request.

The defendant admittedly is being deprived of having arguments being presented on her behalf but the rights of the claimants to have their matter determined need also be borne in mind.

The accident – the claimants case

[5] There is no dispute that this accident occurred sometime on the early evening of the 18th of November 2004. The claimants who had been passengers in the taxi spoke of being on their way home when the accident occurred. Velma Richards estimated that it occurred at about 7:30 whereas Dwight Nugent said it occurred between 7:00 – 7:30 p.m.

The defendant said it was about 6:00 p.m. that she was proceeding along the main road heading from Linstead towards Ewarton. There was no issue as to the adequacy of the lighting at that time.

[6] It is also not in dispute that the area where the collision occurred was a wide roadway where two vehicles could pass each other on one side of the road without going over on the other side. It is apparent that although this section of the roadway may have been in a built-up area overtaking was permitted on some sections. There is some disagreement as to whether the roadway was a straight stretch of road or whether there was a bend or a corner along the stretch.

[7] The passengers and the driver of the taxi all are unable to say how the accident occurred. They were only aware of the impact they say was felt to the rear of the vehicle. They all said they heard no horn or warning device or cannot recall hearing any. They did not see any other vehicles on the road prior to the impact. Karl McDermott said the car ended up upside down and not at the point at which he had stopped after a loud sound was heard and he had apparently

"blacked-out" for a few seconds. In his estimation the car seemed to have skated about a chain down from where he had stopped.

[8] Under cross-examination Mr. McDermott said the entire back section of vehicle; left and right; had been "dent in so it looked more like a two-seater car". He disagreed with suggestions that there was a large impact to the right rear of the vehicle as it was the entire back which had been damaged. Neither the defendant nor Marlon Brooks who was a passenger in her vehicle spoke of seeing the damage to the taxi after the collision.

[9] Velma Richards under cross-examination admitted she could not say how fast the other vehicle was going; could not say if the driver had done anything to avoid colliding with the vehicle she was in nor could she say whether or not the driver had failed to apply her brakes. She also did not see any vehicle coming behind her vehicle other than the one which collided into it; which she did not see before the collision.

Karl McDermott also could not say if the defendant did or attempted to do anything before colliding into his taxi to try to prevent the collision.

[10] It is noted that although in his Claim Form and Particulars of Claim Marlon Brooks said he was a passenger in the taxi, his evidence revealed that he was actually a passenger in the defendant's vehicle. He was travelling in the back of he vehicle which was a pick-up van transporting pigs. He had the responsibility to ensure the pigs stayed in the van.

He said the van was going at a good speed – a conclusion he came to "because of how the accident happen and the fact that the vehicle was written off". He was unable to tell the exact speed.

[11] From his vantage point he said he saw the stationary vehicle before they reached into a little bend.

He said he heard a horn blowing behind him, looked behind to ensure the pigs were alright and felt an impact. The horn sounded from behind the van and he saw it came from a coaster bus which was pretty close to the bumper of vehicle he was in. It was so close if he reached out he could touch it.
Then he heard the collision with the vehicle he was in colliding into the back of the taxi. He agreed that the impact happened very fast.

[12] Further under cross-examination he said this bus he saw was overtaking. He also said he saw a truck and a car coming in the opposite direction; the car being in front of the truck. He agreed that the same time that the bus was overtaking the van he was in the truck was coming in the opposite direction.
He however did not know if the coaster bus touch or "lick" the van in which he was travelling. He was able to get across the road after the collision in time to see the coaster bus going around a corner – going the Ewarton.

The defendant's account

[13] The defendant acknowledged that she did see the stationary taxi; she said it was as she was in the process of going around the bend in the road when she saw it.
In her evidence-in-chief/witness statement she described how she swerved to her right to create a wide enough space between her van and the car so as to overtake the car. It was during this process she looked through her mirror to see a coaster bus coming very fast behind her, travelling in the right lane.
At that time she saw a truck travelling in its correct lane approaching in the opposite direction.
She said the coaster bus swung to his left across the "mediation" onto the left side of the road and collided into the right front door section of her vehicle and propelled it causing it to collide with the taxi.

[14] She emphasized that the bus came on her suddenly and without warning, it appeared from nowhere while she was parallel with the car in front of her. There was no vehicle seen behind her when she started to overtake the vehicle in front of her. She was not speeding she maintained and the fact that the passengers in her vehicle got minor or no injuries at all she said is a testament to the fact that she was not driving fast.

[15] Under cross-examination she was tested in particular to establish various measurements, eg. distances, length of vehicles- width of vehicles. The width of the road she described as pretty wide – estimated to be about 50 to 70 feet across – shared equally between the right lane and the left lane.
When she first saw the stationary vehicle it was an estimated 40 feet away. She said it was partly on the driving surface as there was in her recollection hardly any soft shoulder at that point – less than half of vehicle was in the driving surface.

[16] She estimated the car was about 7 feet wide. Her vehicle was what she described as a narrow van – estimated to be about five (5) feet wide and fourteen (14) feet long. She said she had barely started to overtake the taxi when the incident occurred. She was to the back and alongside the taxi a few inches along the side. Her right side was estimated to be four (4) inches from the middle of road. It was at a the point when passing that she heard a toot of a horn coming behind her causing her to glance in her mirror to see a coaster bus right behind her – by her side almost. She further described it as being to side of the back of the van – estimated to be 2½ feet away.

[17] She explained that she maintained a speed of 10-15 mph as she was about to pass the taxi.
She saw this truck coming from a distance she described as not far away and it was on the side that the coaster bus was now on.

She said the bus was now six (6) to seven (7) feet beside her and she was two (2) feet beside the parked vehicle.
She did not increase her speed and she said she thinks she held her brakes. The collision then took place into her right side by the front fender at the wheel area.

[18] She was asked why she did not just stop when she became aware of the situation facing her but said she could not despite the fact she was then travelling at a very slow rate of speed. She insisted that it was the coaster bus that "flung" her into the parked vehicle. She could not say with certainty which part of her vehicle collided with the stationary taxi but she guessed it was the left hand side at the back part possibly the back door.

[19] She admitted having her vehicle repaired – to an extent – with the damage being mostly to the front part where the bus hit it and where it went on the other side on the embankment.
She said a loss adjuster did look at her vehicle and she took photographs of the damage. She however offered nothing in proof of her allegation of damage to her vehicle.

Was the defendant negligent?

[20] None of the passengers or the driver of the taxi into which the defendant collided purport to be able to explain now the collision occurred – they cannot speak to the manner of driving of the defendant prior to her impacting with the rear of the stationary vehicle in which they were seated.
As far as they are concerned the defendant left the driving surface of the road – which all agreed was a wide one and struck them as they sat there.

[21] The particulars of negligence that they assert in the defendant are largely similar. They all particularize the following:-

(i) Driving at too fast a rate of speed in the circumstances.

(ii) Failing to see motor vehicle registration number 8114 PP within sufficient time or at all

(iii) Failing to apply brakes within sufficient time or at all

(iv) Failing to stop, slow down, swerve or otherwise conduct the otherwise conduct the operator of the said motor vehicle so as to avoid the said collision.

[22] Marlon Brooks, Karl McDermott and Nicole Linton assert that the defendant was negligent in colliding with motor vehicle registration number 8114 PP.

Dwight Nugent asserts she caused her motor vehicle to collide with the other motor vehicle.

Velma Richards said she was negligent by driving at or into motor vehicle registration number 8114 PP.

Nicole Linton describes her negligence as driving into the path of the motor vehicle registration number 8114 PP.

Karl McDermott asserts that the defendant had been driving on the incorrect side of the road.

[23] Marlon Brooks and Velma Richards also assert that the collision was caused due to the defendant failing to maintain sufficient control over her vehicle.

Karl McDermott said it was due to her failing to approach motor vehicle registration number 8114 PP with caution and attention.

Dwight Nugent asserts that she was driving on the said road in a careless manner.

[24] Having not actually seen the defendant's vehicle before the collision, the passengers and driver of motor vehicle registration 8114 PP are asking the court

to find that the accident could have happened only if the defendant was negligent in the way they have asserted.

Marlon Brooks although in the defendant's vehicle had not described how the accident occurred either, so he too is asking the court to presume the accident must have been due to the negligence of his driver.

The claimants Marlon Brooks and Karl McDermott are however the only ones who indicated in their particulars of claim that they intended to rely upon the doctrine of Res Ipsa Loquiter.

[25] The principle was defined by Chief Justice Earle, from 1865 **in Scott v. London and St. Katherine Docks Co. (1865) 150 ER 665 at page 667** "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care".

Thus it is now well established that negligence will be presumed under the doctrine where the accident which occurred is such that would not have normally occurred unless the defendant had been careless.

[26] The other claimants have failed to categorically plead the reliance on the resumption but this failure may not be fatal to their case.

In Bennett v. Chemical Construction (G.B.) Ltd. [1971] 3 All ER 822 the English Court of Appeal held that it was not always necessary to plead res ipsa loquiter.

Lord Justice Davies at page 825 said:

> "In my view it is not necessary for that doctrine to be pleaded. If the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendants, then it is for the defendants to

explain and show how the accident could have happened without negligence.....

.....I have said that in my opinion it is not necessary to plead res ipsa loquiter. If the facts pleaded and the facts proved show that the cause of the accident was apparently and on its face negligence, that is sufficient....."

[27] In his submissions Mr. Kinghorn shared with the court an authority which bares some similarity with the instant matter namely –

Randall v. Tarrant 1955 1 All ER 600.

The court in this case held that where there was a collision between a moving vehicle and a stationary vehicle which was plainly visible, the onus was on the driver of the moving vehicle to show that he had taken all the steps which ought to have been taken in the circumstances.

The facts were that the plaintiff had driven his motor car on to a country lane which was a public highway but led only to a farm. He parked as close to the nearside of the lane as possible. The lane was about fifteen (15) feet wide at the spot and the plaintiff's car was about five (5) six inches wide. The defendant driving a tractor, came out of a field and turned into the lane in the direction of the plaintiff's car. He slowed down on approaching the car but attempted to pass on the advise of a servant who was sitting at the back of the baler. He damaged the car and in the circumstances he was held to be negligence.

[28] Sir Raymond Evershed, MR at page 602 opined:

"A driver along a highway who sees a stationary vehicle or other object on the highway plainly has to take "all possible care to avoid a collision and if there was in fact room to pass but nevertheless a collision occurred, then it seems to me that prima facie the defendant had failed to discharge the duty which those circumstances have

laid on him".

[29] The Local Court of Appeal decision of **Sibbles v. Jamaica Omnibus Services Ltd. (1965) 9 J.L.R 198 referred to Randall v. Tarrant** (Supra)
In that case the plaintiff had parked his car on the left side of a roadway facing north when the defendant's omnibus whilst being driven in a northerly direction collided with the plaintiff's car causing damage. The driver of the bus had explained that he had seen a cyclist riding towards his bus and he got the impression the cyclist was going to collide head on with him so he pulled to his left to avoid hitting the cyclist and in those circumstances had hit the plaintiff's car.
The plaintiff had not been present at the time of the collision and called a witness who spoke of hearing a crash but not actually seeing the accident.
The Court of Appeal found the defendant to have been negligent setting aside the finding of the Resident Magistrate to the contrary.

[30] Justice Lewis, J.A. commented:-

> "There was no duty on the driver to avoid the cyclist at all cost even to the extent of damaging the stationary traffic on his left, and it is for him to show that he had managed his vehicle with proper skill and care, that he could not have swerved without striking the stationary car upon his left. This, in my opinion, he had not done".

[31] In the instant case the defendant had sought to explain how her van collided with the stationary taxi by pointing to the role played by an overtaking bus and approaching truck. Her explanation was rendered more exposed to disbelief after being tested by cross-examination.
In her witness statement/evidence-in-chief she seemed to be saying the bus appeared suddenly when she was parallel with the car in front of her and she felt an impact at that time to the right front door section to her motor vehicle. She

even said there was no vehicle behind her as she started to overtake, yet also said while in the process she looked through her mirror and saw the bus travelling very fast behind her.

[32] Under cross-examination she tried to explain that she was at the rear of the vehicle, she was in the process of overtaking when the coaster bus slammed into her car to the right front fender at the front wheel area. She also now spoke of hearing the tooting of the horn which was what caused her to look behind and see bus coming fast.

It was frankly not clear to me exactly where she was in relation to the stationary vehicle when the bus was overtaking her as she alleged.

Certainly she has provided no reasonable explanation to why she did not stop to avoid the collision if she was going as she said at 10 to 15 miles per hour.

[33] There is no dispute that the area the accident occurred was along a wide section of the road. The defendant described it as a two lane road and each lane being wide enough to allow vehicles to overtake without travelling on the other side of the roadway.

She had swerved to her right to create a wide enough space between her van and the car to complete the overtaking.

The bus she placed on the further right lane in the trucks side of the road. Yet given the width of the road the bus she said was able to swing over on her only hitting the right front fender area of her car and "propelling" her into the stationary car.

[34] She therefore alleged that going at 10-12 miles per hour this bus hit only her right front side and caused her to go into the stationary car.

She did not swerve or in anyway propel her van herself she is claiming. Indeed does not recall slamming on her brakes and she did not reduce her speed.

[35] The claimant who was sitting in the back of the van does not seem to be able to support this assertion that it was the bus which hit her vehicle and propelled it into the car parked along the side of the road.
Mr. Brooks said he heard the horns, saw the bus three to four inches from the bumper and heard the collision same time. He said the van collided with the back of the taxi.

[36] In the final analysis, the facts pleaded by the claimants and the facts proved show that this was an accident which would not have occurred in the ordinary course of things and would not normally have happened unless the defendant had been carless.
The defendant's vehicle while driving along a wide main road struck a stationary vehicle that was properly stopped along the side of the road. This in and of itself can properly be viewed as prima facie evidence of negligence.
The defendant has failed to show that she managed her vehicle with proper skill and care. On the balance of probabilities her account of the role played by the coaster bus and the truck is found to be unbelievable.
The defendant is therefore found to be negligent and liable for the injuries caused to the claimants in these consolidated cases.

Damages

[37] Velma Richards

The claimant was a household helper, 37 or 38 years at the time of the accident.
She sustained a laceration to the scalp; head injury with cerebral concussion and a dislocation of the left hip. She was subsequently also assessed to have chronic neck pain, secondary to a whiplash injury.
She was incapacitated for about two (2) months and in November of 2005 she was found to still continue to have occasional neck pain. The doctor said no significant complication was to be expected in the left hip. With respect to the

neck pain which was found to be most likely secondary to a whiplash type injury, the chronicity of the pain falls in the DRE category ii which is about 5% whole person impairment.

After the accident, she woke up in hospital feeling a lot of pain and stayed in hospital for about two (2) days. She used crutches for nearly two (2) months and had to wear a neck brace.

[38] In submissions on her general damages, Mr. Kinghorn referred to

(i) **Dawnette Walker v. Hensley Pink – Khan Vol. 6 page 114**

(ii) Bernice Clarke v. Clive Lewis – del. On 11/4/2003

(iii) Lillian Livermore v. Casbert Morrison – Knan vol. 5 page 23

In **Dawnette Walker v. Hensley Pink** the claimant suffered 'an injury to the neck, right shoulder and upper back. She had a disability of 5%. An award of $650,000.00 was ordered by the Court of Appeal. At the time the submissions were made in October 2011 this amount updated to $1,792,918.45.

In **Bernette Clarke v. Clive Lewis** the claimant sustained "a mild cerebral concussion". The court award was $550,000.00 which updated to $1,398,858.44.

In **Lillian Livermore v. Casbert Morrison** the claimant sustained a fracture of the femur, a fracture of the right pubis bone, subluxation and a fracture of the cervical spine and cerebral concussion.

An award of $2,000,000.00 was made which updated to $6,438,065.88.

It was submitted that a reasonable award taking into account these authorities, would be $3,500,000.00 for general damages.

In the circumstances I find that an award of $2,500,000.00 is appropriate.

[39] **<u>Special Damages</u>**

In her pleadings Ms. Richards particularized her special damages as:-

(i)	Transportation expenses	$25,000.00
(ii)	Loss of earnings for 8 weeks @ $3,000.00 per week	$24,000.00

(iii)	Medical expense	$38,211.48
(iv)	Public Extract	$ 1,000.00

She has served notice of her intention to rely on certain documents including receipts and there had been no objection. At trial there was no challenge to her evidence as to her losses. The following items were found proved.

(i)	Transportation expenses	-	$ 8,000.00
(ii)	Medical expenses	-	$ 6,500.00
	Visit to doctor	-	$ 3,000.00
	Expenses at hospitals	-	$ 9,170.00
	Pharmacy	-	$ 3,541.48
	For medical reports	-	$11,000.00
	Total	-	$41,211.00

It needs be noted that this claimant claimed for expenses from one pharmacy and presented three separate documents in the exact amount which appears to me to be for the same items so a single award of $1739.00 will be made.
I also decline from making an award in relation to the police report/abstract as I do not find it appropriate to be recoverable by way of special damages.

[40] The claimant also asserts that she was at the time working as a household helper earning $3,000.00 per week. She also refers to additional sources of income being obtained from selling produce in the Linstead market making a profit of $3,500.00.
She has offered no documentation in proof of these earnings. It is well recognized that there are some types of employment for which a claimant can hardly be expected to provide pay-slips or any kind of document.
One however would find it unlikely that an employer of a household helper would not be willing to provide even a letter acknowledging the employment of and payment made to their employee.

This claimant said she was unable to move comfortably for two (2) months and therefore unable to work.

In the circumstance I do not find the amount as pleaded unreasonable. It is noted that there was no pleading made in respect to the earnings in the market and this was not pursued.

For loss of earnings and award of $24,000.00 will be made.

Total special damages to be awarded is $65,211.48

[41] Karl McDermott

This claimant was the driver of the taxi and was at least twenty-four (24) years old at the time of the accident.

The medical report issued from the hospital where he was first treated said he had sustained injuries to the head and right leg with a mildly tender swelling to mid-right leg. He was seen by a private doctor on the 23rd and 30th of November 2004, days after the accident. He was found to have a 1cm bruise over the scalp, the neck muscles on the left side were slightly tender and had painful movements of the neck to his right. His chest and upper back injuries were confined mostly to soft tissue (muscle).

Subsequently, he reported pain in his lower back and examination revealed mild muscular tenderness over his right lower back.

By April of 2006 he was seen by an orthopedic surgeon who diagnosed a cervical strain and lumbosacral strain and was suffering a Permanent Partial Impairment of 2% of the whole person.

[42] Mr. Kinghorn is making submissions as to general damages referred to the following authorities:

(i) Milton Goldson v. Knoeckley and Nestle JMP Jamaica Limited – Claim No. 2009 HCV 1260.

(ii) Chasany Queenland v. Donovan Haughton and Alfred Edwards – Claim No. 2008 HCV 00753

(iii) St. Helen Gordon v. Royland McKenzie – Khan Vol 5 page 152

In **Goldson v. Nestle JMO Jamaica Ltd** the claimant had neck and back stiffness due to muscle and ligament damage and was awarded $850,000.00 which at time of submissions updated to $941,252.00.

In **Chashany Queensland v. Haughton et al** the claimant was found to have pain or lateralization of the neck, the range of movement of the right arm and right hip was painful. There was difficulty flexion and extension of the right leg. The diagnosis was soft tissue injury of the neck and back. In March 2011 after a contested assessment of damages an award of $1,280,000.00.

In **St. Helen Gordon v. McKenzie** the claimant sustained a whiplash injury with pain centered around neck and shoulder. Her whole person disability was 3% which was likely to improve with time but slowly. An award of $400,000.00 was made which updates to $1,381,848.00.

In the circumstance this claimant had submitted that an award of $1,300,000.00 was appropriate. I however do not agree that the strains experienced here requires such an award. An award of $1,000,000.00 is more reasonable.

[43] Once again the special damages pleaded by this claimant went without challenge namely:-

(i)	Medical expenses	-	$ 1,400.00
(ii)	Loss of earnings – 3 months		
	At $40,000.00 per month		$120,000.00
(iii)	Transport expenses		$ 5,000.00

He served notice of his intention to rely on medical reports from three (3) doctors and three (3) receipts evidencing payment for the reports and for consultations with these doctors.

There being no objections Mr. McDermott would have successfully proven nine thousand and one hundred dollars ($9,100.00). He however pleaded only $1,400 for medical expenses and there was no attempt made to amend the

pleadings during the trial. He offered no evidence to establish how he would have spent $5,000.00 for transportation.

He in his evidence did make mention of earnings from driving for one Ms. Gordon and spoke of a letter he had from her. He however failed to exhibit this letter. He also said he earned $2,000.00 per day but he failed to say how many days per week he worked and pleaded $40,000.00 per month without more.

He pleaded loss of earnings for three (3) months. The medical reports he exhibited does not indicate that he would have been unable to work for such an extended period. Indeed the first doctor had opined that a period of approximately seven days incapacitation was expected.

The claimant had failed to present credible evidence proving the sums pleaded and I therefore decline from making those awards.

At most the claimant can only be awarded $1,400.00.

[44] It is noted that at end of his submissions, Mr. Kinghorn made an application to amend all the particulars of claim to have those particulars of claim accord with the evidence.

It was stated that "where the particulars of claim digress from the evidence, in so far as most of the documents have been agreed in this matter, the claimants apply to amend the particulars of claim in accordance with the evidence led and the documents agreed into evidence".

It was further submitted that there was a plethora of authorities that support this position. The case of **Shaquille Forbes v. Ralston Baker et al HCV 02938 of 2006** referred to as one such recent authority.

[45] In that case the judge recognized that the need for the amendment arose through what was clearly a clerical or administrative error. After reviewing various authorities the judge did form the view that the defendants were in no way misled concerning the nature of the evidence to be relied on. It did not

yield to the claimant any unexpected advantage nor did they in anyway prejudice the defence being advanced.

[46] In the instant case, the claimant has not even sought to identify the amendments being applied for. The defendant would not be aware of what she was now being expected to respond to by way of the amendments.
The need to amend special damages to my mind cannot be done in this almost blind blanket way. These damages must be specially pleaded and proved. The court is being asked to make adjustments to the pleadings to benefit the claimants without the defendant having any say in the matter. The defendant could well be prejudiced by these unknown and unidentified amendments.
Under the circumstances I cannot grant this application so far as they relate to the special damages.

[47] The need for an amendment to a statement of case applies to the claimant Marlon Brooks. He is described as being a passenger in the taxi when his witness statement clearly identifies him as being a passenger in the defendant's van.
Indeed under cross-examination he was challenged as to his assertion that he was seated in the front of the van and conceded and admitted that he was actually sitting in the back ensuring the safety of the pigs being transported there.
This amendment would arise as a result of the careless preparation of his case by his attorneys or; as the judge in the **Shaquille Forbes v. Ralston Baker et al** (supra) delicately put it; was due to a clerical or administrative error.
I am satisfied that Marlon Brooks ought not to be punished by this error. The defendant had not been misled or prejudiced and this claimant will indeed not gain any unexpected or unfair advantage.

[48] At the time of the accident he was a chef approximately twenty-three (23) years of age.

He was transferred from the Linstead Hospital eventually to the Kingston Public Hospital and the medical report from that institution revealed that he sustained a left corneal laceration that was repaired by surgery. He continued to be seen at the Kingston Public Hospital and at the date of the report, the 23rd of March, 2007 his last visit had his left visual activity being 20/20

[49] For his general damages, it is submitted that the following cases are relevant:-

(i) **Henry Bryan v. Noel Hoshue - Khan Vol. 5 page 177**

(ii) Bernice Clarke v. Clive Lewis (supra)

In **Bryan v. Hoshue** the claimant sustained abrasion to frontal scalp and severe headaches along with other injuries. He was left with no disability and was awarded $350,000.00 which updated to $1,295,922.00.

In **Clarke v. Lewis** for a mild cerebral concussion an award of $550,000.00 which updates to $1,398,858.44.

It was submitted that this claimants' injuries were more severe as Mr. Brooks had a skull fracture and a laceration to the eye. An award of $2,500,000.00 was submitted to be appropriate.

[50] It was stated in the first medical report from the Linstead Hospital that on examination there was an area of mild depression (old injury to area). Diagnosis was injury to scalp R/o skull fracture, injury to left orbit.

As I understand it R/o means rule out, therefore this was not to be taken as evidence that this claimant did in fact have a skull fracture. No further examination seem to have been done to see if there was any fracture as the focus thereafter seemed to have been on the eye. The depression seen was found to be an old injury to area. The claimant had particularized his injury only

as being a left corneal laceration. There is no conclusive evidence that there was any other injury and so his claim will be kept limited to what he had pleaded.

In any event an injury to the eye is sufficiently serious to warrant an award greater that those in the authorities referred to. Fortunately there is no permanent damage but this claimant spoke to the pain and discomfort he had to endure.

In the circumstance an award of $1,800,000.00 seems appropriate.

[51] **Re: Loss of earnings**

This claimant pleaded loss of earnings for four (4) weeks @ $15,000 per week. He in his evidence said he stayed home from work as a chef for three (3) weeks. He also in his evidence said he earned $4,000.00 per week which was a 7 day work week from 7:30 to as late as 12 a.m. every day.

The claimant therefore had failed to prove that which he pleaded. He has not supplied any documentation to support his evidence but this may well be one of those sectors where no pay slip will be forthcoming.

The award under this heading will be made in keeping with his evidence i.e $4,000.00 for three (3) weeks a total of $12,000.00.

[52] **Other Special damages**

The claimant has not supplied any documentary evidence to support his claim of $50,000.00 for medical expenses. I must therefore decline from making an award under this heading in this amount.

However in his evidence he stated that he had to pay $1,000.00 for each of the two reports he exhibited. This amount is not unreasonable, given what is known to have been paid in other matters and an award of $2,000.00 will be made.

This claimant explained that he had to be going back and forth from the Kingston Public Hospital for treatment over a three week period. The report submitted did make reference to his continued treatment. Mr. Brooks said it cost

him a lot of money to get there from his residence at Byndloss, Cross Roads, Linstead to the hospital.

I accept this evidence and find his claim of $10,000.00 for transportation a reasonable one, even without documentary evidence.

A total award of $24,000.00 will be made for special damages.

[53] Nicole Linton

This claimant was approximately twenty-three (23) years of age at the time of this accident and was employed as a counter clerk at a wholesale store.

The medical report from the hospital she was initially treated indicate that she was assessed as having head injury with cerebral concussion.

Her evidence is that she was admitted in hospital for a couple of hours and then released but was still experiencing a lot of pain. Some days after she saw a Dr. Nesbeth and this doctor found that she had the following injuries:-

(1) Severe headache which was worst in the occipital area of the head

(2) A 5cm laceration that was sutured at the parieto occipital area

(3) Severe whiplash on the right side

(4) Moderate lower back pain and spasm on the right side

(5) Severe abdominal pain on the right side

(6) Right hip was painful and swollen with the patient experiencing difficulty in extending and flexing it.

There was no fracture observed. This claimant was pregnant at the time but her pregnancy was not affected. However the treatment she received had to be adjusted to avoid harming her pregnancy.

[54] **General Damages**

The following authorities were referred to:-

(i) Henry Bryan v. Noel Hoshue – Khan Vol. 5 page 177

(ii) Bernice Clarke v. Clive Lewis delivered on 11/4/03

(iii) Monica Llandell v. Judith Campbell – Claim No. 2006 HCV 01324

(iv) Claston Campbell v. Omar Lawrence – Suit No. C135/2002

The first two authorities have already been noted above.

In **Llandell v. Campbell** the claimant sustained a moderate whiplash injury and was awarded $950,000.00 when this judgment was delivered in December of 2009. Counsel failed to assist the court as to how much this figure would be when updated.

In **Claston Campbell v. Omar Lawrence** the claimant had sustained a whiplash injury found to be moderate. An award of $650,000.00 was made which updates to $1,686,568.30. In the instant case an award of $2,500,000.00 was submitted as being appropriate.

It is noted that this claimant had what the doctor found to be severe whiplash, worst on right side, there was moderate back pain and the right hip was swollen and painful. It is also to be remembered that, fortunately there was no fractured bones.

In the circumstance I find an award of $2,000,000.00 appropriate.

[55] This claimant has particularized her special damages as follows:-

Medical expenses	-	$45,450.00
Transportation expenses	-	$ 6,000.00
Total		$51,450.00

Under cross-examination she was tested as to her receiving treatment from Dr. Nesbeth. She could not remember if she went back to the doctor after November 2004 but she agreed she had visited the doctor five (5) times or less. She also agreed that when she had finished her treatment with the doctor the injuries she sustained in the accident had been resolved.

She served notice of her intention to rely on the medical report supplied by this doctor along with several receipts evidencing payments made when she visited

Dr. Nesbeth along with receipts for medication, for a cervical collar and for x-ray done.

Dr. Nesbeth in her report dated July 22, 2007 said this claimant was finally discharged on the 30th of April, 2005 and the receipts exhibited show sixteen (16) office visits from November 20, 2004 to the 30th May, 2005. Each visit cost $1,000.00. At five (5) of those visits she received cataflam injections which cost an additional $1,250.00 each.

On three of the visits she had cleaning and dressing done at a cost of $1,150.00 each time in addition.

On the 30th May, 2005 this claimant had to pay $10,000.00 for the medical report. There was and additional cost of $2,750.00 paid for a cervical collar. A total of $38,450.00 was spent for her treatment with this doctor.

The claimant also spent $5,000.00 in respect to costs from the Linstead Hospital and a further $2,000.00 for a skull x-ray.

For medical expenses therefore this claimant has proven the following:-

Re: Dr. Nesbeth	-	$38,450.00
Linstead Hospital	-	$ 5,000.00
X-ray	-	$ 2,000.00
Total		$45,450.00

[56] This claimant has also pleaded transportation cost of $6,000.00. She explained in her evidence that she had to spend for each visit she made to the doctor. She did not receive any receipts from the taxi drivers which is frankly not surprising. This absence of any documentary proof will not prevent an award of $6,000.00 under this heading as being reasonable.

[57] Dwayne Nugent

In his particulars of claim, this claimant said at the time of the accident he was a bottler at a chemical store and was twenty-one (21) years old.

He particularized his injuries as:-

(i) abrasion to scalp

(ii) pain to chest

(iii) soft tissue injury

He served a notice to rely on the medical reports from the Spanish Town Hospital and from Dr. Koteah Katragadda.

The first refers to a diagnosis of a motor vehicle accident with soft tissue injury. Physical examination had revealed normal vital signs, pains to the chest with no tenderness or swelling detected and an abrasion to the top of the scalp.

Dr. Katragadda said he treated Dwayne Nugent on the 19th of November, 2004 and saw an abrasion with haemaloma to the head. There were complaints of severe chest pain and x-rays did not reveal any bony injuries. He said that the period of incapacity was put at 3-4 weeks from the date.

[58] The authorities relied on was:-

(i) Shaquille Forbes v. Ralston Baker et al delivered on the 10th of March, 2011

(ii) Trevor Benjamin v. Henry Ford et al – claimed No. 2005 HCV 02876 delivered on March 23, 2010.

In **Shaquille Forbes v. Ralston Baker et al** the claimant sustained headaches and pain to the right forehead and received an award of $400,000.00.

In **Trevor Benjamin v. Henry Ford et al** the claimant sustained injuries characterized as soft tissue injuries with some persisting residual pain but no fracture. An award of $700,000.00 was made.

This latter case had become the authority for the assertion that all soft tissue issue should received an award of at least $700,000.00. I find that it is not clear where the claimant had been injured and the usage of the plural "injuries" suggest that there was more that one area involved.

I therefore cannot agree that an amount in that sum can be appropriate in all cases once there is a soft tissue injury.

[59] In the instant case Mr. Nugent had severe chest pain and an abrasion to the top of the scalp. That severe chest pain is seemingly what would have amounted to soft tissue injury.

It is noted that at the time of giving his witness statement in March 2011, he was still feeling chest pain on and off whenever he lifted anything. This he said affected his duties on his current job at Nestle Jamaica Limited. This is against the background that he describes himself as a musician so it is curious what his duties as a musician would be at Nestle Jamaica Limited. He also said this accident had changed his life dramatically and he is unable to do physical activities like playing football, weight lifting and general household activities which he is now unable to do in its entirety.

In spite of these difficulties, Mr. Nugent has seemingly not seen any other doctor since 2005 and at that time the doctor had opined that his period of incapacity was 3-4 weeks.

I am satisfied that this claimant had exaggerated his injuries in the absence of any medical evidence to support his claim. The award requested of $800,000.00 is wholly inappropriate and but for the abrasion to the head this matter may not have attracted an award outside of that made in the Resident Magistrate's Court. I find that an award of $300,000.00 is appropriate.

[60] Special Damages

This claimant has pleaded special damages as follows:-

(i)	Medical expenses (and con't)	-	$7,797.40
(ii)	Transportation (and con't)	-	$5,000.00

In his evidence he refers to the cost of obtaining the medical report and also to other medical expenses including glasses. No where in his evidence does he refer to having received any injury to his eyes or anything that could explain his need for glasses. He exhibited and gave notice of his intention to rely on receipts for payments made in relation to an examination in the amount of

$2,000.00 at a vision pavilion and a deposit made on glasses in the amount of $13,500.00.

These receipts are dated in May and August 2005 and are in the name of Aaron Nugent. The significance of these receipts is not apparent and perhaps was placed in this claimant's matter due to a clerical or administrative error.

[61] The other receipts are for chest and skull x-rays done on the 22/11/04. There are two (2) receipts in the amount of $2,800.00. Although he has not exhibited receipts for the reports he obtained detailing the injuries he sustained, a reasonable amount can be awarded.

However, to make the award in the amounts he has given evidence of could exceed the amount he has pleaded for medical expenses. I will make an award of $4,000.00 for the report from the private doctor and $995.40 for the one from the hospital.

For medical expenses the award under the heading of special damages is as follows:-

For X-ray	-	$2,800.00
For reports	-	$4,995.40
Total		$7,795.40

There has been no evidence of any kind supporting this claimant's assertion that he incurred losses related to his being transported anywhere in relation to this matter.

The decision

There is judgment for the claimants and damages assessed as follows:-

(1) Velma Richards.

General damages - Pain and suffering - $2,500,000.00 with interest at 3% from the 3rd of July, 2006 to the 9th of October, 2011 (the date the submissions for the claimant were received)

Special damages -$65,211.48 with interest a6 6% from November 18, 2004 to 21st June, 2006 and at3% thereafter to the 9th of October, 2011.

(2) Karl McDermott

General damages - Pain and suffering - $1,000,000.00 with interest at 3% from the 25th of November, 2006 to the 9th of October, 2011.

Special damages – Medical expenses - $1,400.00 with interest at 6% from 18th November, 2004 to 21st June, 2006 and at 3% thereafter to the 9th of October, 2011.

(3) Marlon Brooks

General damages – Pain and suffering - $1,800,000.00 with interest at 3% from the 25th of June, 2008 to the 9th of October, 2011.

Special damages-

Loss of earnings	-	$12,000.00
Medical expenses	-	$ 2,000.00
Transportation	-	$10,000.00
Total		$24,000.00 with interest at 6% from

November 18, 2004 to June 21, 2006 and at 3% thereafter to October 9, 2011.

(4) Nicole Linton

General damages – Pain and suffering - $2,000,000.00 with interest at 3% from June 25, 2008 to October 9, 2011.

Special damages

Medical expenses	-	$45,450.00
Transportation	-	$ 6,000.00
Total		$51,450.00 with interest at 6% from November 18, 2004 to June 21, 2006 and at 3% thereafter to October 9, 2011.

(5) Dwayne Nugent

General damages – Pain and suffering - $300,000.00 with interest at 3% from August 20, 2010 to October 9, 2011.

Special damages

Medical expenses - $7,795.40 with interest at 6% from November 18, 2004 to June 21, 2006 and at 3% thereafter to October 9, 2011.

There will be costs to the claimants to be taxed if not agreed.