[2012] JMSC Civ. 183

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006 HCV 01661

BETWEEN	**ASHLEY SAMUELS**	**CLAIMANT**
	(By her next friend Rose Ellis)	
AND	**STEVE DALEY**	**FIRST DEFENDANT**
AND	**EVERTON McKENZIE**	**SECOND DEFENDANT**

Gordon Robinson instructed by Winsome Marsh for the claimant

Ursula Khan and Charles Campbell for the second defendant

July 2 and December 20, 2012

NEGLIGENCE – VICARIOUS LIABILITY - WHETHER DRIVER EMPLOYEE OR AGENT OF OWNER – WHETHER OWNER LIABLE FOR NEGLIGENCE OF DRIVER

SYKES J

[1] On November 4, 2002, Miss Ashley Samuels was struck down while crossing the main road in Gregory Park, St. Catherine, by a motor car owned by Mr Steve Daley and driven by Mr Everton McKenzie. She has suffered very serious injuries

for which she is seeking compensation from both defendants. Mr McKenzie did not appear at the trial. Judgment was entered against him before this trial. Miss Samuels has her sights trained on Mr Daley. He has insurance and may be able to satisfy all of the claim. To get compensation from Mr Daley, Miss Samuels has to prove Mr McKenzie was the agent of Mr Daley at the time of the collision. The whole of this case is dedicated to that goal. Mr Daley is resisting the claim on the basis that Mr McKenzie, at the time of the collision, was not driving the car on any business of Mr Daley and therefore was on his own business.

[2] From what has been said already, the first significant issue is whether Mr Daley can be held strictly liable under the doctrine of vicarious liability. The second significant issue is the quantum of general damages Miss Samuels should receive.

The applicable legal principle

[3] Needless to say, the claimant could not speak to the actual relationship between Mr McKenzie and Mr Daley other than to assert that Mr McKenzie was driving a car owned by Mr Daley. This assertion led the claimant to invoke the principle laid down in **Mattheson v Solteau** [1933] JLR 72 by the Full Court of the Supreme Court on appeal from a trial before a single judge of the Supreme Court. In that case the court held at page 74 that:

> *It is now accepted in our Courts that in the absence of satisfactory evidence to the contrary this evidence [being the registered owner of a vehicle] is prima facie proof that the driver of the vehicle was acting as the servant or agent of its registered owner. The onus of displacing this presumption is on the registered owner, and if he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him.*

[4] The principle from **Mattheson** was reaffirmed recently by the Court of Appeal in the case of **Rodney v Werb** [2010] JMCA Civ 43 (unreported) (delivered

December 3, 2010). In the latter case Phillips JA did a thorough review of the case law both in Jamaica and other jurisdictions.

[5] From her Ladyship's reasoning and analysis, it is the view of this court, that her Ladyship's judgment can be understood to have established the following principles:

a. in order to make the owner of a vehicle liable in circumstances where the owner was driving the vehicle at the time of the collision, the claimant must prove that driver as either the agent or employee of the owner;

b. proof of who the registered owner is at the time of the collision will be prima facie evidence that the driver of the vehicle was driving in the capacity of either a servant or an agent of the registered owner. This prima facie conclusion may become conclusive **unless there is evidence to show otherwise** (see paragraphs 31 – 32, 43);

c. the burden of disproving the prima facie inference that arises from proof of ownership lies on the registered owner and if he fails to discharge his burden of proof then the prima facie inferences become conclusive and the claimant succeeds, assuming, of course, that negligence on the part of the driver is established (see paragraph 33);

d. the owner can rebut the prima facie inference in one of two ways: '[i] by giving or calling evidence as to [the driver's] object in making the journey in question, and establishing that it served no purpose of the [owner] [or] [ii] by simply asserting that the car was not being driven for any purpose of the [owner], and proving that assertion by means of such supporting evidence as was available to him' (see paragraph 43);

e. the evidence put forward to rebut the prima facie inferences that are drawn from proof of ownership must be satisfactory and credible (see paragraph 35);

f. where more is known about the facts of the case other than A owned the car but it was not being driven by him at the material time, then in deciding whether the driver was the employee or agent of the owner, the court must

have regard to all the evidence in the case that bears on that issue (see paragraph 42).

[6] From Phillips JA's judgment, this court understands the expression 'satisfactory and credible' to mean that the evidence must be admissible and if admitted then it must be credible.

[7] The court goes back to the **Mattheson** case to make an important point. Since the principle was approved without modification it is important to understand the context of the case to see what was the underlying reasoning and conclusion in that case. The facts were that the truck was driven by Mr Herbert Lee at the time of the collision. Negligence on his part was established by the evidence. Initially, the claimant sued Mr G O Soltau (G O) because it was believed that he was the employer of Mr Lee. Later on the claimant got more information and joined Mr W T Soltau (W T). They were brothers.

[8] Judgment was entered against G O and the claim against W T was dismissed. On appeal it was argued that judgment should have been given against W T and not against G O. The appeal succeeded.

[9] W T's evidence was that he had bought the truck in 1929 and before the collision on July 15, 1930, he had come to an understanding with G O that he (G O) would take the truck, do the needed repairs, test drive it and if it was in good order, purchase it. W T also said that G O actually paid for the truck by instalments and that at the time of the collision G O had the truck in accordance with the terms already stated and therefore the truck, on the day of the collision, was not under W T's control and neither was it being used for his business.

[10] The Full Court stated that there was no supporting documentary evidence for W T's account. The court was not saying that documentary evidence was necessary in cases of this nature. What it did say was that the 'whole of the evidence on behalf of both defendants was so replete with contradictions and improbabilities that no Court should have considered it sufficient to rebut the presumption that W T Soltau was registered owner was in control of the truck and its driver at the time of the collision' (page 75).

[11] Two reasons for this conclusion may have been (a) there was evidence that G O said that Mr Lee (the driver) was employed to him permanently and had been so employed for two weeks before the accident and was paid weekly. This contrasted sharply with the evidence of the driver which was that he was driving the truck for the first time at the time of the collision and the terms of his engagement were that he would be paid for each trip he made; (b) G O testified that he had bought fence posts from W T and was having them delivered at Flint River. The posts were to be delivered to Flint River because G O had a shop on W T's property. It turned out that the very shop was licensed in W T's name.

[12] The problem for the defendants was that there were no receipts or any document consistent with their defence and such document (the licence for the shop) as there was showed that their account was unreliable.

[13] The nature and quality of the evidence in this case should be borne in mind when the court examines later some other cases relied on by Mr Robinson.

Whether Mr McKenzie was an employee or agent of Mr Daley

[14] In order to resolve the first significant issue identified at paragraph 2, the court must determine whether Mr McKenzie was a servant or agent of Mr Daley.

[15] Mr Daley asserts that at the time of the collision with Miss Samuels, Mr McKenzie was on his own business and not that of Mr Daley. As one would expect, he was closely cross examined by Mr Gordon Robinson. At the end of his evidence Mr Daley's position was he engaged Mr McKenzie to take his (Daley) mother to the hospital for medical treatment from time to time. This was said to be an unpaid arrangement. Undoubtedly, this was designed to say that Mr McKenzie was not the employee of Mr Daley.

[16] Mr Daley also said that this arrangement was one which sprung from the good nature of Mr McKenzie because he was available to do the errand. Mr Daley also said that he permitted Mr McKenzie to drive the car for his business (McKenzie) whenever he wished. The only basis, it emerged from the evidence, for Mr McKenzie to have ready access to the motor car was that he was ready, willing and able to take Mr Daley's mother to the hospital whenever that was necessary.

It seems to this court that Mr McKenzie would not have had this kind of access to the motor car if he was not available to take Mr Daley's mother to the hospital.

[17] The reason for this arrangement was that Mr Daley was heavily involved in political campaigns and so he was not readily available to take his mother to the hospital when necessary and so the services of Mr McKenzie were engaged to meet this need. So frequent was the use of the car by Mr McKenzie that his name was added to the list of authorised drivers for that motor car. In addition, Mr McKenzie was free to use the car, for his own business, as long as the mother did not need to be taken anywhere.

[18] Mrs Khan pointed out in her written submissions that Mr McKenzie was doing what he did for the mother as a favour to Mr Daley. The basis for this submission was that Mr McKenzie operated a garage business and so he was not just sitting at home waiting for the call to transport the mother to some place. Counsel sought to say that the arrangement was not akin to employer/employee but rather one of Mr McKenzie being a Good Samaritan.

[19] Mr Daley's sister's evidence has not displaced any of the reasoning and so need not be examined at all. If her evidence did anything, it reinforced the point that Mr Daley was very busy and could not undertake the transportation of his mother as and when she needed and like all good sons he made alternative arrangements which worked quite well.

[20] From the evidence adduced there is nothing to say that Mr McKenzie was an employee of Mr Daley. This court does not accept Mr Robinson's submission that the payment to Mr McKenzie was unlimited access to use the car whenever he wanted. There is none of the usual incidents of a contract of employment. The court examines the evidence in order to determine whether the circumstances ground vicarious liability in Mr Daley on the basis that Mr McKenzie was acting as his agent at the material time.

[21] Other than proof that Mr Daley was the owner of the car, the evidence on this aspect of the case comes from Mr Daley. He said that on the day in question, Mr McKenzie was driving on his own business. He said that Mr McKenzie was going to pick up a friend. In order to make Mr Daley liable it has to be shown that at the

time of the collision Mr McKenzie was driving the car on Mr Daley's business or the trip was one in which Mr Daley would have an interest or benefit in some way (**Princess Wright v Alan Morrison** [2011] JMCA Civ 14 (unreported) (delivered April 15, 2011)).

[22] On this aspect of the case both counsel cited **Rambarran v Gurrucharan** (1970) 15 WIR 212; [1970] 1 All ER 749. The facts of that case were these. The son had general permission to drive his father's car. Sometimes the car was used to do the father's business. The car was involved in a collision and the claimant sued the father. It was established on the evidence that the collision was caused by the son's negligence. The son who was driving the car at the time was never joined as a party and was not called to give evidence. The father gave evidence and told the court that he was at his farm and did not know where the car was at the time of the accident. He went further to say he had no objections to any of his sons using the car (see **Gurrucharan v Rambarran** 11 WIR 443, 450 CA (Cummings JA)). The trial judge dismissed the claim but was reversed by the Court of Appeal. The Privy Council reversed the Court of Appeal on the ground that the conclusion of fact by the trial judge was sustainable because there was evidence capable of justifying the trial judge's decision.

[23] The significance of the Privy Council's decision for this court is that it exposed the fallacy of the Court of Appeal which had reasoned in the following manner. Apparently, the majority of the Court of Appeal embarked on an illegitimate form of reasoning which was to the effect that since the father had failed to lead evidence regarding the circumstances under which the son drove the car and such circumstances were within his knowledge then it followed that the prima facie evidence of agency was not rebutted. In other words, it was not sufficient to say that the trip was not for his business but he must go further to say what was the purpose of the trip. The Chancellor of the Court of Appeal went as far as asserting that the 'defendant who alone knows the facts must give evidence of the true facts' (see **Gurrucharan v Rambarran** 11 WIR 443, 445 CA). In similar vein was the judgment of Persaud JA (the other member of the majority) who said that the court was left without any further information in the sense that the

father did not give any evidence as to the purpose of the journey which was being undertaken at the time of the accident (see **Gurrucharan v Rambarran** 11 WIR 443, 449 CA). It is right to pause to observe that the Court of Appeal focused on the fact that the father did not say why the son was driving the car at the material time and discounted his evidence that the son was not driving on the father's business.

[24] The frailty in the Court of Appeal's reasoning appeared to be that their Lordships seemed to have suggested that unless the father could explain the reason for the trip then the prima facie inference which arose from proof of ownership could not be rebutted. The Court of Appeal also appeared to be suggesting that the father's evidence was inherently incapable of delivering the proof he needed. The Privy Council reversed this reasoning by holding that the prima facie inference can be displaced by proof that the trip was not connected with the owner's business or for some purpose of the owner. Once the father proved (by oral evidence which was accepted by the trial judge) that the car was not being driven on the father's business then it matters not what the son's purpose was when he drove the car. Thus, the fact that the father did not prove what the purpose for which the son drove the car did not mean that it must have been on the father's business.

[25] The facts of **Gurrucharan** make the eloquent point (as if it needed to be made) that there is no restriction on the nature of the evidence that may be adduced to rebut the prima facie inference which arises from the fact of registered ownership. The circumstances may be such that only oral evidence is available; in others, the absence of documentary evidence may be significant. Even in cases where documentary evidence may be expected, the absence of such evidence is not automatically fatal. The evidence may be credible despite the absence of documentation.

[26] Mr Robinson also relied on the Court of Appeal of Jamaica's decision in **Wright**. In that case, the owner of the car employed a driver to conduct errands, to transport his children to and from school on weekdays. The driver was allowed to take home the vehicle at nights and on weekends. The accident took place on Saturday, July 17, 2004.

[27] The evidence from the owner was that on the day in question, the driver was not driving on the employer's business because he was not assigned any duties that weekend and so he could not be liable for the driver's negligence. From the reasons for judgment there was no evidence from any other source saying that what the owner said was not true and neither did the Court of Appeal say, as the Full Court in **Mattheson** did, that the evidence was 'intrinsically incredible'. The driver was not called as a witness. Thus what was before the trial court was the evidence of ownership and the owner's evidence. The trial judge concluded that vicarious liability was not established. This was reversed on appeal.

[28] On appeal, two submissions were advanced by the appellant. The first was that there was no evidential basis for the trial judge to find that the driver was not driving on the owner's business. The second was that the driver was doing what he was employed to do, namely driving, and what he was doing at the time of the collision was closely connected with his employment and therefore the net of liability could be extended to ensnare the owner. It is not clear what the court thought of the first submission since no clear indication is given. From a close reading of the judgment there does not appear to be any express or implicit finding that what the owner said was not true, or worse, he was deliberately lying. However, in relation to the second submission the court appeared to have agreed with counsel's submission.

[29] The first submission made by counsel in **Wright** is indistinguishable from the reasoning of the Guyanese Court of Appeal in the **Rambarran** case. This, perhaps, explains why it was not dealt with explicitly in the reasons for judgment. Failing to prove the purpose of the trip does not necessarily mean that the trip was for the employer's business. At the risk of repetition, all the defendant needs to prove is that the trip was not for his business. He does not have to prove the purpose of the trip. This is why Lord Donovan in **Rambarran** said '[o]nce he had thus proved that Leslie [the son] was not driving as his servant or agent, then the actual purpose of Leslie on that day was irrelevant' and that '[i]f this supporting evidence was sufficiently cogent and credible to be accepted, it is not to be overthrown simply because the appellant chose this way of defeating the

respondent's case instead of the other.' In **Rambarran**, the only evidence referred to in both appellate courts when discussing the defendant's case is that of the father. From this it is reasonable to say that only the father gave evidence for the defence. If this is so, then the expression 'supporting evidence' in the context in which Lord Donovan was speaking meant evidence called in support of the assertion or pleading **and not** evidence from some source other than the father. If his Lordship was mandating that there must be evidence other than the oral evidence of the registered owner in order to make a successful defence in these types of cases, then the outcome of the case would have been different. The fact that the trial judge's decision was restored in circumstances where no other evidence other than the father's was referred to tends to support the conclusion just stated in respect of Lord Donovan's reasoning.

[30] The court in **Wright's** case seems to be saying that the general authority to drive the vehicle on matters connected with the employer's affairs coupled with evidence that the driver also drove some weekends on the employer's business was sufficient to negate the explicit evidence of the employer that on the day of the collision the driver was not tasked with anything having to do with the employer's business or affairs. The proposition seems to be that being employed as a chauffeur and actually driving on the Saturday (since there was no direct evidence that on the day of the accident he was driving on the employer's business) was sufficiently connected with his job of running errands generally so as to be able to counteract the employer's testimony. If this is correct, then it now means that the 'frolic defence' is very difficult to establish. Proving that an employee was not acting within the scope of his employment has become more difficult.

[31] Mr Robinson's submission was that the present case is quite analogous to the **Wright** case in this way. Mr McKenzie was the agent of Mr Daley. Mr McKenzie had full authority to drive the car to do business for Mr Daley. He was allowed to keep the car even for his own business as long as it was not needed for the mother's use. By parity of reasoning, this state of affairs is sufficient to override

Mr Daley's evidence that on the day of the collision Mr McKenzie was not doing any business connected with Mr Daley.

[32] Mr Robinson also submitted that Mr Daley was not to be believed and like the defendant in **Werb**, his evidence was to be rejected and the court should find that the prima facie inference that arises from ownership should prevail.

[33] The problem with the latter submission is that there is no proper basis for me to reject Mr Daley's evidence regarding the trip taken by Mr McKenzie on the unfortunate day. Mr Daley told the court quite candidly that he was too busy because of his political activities to take his mother to and from hospital and other business. He made arrangements for this and since Mr McKenzie would be doing this on a frequent basis he added his name as an authorised driver. Like the son in **Rambarran**, Mr McKenzie could drive the car at any time and also on his (McKenzie) business. Mr Daley, in this case, has gone further than the father in **Rambarran:** he not only stated that the car was not on his or his mother's business at the material time but also stated the purpose of the trip, namely to pick up a friend of Mr McKenzie. This evidence does double duty: first it states that the trip was not for Mr Daley's purpose and second that the purpose of the trip was for the benefit of Mr McKenzie.

[34] Mr Robinson submitted that the evidence that he lent the car to Mr McKenzie to pick up a friend was inadmissible in the sense that it depended on an assertion by Mr McKenzie about his purpose for wanting the car that this assertion was struck out at trial on the basis that it was hearsay. The court does not agree. As a practical matter, how else would Mr Daley be able to state what was his purpose for lending the car to Mr McKenzie on the day in question? If he cannot say what his purpose was then who else can safely do so when that is actually one of the contested issues in the case?

[35] Mr Robinson also submitted that Mr Daley's evidence concerning his attempt to find Mr McKenzie was just too convenient – he tried and could not find the driver and so the way is open for him to make just about any assertion. Again, what else can a witness say if that is the case? Mr Robinson pointed to the evidence of Mr Daley which was to the effect that he went to Clarendon in search of Mr

McKenzie. Learned counsel submitted that he gave no reason for going to Clarendon when Mr McKenzie's last known address was in the Corporate Area. The fact of the matter is that Mr Daley was responding to questions asked of him. No one asked him the reason for going to Clarendon. Not having been asked then it would be unfair to draw an adverse conclusion when he was not presented with the opportunity (via questions) to clear up any difficulties that may arise.

[36] There is no legal requirement that Mr Daley must produce corroborating or supporting testimony from any other source. The father's apparent stand-alone testimony was deemed sufficient by the Privy Council in **Rambarran**. By parity of reasoning, If Mr Daley has not been discredited and in the absence of evidence showing that his testimony was untrue or unreliable, this court cannot see any reason by Mr Daley's stand-alone evidence regarding the circumstance Mr McKenzie took the car on the unfortunate trip is not sufficient to deflect liability from him. There is no evidence to show that Mr Daley or his mother had any interest or would benefit in any way from the trip to pick up the friend.

[37] In any event, **Wright** can be distinguished on the basis that that was an employer/employee case and so the employer may well be expected to exercise greater control over the use of his vehicle. The present case does not fall within that category and so does not apply to the present case. It follows that Mr Daley cannot be held vicariously liable for Mr McKenzie's negligence.

[38] Evidence was placed before the court of Mr Daley visiting the hospital and taking clothes, food and money, for Miss Samuels. This court wishes to state categorically that it does not regard any of these acts as amounting to an admission of any kind from which any inference adverse to Mr Daley can be drawn. It would be a strong thing for a court to hold, especially in the context of a young child being injured, that acts of generosity and decency metamorphosed into an admission of liability.

[39] The claim against Mr Daley is dismissed with costs to him to be agreed or taxed.

[40] The court must, however, go on to assess the quantum of damages because judgment was entered against Mr McKenzie.

The assessment of damages

[41] The assessment will be done using the suggested format by Wooding CJ in **Cornilliac v St Louis** (1965) 7 WIR 491, 492. The learned Chief Justice approved the respondent's counsel's summary of the various factors a judge should have in mind when assessing damages. These are '(a) the nature and extent of the injuries sustained; (b) the nature and gravity of the resulting physical disability; (c) pain and suffering; (d) loss of amenities; (e) the extent to which pecuniary prospects were affected.'

The nature and extent of injuries sustained

[42] Miss Samuels stated that as she tried to cross the road she was hit by the car when she reached the middle of the road. She woke up in the Bustamante Hospital for Children suffering a broken leg and she was in 'a lot of pain.' As far as she can recall, she could not see out of her left eye. The whole of her face and head were hurting. She was at the hospital for many months (which turned to be from November 2002 to March 2003) and had several surgical procedures. Other details come from Miss Samuels' mother, Miss Rose Ellis, and medical reports.

Medical report of Dr Nyi Than, orthopaedic resident, dated July 5, 2005

[43] There is a medical report from Dr Nyi Than, orthopaedic resident, at the Bustamante Hospital for Children dated July 5, 2005. According to this report, Miss Samuels presented at the hospital with:

a. 3cm x 2 cm laceration with swelling over the forehead;

b. bruising on left cheek;

c. periorbital haematoma of right eye;

d. 12cm x 6cm degloving injury to the medial aspect of the left leg and left ankle.

[44] The x-ray done showed:

a. comminuted fracture on the left distal tibia and fibula;

b. fracture of the anterior cranial fossa.

[45] Miss Samuels was taken to the operating theatre where there was debridement of the wound and an external fixation applied. She was given antibiotics and analgesics.

[46] She had a second operation where a second look debridement was done. She was diagnosed with a grade 3B open fracture of the left tibia and fibula. The medical team did skin grafting surgery on the left leg during a third operation. The external fixator was removed and plaster of paris applied to the left leg.

[47] Miss Samuels who was admitted on November 4, 2002 was discharged on March 21, 2003. When last seen on December 12, 2003, Miss Samuels was walking with crutches and was non-weight bearing. X rays showed that the fracture had healed with callus formation. The plaster of paris was removed. This report was said to be an interim report.

Medical report of Mr Dwight Webster, consultant neurosurgeon, dated August 31, 2005

[48] Mr Webster is a consultant neurosurgeon. When he saw Miss Samuels, she readily obeyed commands and was oriented. She opened the left eye spontaneously. The right eye was not visualised because of marked periorbital swelling. The left lower limb was limited by the fracture but she moved the other three limbs with excellent power. The forehead was swollen with an associated 3cm laceration. A bruise was noted on the left cheek.

[49] The skull x-ray showed linear factures of the occipital and frontal bone. From all this Miss Samuels' neurological diagnosis was mild head injury with linear skull fractures. Miss Samuels was not seen by the neurological service after discharge

and thus, Mr Webster says, a ‘neurological assessment of permanent impairment is therefore not possible.’

Medical report of Mr Guyan Arscott, cosmetic and reconstructive surgeon, dated January 31, 2006

[50] Miss Samuels was first seen on January 12, 2006. At the time she had ‘obvious facial scarring and marked scarring of the (L) leg.’ She also had over ‘her central forehead … a 4 x 4.5 cms are of hypertrophy hyper-pigmented scar.’ There was ‘a hyper-pigmented blemish representing skin graft donor (sic) sites over the (L) buttock.’

[51] Mr Arscott observed that the lower left leg had marked scarring and deformity involving the lower two thirds of the anterior medial aspect of the leg. The deformity was principally an inversion-type deformity which was an indication that there was some form of malunion at that area.

[52] Mr Arscott’s assessment was that corrective surgery could improve the forehead scar by about fifty percent but improvement in the deformity and scarring of the lower leg would have to await some form of correction by an orthopaedic surgeon.

Medical report of Dr Dileep Byregowda, orthopaedic resident, dated July 13, 2011

[53] This report states that when Miss Samuels was admitted at the hospital the examination showed (a) degloving injury to the left leg and ankle; (b) the bone was exposed and (c) no distal neurological deficit. The x-ray showed a grade 3 B open fracture distal left tibia. The young lady was taken to the operating theatre where a Hoffman external fixator was put on. Miss Samuels was eventually discharged on March 21, 2003.

[54] When she was reviewed at the outpatient orthopaedic clinic it was observed that not enough bone had formed at the fracture site and so plaster of paris was applied. She was reviewed in April 2006. The x-ray at the time ‘suggested angular deformity of left leg.’ Because of the deformity the suggested treatment

was left leg osteotomy and bone grafting. Miss Samuels was taken to theatre in August 2006 to effect the recommended treatment.

[55] She was reviewed in July 2008 and at that time there was observed a malunion of the left distal tibia. The treatment here was an 'epiphysiodesis of right proximal tibia physis and fibula.' For the malunion, an Ilizarov frame was applied. Miss Samuels was discharged and followed up in the orthopaedic clinic.

[56] In October 2009, on a follow up visit, pus was observed to be oozing from the pin site. She was admitted and antibiotics administered. When the infection was cured the external fixator was removed in December 2009.

[57] Miss Samuels was seen again in August 2010 and at that time the examination showed 'valgus deformity noted with limb length discrepancy.' For this observation Miss Samuels was subject to an 'osteotomy and splinting … to left tibia.'

[58] She was last seen at the clinic in May 2011 and she 'had valgus deformity of left ankle about 10" and equinous deformity 30".'

The nature and gravity of the resulting physical disability

[59] There is scarring at the site from where skin was taken for the skin graft. Her left leg is smaller and shorter than the right leg. Her left ankle is not in the right position. There is scarring of her forehead. She wears an insole to assist with her gait but despite this she does not walk normally because of the leg length difference referred to earlier.

Pain and suffering

[60] From the witness statement of Miss Samuel, there is no evidence that she had any awareness of pain when she was first struck by the car. Her evidence is that she was hit and then regained consciousness in the hospital which suggests that the initial blow made her unconscious. Her awareness of pain and the broken leg began in the hospital. Her face and head were hurting. She also indicated that she had to do 'a lot of physical therapy which was very painful.'

[61] In her amplified evidence, she said that she is not experiencing any pain at the moment save that her left knee hurts a little when she walks. It does not appear that the surgical procedures themselves produced any pain.

Loss of amenities

[62] Miss Samuels stated that her left leg is shorter than her right leg with the consequence that she does not walk evenly. She can no longer play games or run about as she could before the collision. Needless to say, she is unable to play netball.

[63] She has indicated that she is insecure and shy because of what she fears persons will say and how she is looked at in public spaces. This made her reluctant to go out. After the initial stares, the community members got used to seeing her injuries but whenever she goes into new surroundings the stares begin anew. This state of affairs undoubtedly has affected her poise, self confidence and her perception of herself. It appears that she believes that she does not have the grace, charm and beauty with which women are endowed. To put it another way, the injuries have produced psychological scars as well.

[64] Miss Samuels complained that her left leg looks unsightly and she has ugly scars at the spot of her body where skin was taken to do the skin graft on her left lower leg.

[65] Miss Samuel has been deprived of the opportunity of growing up as a normal child with limbs free from deformity and skin free from scarring.

Quantum

[66] Mr Robinson in final written submissions accepted, implicitly, that there is no medical evidence indicating Miss Samuels' disability. He submitted that the case was none the worse for that because it was obvious that Miss Samuels, nearly ten years after the collision, was suffering from the effects of the injuries. The left leg was shorter than the right leg.

[67] Miss Samuels testified that she had an operation on her right knee in order to stop her right leg growing. Mrs Khan challenged this evidence on the basis that

one would have expected to see some medical evidence supporting this evidence and there was one. Therefore, it was submitted, the court ought to be cautious before it accepted such testimony. The court agrees with Mrs Khan. It does seem remarkable that such a significant operation could have occurred and there is no medical evidence in support. This being so, the court finds that the evidence is not sufficient to enable it to conclude that the operation took place.

[68] Mr Robinson submitted that the court should award the sum of JA$10,000,000.00 for pain, suffering and loss of amenities. Mrs Khan, on the other hand, submitted that any general damages awarded should range between JA$1,500,000.00 to JA$4,000,000.00. This range is a rough estimate derived from the cases submitted by Mrs Khan.

[69] It is well established that the assessment of damages for personal injury has two components. There is the objective component (the assessment of the injury itself) and the subjective component (the impact of the injury on the victim). There is also another principle which operates and it is this: similar injuries should receive similar compensation. There is good reason for this latter principle. It promotes consistency and therefore facilitates negotiations between parties and reduces costs since the parties know what the range of awards is and then, acting reasonably, they will be able to make an informed judgment on where their particular case falls. At the same time, it is also important that the victim receives adequate compensation, so far as money can, for the injuries received.

[70] Many cases were cited by counsel on either side and no useful purpose would be served by referring to them all. The court will select what it believes were the more useful ones.

[71] The cases cited by Mr Robinson, as Mrs Khan pointed out, are distinguishable from the present case. However, it is the view of the court that the distinction cannot result in an award lower or even similar to the cases cited by Mr Robinson. The award in this case has to be higher. None of the cases cited by counsel had the combination of injuries and circumstances of this particular case. For example, in the case of **Rowe v McKenzie** Vol 5 Khan 88 the victim was

unconscious, had a compound comminuted fracture of the right tibia and a fracture of the right fibula in two places. There was also limb shortening of 1.5cm.

[72] In **Page v Campbell** Suit No CL 2002/P 06 (unreported) (delivered June 29, 2004), there was a displaced fracture of the neck of the humerus (left), mainly bruises and lacerations to upper left limb, left knee, right side of face and neck.

[73] In **Wright v Marsh and Marsh** Vol 5 Khan 70, there was cardiorespiratory distress, bruising and swelling of the upper eyelid with subconjunctival haemorrhage, comminuted displaced fracture of the left femur, compound comminuted fracture of the left tibia and fibula with missing bone, fracture of the left tarsal navicular bone and palm size wound over anterior medial and lateral aspects of left leg. Mr Wright had neurological deficit over the dorsum of the foot. There was no dorsiflexion power in the ankle or toes.

[74] In the present case, Miss Samuels was a young girl when this tragedy struck (eight years old). She has received a very serious injury to the lower leg. While there is no evidence of neurological deficit, there is no doubt that the leg is very deformed and one leg is not just slightly but very much longer than the other. There was also evidence of degloving and an open fracture of the lower left leg. She also suffered a linear skull fracture. The fracture site of the lower left leg became infected and this led to further hospitalisation. She now has equinous deformity which is significant loss of the ability to flex the ankle and bring the toes toward the shin. She also has valgus deformity which is an outward angling of the bone or joint. The court observed her while she ambled to the witness box and then returned to her place in court.

[75] She underwent a series of operations. From as early as eight years old she has been deprived of the pleasures of childhood and teenage years. She cannot run about, jump, skip or even walk without a very awkward gate. Her skin has had to be removed from parts of her body to graft unto the fracture site. Miss Samuels has a scarred face, scars at the fracture site and scarred self-image.

[76] Miss Samuels was hospitalised from November 2002 to March 2003. She has been hospitalised a few times since this initial one.

[77] From the cases cited and the particular circumstances of this case, the view of this court is that JA$7,000,000.00 is awarded for general damages for pain, suffering and loss of amenities. From this sum JA$550,000.00 should be deducted because this sum was paid to the claimant as an interim payment. The final sum awarded is JA$6,450,000.00.

Cost of Future Medical Care

[78] There is a claim for future medical care. According to the medical report of Mr Guyan Arscott the 'approximate cost of surgical management will therefore be difficult to ascertain at this time' and so he gave what he described as 'a basic guideline' which amounted to JA$310,000.00 for surgical management of her facial scars (at cost of JA$60,000.00) and two surgical procedures (at cost in excess of JA$250,000.00). The purpose of the procedures is to put a tissue expander in the lower leg. The expander costs US$500.00 – US$700.00. All this was in Mr Arscott's January 31, 2006 report. There is no current information before the court on this issue of future medical care. Such was the state of uncertainty on the part of Mr Arscott, at the time of the report, that he stated that 'we would have to work jointly with the Orthopaedic Service to determine the best corrective approach for this child's leg.'

[79] In order to overcome this hurdle, Mr Robinson, in written submissions suggested that the CPI-method of updating damages should be applied to the figure (using the CPIs of January 2006 and May 2012 the current value would be JA$800,000.00. It was also submitted that a global award of JA$1,500,000.00 should be made. This figure would take account of the surgeries required, transportation and medication.

[80] This court cannot award the sum of JA$1,500,000.00 because there is no proper evidential foundation for it. The best that can be done is to use an updated CPI figure but not the JA$400,000.00 which was used by counsel. It is not clear how the JA$400,000.00 was arrived at.

[81] Also it is not immediately obvious that the method of treatment proposed in 2006 holds good in 2012. Is she too old to have the intervention suggested? Having

regard to her growth would there be any changes in her care? To apply the CPI method to the United States currency portion of the cost would not be appropriate since there is no evidence that the rate of inflation in the United States was identical to Jamaica's during the relevant time.

[82] Since the CPI-method has been used to update actual general damages awarded for personal injury there is no reason in principle why the same method cannot be used for updating the value of future medical care. Using the CPIs mentioned by Mr Robinson, the current value of the estimated Jamaican currency part of the cost of future medical care is JA$598,268.58. The court will use the end of the range for the tissue expander given by Mr Arscott which was US$700.00. This portion of the award will not attract any interest because the cost has not yet been incurred and therefore it cannot be said that Miss Samuels is out of pocket for any sum expended by her. It is not strictly speaking compensation for the actual injury suffered.

Special damages

[83] At the beginning of the trial it was indicated that all items of special damages in the amended particulars of claim (filed April 26, 2007) on page 5 and in respect of page 6, all the items listed from top of the page down to the receipt dated July 13, 2005 were agreed. The rest of the items listed on page 6 were contested. It was indicated that the total arrived at by counsel was JA$112,905.00. However, the total arrived at by the court is JA$113,305.00.

[84] The parties also agreed items not pleaded. The particulars were further amended to include the following previously unpleaded items:

a. Receipt dated July 6, 2011 from the South East Regional Health Authority (SERHA) – JA$3,000.00 (medical report);
b. Receipt dated July 11, 2011 from SERHA – JA$1,000.00 (medical report);
c. Receipt dated October 26, 2009 for biomedical services – JA$1100.00;
d. Receipt for cost of x-ray to right knee dated May 9, 2008 – JA$2000.00;
e. Cost of special shoes – JA$23,600.00;

[85] The total of the items in paragraph 83 and the items listed in paragraph 82 is JA$143,005.00. The parties agreed on a total of JA$144,000.00 as the figure for the items in paragraph 82 and 83.

[86] The disputed items of special damages are:

a. Taxi fare to the attorney – JA$700.00;
b. Additional hospital registration (4 x JA$300.00 each) – JA$1,200.00;
c. Additional x-rays (4 @ JA$300.00 each) – JA$1,200.00;
d. Additional lunch (4 @ JA$300.00 each) – JA$1,200.00;
e. Additional bus fares – (4 @ JA$260.00) – JA$1,040.00;
f. Additional expenses incurred by mother as a direct result of the accident including sums for transportation, extra snacks and lunch –
    i. 04/11/02 – 30/11/02 – 26 days @ JA$1,500.00 per day – JA$39,000.00;
    i. 01/12/02 – 21/03/03 – 111 days @ JA$1,000.00 per day – JA$111,000.00;
    ii. 22/03/03 – 31/03/03 – approximately 7 visits to and from hospital @ approximately JA$2,000.00 per visit – JA$114,000.00
g. Lunch and transportation 1/11/06, 22/11/06, 18/12/06, 15/1/07, 26/2/07, 28/2/07 and 19/3/07;
h. 12 night gowns @ approximately JA$100.00 each – JA$1,200.00;
i. Underwear (12) @ approximately JA$50.00 – JA$600.00;
j. T – shirts – JA$600.00;
k. Shorts – JA$200.00;
l. Cost of shoe US$250.00

[87] All these items except the cost of underwear, t-shirts, shorts and shoes, cost of x-rays, cost of additional hospital registration and taxi fare to the attorney at law are recoverable based on the House of Lords decision of **Hunt v Severs** [1994] 2 AC 350. The specific facts of that case are not comparable but their Lordship's analysis of the law applies to this case. The other expenses are recoverable under normal principles of costs incurred because of the tortfeasor's negligence. The total sum recoverable in respect of the disputed matters is JA$174,500.00.

The cost of the shoe at US$250.00 is recoverable. It was not included in the JA$174,500.00.

[88] In respect of special shoes and insole Mr Robinson submitted that the court should act on the basis that those shoes are replaced every two years at a cost of US$250.00/per shoe. He submitted that the court should use the multiplier/multiplicand method and make an award of US$2,000.00 using a multiplier of 16 since Miss Samuels is now 19 years old. This seems reasonable and the court agrees.

Final disposition

[89] Judgment for Mr Steve Daley with costs to be agreed or taxed. Default judgment having been entered against Mr Everton McKenzie damages are awarded to Miss Ashley Samuels in the following amounts:

a. General damages JA$6,450,000.00 at 3% from date of service of the claim form to date of judgment;

b. Cost of future medical care - JA$598,268.58 and US$700.00 with no interest on either amount;

c. Special damages – JA$317,505.00 and US$700.00 at 6% interest from November 2, 2002 to June 22, 2006 and 3% from June 23, 2006 to date of judgment;

d. Cost of replacing shoe – US$2,000.00 at no interest;

e. Costs to Miss Samuels;

f. Costs awarded to Mr Daley to be paid by Mr McKenzie.