



[2023] JMSC Civ 158

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CIVIL DIVISION**

**CLAIM NO. 2011HCV01185**

<b>BETWEEN</b>	<b>KEINO SIMPSON</b> (By Next Friend Simone May)	<b>CLAIMANT</b>
<b>AND</b>	<b>NEWTON SOUTH</b>	<b>DEFENDANT</b>
	<b>AND</b>	
<b>BETWEEN</b>	<b>NEWTON SOUTH</b>	<b>ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>SIMONE MAY</b> (Mother and Next Friend of Keino Simpson)	<b>ANCILLARY DEFENDANT</b>

**IN OPEN COURT**

**Mr. George Clue instructed by Mrs. Shelly-Ann Beckford-Louden appeared for the Claimant and Ancillary Defendant**

**Miss Racquel Dunbar instructed by Dunbar & Co. appeared for the Defendant and Ancillary Claimant**

**Heard: 30<sup>th</sup> October 2015**

**Delivered: 27<sup>th</sup> October 2023 in Chambers via Video Conference with leave of the Parties**

**Negligence – Motor Vehicle Accident – Motor Car and Pedal Cyclist – Credibility of Parties – Contributory Negligence – Whether the then minor Claimant was contributory negligent – Assessment of Damages – General Damages – Future Medical Care – Special Damages – Counterclaim – Agency – Relationship between Principal Actor and Third-Parties – Road Traffic Act s. 51**

**L. PUSEY J**

[1] This matter came for hearing on the 30<sup>th</sup> of October 2015. At the trial, the court had embarked on a pilot project with audio recording equipment in which matters were tried without the usual note taking by the judge, as the parties would rely on

an audio recording system. Aspects of the project did not live up to expectations which contributed to the inordinate delay in the delivery of this judgment. Additional unforeseen circumstances created further challenges which prevented the timely delivery of this judgment. Therefore, the Court would like to apologize for the part it played in the delayed delivery of this judgment.

- [2] The court wishes to indicate that it had sufficient material to decide upon this matter and would like to thank Counsel for their written submissions on the quantum of damages to be awarded which aided in the completion of this judgment.

## **BACKGROUND**

- [3] This matter concerns a Claim in negligence brought by the Claimant, Mr. Keino Simpson, who sued by his mother and Next Friend, Miss Simone May, against the Defendant, Mr. Newton South, for personal injuries inflicted upon him and loss sustained arising out of an accident that occurred on the 20<sup>th</sup> day of June 2009 on the May Day Main Road in the parish of Manchester. At the time of the accident, the Claimant was below the age of majority, but when the trial began the Claimant had attained the age of majority.

### **The Claim**

- [4] The matter was initiated through the filing of a Claim Form and Particulars of Claim on the 16<sup>th</sup> day of March 2011. The Claimant alleges that on the 20<sup>th</sup> day of June 2009 on the May Day Main Road in the parish of Manchester at approximately 3:00 p.m., he was riding his bicycle when the Defendant, who owned and was operating a gray Mark II motor vehicle on that same date and time, collided into the Claimant causing injuries and loss to the Claimant.
- [5] It is further alleged that the accident was caused wholly by the negligence of the Defendant. The negligence was particularized in the following way:  
The Defendant was negligent in that he:

- (i) Failed to keep any or any proper lookout or to have any or any sufficient regard for other traffic on the road so as to avoid the said collision;
- (ii) Failed to effect any or any proper or effective control of the motor vehicle;
- (iii) Drove at a speed that was excessive or improper in the circumstances;
- (iv) Failed to heed and/or observe the presence of the bicycle which the Claimant was riding on the said road in sufficient time or at all;
- (v) Failed to stop, slow down, swerve, apply the brakes of the motor vehicle or to otherwise manoeuvre the vehicle so as to avoid hitting the Claimant;
- (vi) Causing and/or permitting the said collision with the Claimant;
- (vii) Drove without due care and consideration for other users of the road, in particular the Claimant;
- (viii) Drove in a reckless and/or dangerous manner;
- (ix) Failed to observe the rules of the road so as to avoid hitting the Claimant.

### **The Defence and Counterclaim**

[6] In his Defence filed on the 27<sup>th</sup> day of July 2011, Mr. South, the Defendant denied the allegations of the Claimant that he caused the collision which is the subject of the claim. Mr. South further contends that his motor vehicle was blue and avers that the accident was caused solely (or at the very least substantially contributed to) by the negligence of the Claimant when he suddenly and without warning rode out from a minor road (Housen Heights Road) onto the major road (May Day Main Road) and into the path of his motor vehicle. The Defendant indicates that his motor vehicle was traveling along its proper left lane on May Day Main Road heading towards Mandeville at the material time when the Claimant rode out into his path without stopping at the intersection and ensuring that it was safe to do so.

[7] The Defendant makes a counterclaim or Ancillary Claim against the mother and next friend of the Claimant, Miss Simone May, the Ancillary Defendant as a result

of what he avers was the negligent riding of the Claimant which resulted in the Defendant suffering loss, damage and incurred expenses. The Defendant indicates that the Ancillary Defendant had accepted responsibility for the accident and agreed to repair the Defendant's vehicle. The negligence of the Claimant is particularized by the Defendant as follows:

- (i) Riding at a fast and/or excessive rate of speed in the circumstances;
- (ii) Failing to keep any or any proper lookout;
- (iii) Failing to observe and/or heed the presence of the Defendant's vehicle while same was lawfully proceeding along in its left lane on May Day Main Road i.e. the major road in sufficient time or at all;
- (iv) Riding without any or any proper care and attention for other users of the roadway;
- (v) Entering a major road from a minor road without first ensuring that it was safe to do so;
- (vi) Suddenly and without warning riding out from the minor road (Housen Heights Road) onto the major road (May Day Main Road) and into the lawful path of the Defendant's vehicle at a time and place when it was manifestly unsafe to do so;
- (vii) Suddenly and without warning riding into the Defendant's vehicle's lawful path and then colliding with his vehicle;
- (viii) Failing to stop at the intersection of Housen Heights Road and May Day Main Rad before riding out onto May Day Main Road;
- (ix) Failing to stop, slow down, swerve or in any other way manage or control his said bicycle so as to avoid the said collision.

#### **The Defence to Counterclaim**

- [8] Miss May, the Ancillary Defendant, avers that the Defendant/Ancillary Claimant, Mr. South, was responsible for the accident for which the claim was brought. Miss May indicates that at the material time of the accident, the Claimant was not a servant or agent of hers. Further, that she did not cause or in any way ratify,

instigate or contribute to the accident which occurred on the 20<sup>th</sup> day of June 2009 and therefore no claim should be maintained against her.

## **THE EVIDENCE**

### **The Claimant's Evidence about the Accident**

- [9] Mr. Keino Simpson indicated that on the date of the incident, June 20, 2009 at about 3:00 p.m., he looked and listened left and right before entering May Day Main Road from the Housen Heights Road. He indicated that he entered May Day Main Road and went into the left lane which leads towards May Day and that shortly thereafter he heard the sounds of car brakes being "mashed". Mr. Simpson indicates that when he looked in the direction of the sound he saw the Defendant's Mark II motor vehicle swerving from the right side of the road leading towards Mandeville and coming into the lane where he was. Mr. Simpson indicated that the car came so close to him, that the right side of the car's front bumper collided into him. Mr. Simpson said the next thing that he remembers is waking up near a light post in front of Housen Heights Road that is about 1 to 2 metres off the road in the grass.
- [10] Mr. Simpson indicated that his bicycle was new, and was in good working order with the brakes working. He noted that there was some high bush on both sides of the road which came out into the road, but that the bushes on the left side of the road come out more into the road than those on the right side. He states that though there are bushes, he could see the road clearly as it was straight, and that on the date of the accident, the road was asphalted, dry and free from potholes.
- [11] Miss Simone May, the mother of the Claimant, indicated that she was not at the scene of the accident, but remembers hearing a loud bang sound at about 3:00 p.m. on the date of the accident.
- [12] The eyewitness, Mr. Kenroy Briscoe, gave evidence for the Claimant. He indicated that on the date of the incident, sometime during the day as he cannot recall the

time, he was observing the scene of the accident from his apartment on the third floor which is situated on a hill where he had a good view of Taylor Close Road, Housen Heights Road where it meets May Day Main Road and May Day Main Road. He stated that he observed the accident through his apartment window while he was talking on the phone.

**[13]** Mr. Briscoe stated that he saw Mr. Simpson ride his bicycle from Taylor Close onto Housen Heights Road and then to the intersection of Housen Heights Road and May Day Main Road. Mr. Briscoe indicated that when Mr. Simpson got to the intersection of Housen Heights Road and May Day Main Road, Mr. Simpson came to a complete stop and looked left and then right. Thereafter, he states, Mr. Simpson proceeded to make a right turn onto May Day Main Road and then crossed over to the left lane, which was the correct lane based on where he was going.

**[14]** Mr. Briscoe stated that while Mr. Simpson was riding his bicycle in the left lane, a blue car emerged from nowhere, in the blink of an eye. Mr. Briscoe indicated that the car was a Mark II car which was first in the right lane, then it started to slide over in the left lane to where Mr. Simpson was. Mr. Briscoe noted that he could hear when the car brakes “mash” and that the car hit somewhere in the middle of the back right side of Mr. Simpson’s bicycle. He indicated that the bicycle flew from under Mr. Simpson, that Mr. Simpson flew in the air, flipped, his face hit the windscreen, and then he slid off the car bonnet and onto the ground. He noted that Mr. Simpson was about 10 feet from the light post in front of the intersection of Housen Heights Road and May Day Main Road when he got hit.

**[15]** Mr. Briscoe stated that he went to the scene of the accident and he saw tire marks on the road which leaves from the right lane and over into the left lane where Mr. Simpson was. After the accident, Mr. Briscoe noted that the car was still in the left lane that Mr. Simpson was in which leads towards May Day, and not the right lane it should have been in which leads towards Mandeville.

### **The Defendant's Evidence about the Accident**

**[16]** Mr. Newton South was the sole witness for the Defense. He indicated that on the date and time of the accident, he was travelling at about 30 kilometers per hour on the May Day Main Road towards Mandeville. He indicated that he was in no rush to head to where he was going and that while he was on his side of May Day Main Road heading towards Mandeville he felt and heard an impact to the left-middle his car bonnet shattering his windshield. Mr. South indicated that upon feeling the impact he immediately stepped on his brakes which brought the vehicle to a complete stop. Mr. South indicated that the stop was so immediate that there were no drag marks on the asphalted roadway. Mr. South noted that he positioned his vehicle to the right-hand side of the road heading towards May Day across from the entrance of Housen Heights Road because it was clear. He noted that he did not see Mr. Simpson or his bicycle while he was coming down the slope to the entrance of Housen Heights Road. Mr. South said that he believed that Mr. Simpson was riding his bicycle too fast and in fact, after the impact, Mr. Simpson and the bicycle were propelled across the roadway into the light post and bushes on the right-hand side of the road.

**[17]** Mr. South indicated that his vision was impeded because of a high embankment on the side of the road leading towards Mandeville which was heavily bushed. He noted that he and other passers-by assisted Mr. Simpson and placed him in the pickup which brought him to the hospital. Mr. South stated that he waited on the scene for the police who did not warn or charge him in the matter and that his vehicle was moved from the scene by a wrecker because of the extensive damages.

**[18]** At this juncture, the Court believes it necessary to explain that the sides of the road are described in the evidence based on the direction that the witnesses were facing at the time of the incident. For clarity and ease of reference, the lanes will be described as follows:

- a. **Lane 1** – The lane on May Day Main Road which goes in the general direction of the May Day area.
- b. **Lane 2** – The lane on May Day Main Road which goes in the general direction of the Mandeville area.

**[19]** Both Lanes would have vehicles travelling in opposite directions of each other. To summarize the Claimant's evidence, it is alleged that the Claimant was in Lane 1 when the Defendant, travelling in Lane 2, swerved over into Lane 1 and collided into his bicycle. In summary, the Defendant alleges that the Claimant came off of Housen Heights Road and into Lane 2 at a high speed and collided into his motor vehicle. The Defendant alleges he was only in Lane 1 at the end of the accident because after the collision Lane 1 was clear.

## **THE SUBMISSIONS**

**[20]** Counsel in the matter made oral submissions on the liability of the Parties and written submissions on the quantum of damages to be awarded which the Court has duly considered in delivering this judgment. Their submissions will only be referred to as is necessary to explain the position of the Court on a particular issue.

## **ISSUES**

**[21]** The issues to be contemplated in this matter are:

- a. Whether the collision was caused solely by the negligence of the Defendant or did both the Claimant and the Defendant materially contribute to such collision; and if so in what proportions?
- b. What is the measure and quantum of damages, if any, due to the Claimant?
- c. Whether an action may survive against the Ancillary Claimant for Negligence considering that the Ancillary Claimant was in no way involved in the accident.



## **LAW AND ANALYSIS**

**[22]** It is settled law that in order for a Claimant to succeed in a claim for negligence, the Claimant must establish on a balance of probabilities that the Defendant owed them a duty of care which has been breached and from which damage to the Claimant resulted.

### **Breach of Duty of Care**

**[23]** There is no dispute as to whether there was a duty of care owed by the Parties to each other. Similarly, there is no dispute as to whether the duty of care owed was breached and resulted in damage. The dispute in this matter surrounds who actually breached their duty of care – was it the Claimant, the Defendant, or Both? Consequently, this dispute is in relation to the manner in which the collision occurred and who is to be blamed as both parties have advanced different versions of events leading up to the accident.

**[24]** To make a determination on this issue, the Court duly considered the evidence put forward by the Parties and the submissions of Counsel in the matter. Additionally, the Court recognizes that this issue will be truly determined based on the credibility of the Parties. In assessing credibility, the Court will usually look at the demeanour of the witnesses. However, in this matter, the demeanour of the witnesses for the Parties was equally satisfactory. The Court will therefore have to carefully examine the nature of the evidence given through using common sense and their knowledge of people and drivers.

**[25]** There is only one eye-witness in this matter and they appear on the case for the Claimant. Mr. Briscoe, the eye-witness, posits a version of events that is similar to that which was advanced by the Claimant, save that, unlike the Claimant alleges in his Claim Form and Particulars of Claim, the eye-witness agrees with the Defendant that at the time of the accident, the motor vehicle was blue.

**[26]** The colour of the motor vehicle is not a major issue in this case. However, a determination on the colour of the motor vehicle will go towards the credibility of the witnesses. The Court is of the view that the Defendant's motor vehicle on the date of the incident was gray. The Court makes this determination on the basis that:

- I. The Defendant has not tendered into evidence any documents which proved that his Mark II was "blue"; and
- II. The Defendant, in his own Defence and Counterclaim, appended a receipt that describes the motor vehicle in question, listing its colour as "gray."

This works in the Claimant's favour because not only did he get the colour of the car correct, but the eyewitness diverged with him on that fact which is one indication that the eyewitness is not merely repeating the evidence of the Claimant.

**[27]** The Claimant and Defendant's evidence also diverge as to the point of impact. However, from the evidence, the Court can deduce that the collision occurred a short distance away from where May Day Main Road intersects with Housen Heights Road. What the Court must determine, therefore, is the lane in which the collision happened and how the collision happened.

**[28]** It is apparent from the account of the witnesses that this was not a head-on collision. The Court is of the view that the collision occurred while the Claimant was exiting Lane 2 to turn right into Lane 1. The Court came to this conclusion based on:

- a. The injuries of the Claimant being predominantly on his right side as the Medical Report of Dr. Carey Ramsay dated the 30<sup>th</sup> of April 2010 and the 12<sup>th</sup> of August 2014 that was tendered and admitted into evidence indicates laceration to the right shoulder, fracture of the lateral right maxillary sinus, and pain to the right leg of the Claimant;

- b. The Claimant indicating that he looked in the direction of where he heard the noise and then the car collided into him. This indicates that the left side of his face was facing the car when it collided into him which explains why the left side of his face was the only left part of his body damaged; and
- c. Mr. Briscoe's evidence that the Defendant's motor vehicle collided into the back right of the Claimant's bicycle which indicates that the Claimant was positioned in such a way that made him either horizontal or obliquely set in the road to take the right turn.

**[29]** This means that the Court rejects the Claimant's evidence that the Defendant swerved into Lane 1 and collided into him. Further, the Court rejects the Defendant's evidence that the impact was to the middle left passenger side of his motor vehicle and that the Claimant exited Housen Heights Road so fast that even after the collision he flew over into Lane 1 and into the nearby light post and bushes.

**[30]** The Court is of the considered opinion that if the impact was to the middle left passenger side of the motor vehicle then the Defendant would have collided into the front right side of the Claimant's bicycle which would arguably send the Claimant into the bushes closer to Lane 2. However, the Defendant's argument is that the Claimant was riding so fast that he flew into Lane 1 and the nearby light post and bushes. Though the Defendant did not explicitly or implicitly say this, it would account for the reason that the Claimant did not end up in the bushes closer to Lane 2. However, the Court rejects this argument because, if the Claimant was riding so fast so as to fly over into Lane 1 and into the nearby bushes and light post after the impact, then the collision would not have broken the Defendant's windshield nor would the motor vehicle have collided into the back right of the Claimant's bicycle. Therefore, the Court concludes that the impact was closer to the right driver's side of the Defendant's motor vehicle. Further, this also reaffirms the Court's conclusion that the collision occurred while the Claimant was exiting Lane 2 to turn right into Lane 1.

**[31]** Additionally, while the Court accepts the Defendant's evidence that he pulled off into Lane 1 because it was clear, it rejects the Defendant's evidence that he was driving at 30 kilometers per hour. The speed limit on main roads in Jamaica is 50 kilometers per hour. Though the Defendant alleges that he was not in a rush to get to his destination, it is unlikely that he was driving so far below the speed limit. Further, it is unlikely that the Defendant driving at 30 kilometres per hour could have been involved in such an accident that damaged his motor vehicle and injured the Claimant in this way. Therefore, the Court must infer that the Defendant was driving at a speed which was significantly higher than that which he claims. The Court estimates, therefore, that the Defendant was driving between 50 to 60 kilometres per hour.

**[32]** The Court believes that the Defendant did "mash" his brakes either a few moments before colliding into the Claimant or at the point of impact. It is unlikely that driving at 30 kilometres per hour or some speed higher than that, and applying brakes in the usual way would lead to an immediate stop of the motor vehicle; unless the brakes were applied with a lot of force which would result in what the Claimant and Mr. Briscoe called "mashing the brakes." Furthermore, the Court accepts the Defendant's own admission that he did not see or know who or what he collided into until after the incident. This suggests and would support the argument that the Defendant saw the Claimant when it was too late and immediately applied his brakes, but was unable to avoid the accident.

**[33]** It is very likely that the parties were unable to see each other due to the high bushes that were protruding out into May Day Main Road. Further, as is apparent from the photographs tendered into evidence, there is a slight bend in May Day Main Road at either ends when observed from the intersection with Housen Heights Road, that a person looking left or right from that very same intersection would not be able to see beyond the bend. Therefore, the Court accepts the Parties' evidence in this regard. Considering the aforementioned, it is likely that the Parties' view of the road was obstructed. In these circumstances, precautions

are necessary as the possibility of danger emerging is “reasonably apparent” (see: **London Passenger Transport Board v Upson** [1949] AC 155; **Moore v Poyner** [1975] Road Traffic Reports 177; and **Cornel Lee v Ivy May Hin** (unreported), SCCA No. 36/86, Court of Appeal of Jamaica, delivered March 22, 1991).

**[34]** Consequently, the Court finds that Defendant failed to uphold his duty of care to the Claimant and is therefore liable for the collision. The Court makes this conclusion on the following basis, having analysed and discussed the evidence above:

- (i) The Defendant was driving at a high speed when it was dangerous to do so, and failed to proceed on May Day Main Road with caution while his view of the road was obstructed;
- (ii) The Defendant failed to keep any or any proper lookout because by his own admission he indicated that he was unable to determine what he collided into until after the accident;
- (iii) The Defendant failed to heed and/or observe the Claimant’s bicycle in sufficient time or at all as if he did, he would either not have collided into the Claimant’s bicycle or know during the collision that he collided into the Claimant’s bicycle;
- (iv) The Defendant was not driving with due care and attention having regard to the speed at which he was estimated to be driving and the fact that he was not keeping a proper lookout; and
- (v) The Defendant failed to take evasive action pursuant to section 51 of the Road Traffic Act. Mr. South was required to “*take such actions as may be necessary to avoid an accident*” which includes swerving, braking, and blowing the vehicle horn. Though the Defendant did apply his brakes, the Court is not satisfied that this was enough evasive action in the circumstances to avoid the accident. The Court accepts that despite this happening suddenly, the Defendant could have swerved and/or also employed the use of his horn to avoid colliding with the Claimant.

## CONTRIBUTORY NEGLIGENCE

[35] Having found that the Defendant is liable for the accident, the argument of the Defendant that the Claimant was solely responsible for the accident fails. However, in the alternative, the Defendant indicates that the Claimant significantly contributed to the accident.

[36] In the case of **Berrill v Road Haulage Executive [1952] 2 Lloyds Rep 490** it was held that:

“A driver is not bound to foresee every extremity of folly which occurs on the road. Equally he is certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of a road user teaches that people do albeit negligently.”

[37] Contributory negligence is not a breach of a duty to take care, it refers to careless conduct on the part of a person, usually the Claimant, failing to prevent or to avoid the carelessness of the other person's breach of duty to take care (see: **Charlesworth and Percy on Negligence**, 9<sup>th</sup> edition, paragraphs 1-10). Therefore, contributory negligence is the carelessness of a person in looking after their own safety. Denning LJ (as he then was) had this to say about contributory negligence in the case of **Jones v Livox Quarries Ltd [1952] 2 QB 608**:

“A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of other being careless.”

[38] In respect of a child or young person, in law that is a person below the age of 18 years old, the law expects and accepts a lower standard of care. Therefore, an act that would ordinarily constitute contributory negligence on the part of an adult may fail to do so in the case of a child or a young person (see: **Charlesworth and Percy on Negligence**, 10<sup>th</sup> edition at page 182 paragraphs 3-28). This does not mean that a child cannot be contributory negligent. The Court may decide that a child is contributory negligent if that child is at an age reasonably to be expected

to take precautions for their own safety (see: **Gough v Thorne [1966]** 3 All ER 398).

**[39]** The Court is of the view that the Claimant in this case, at the time of the accident, was of average development and intelligence as that to be expected of a reasonable 14-year-old child. The Claimant's evidence suggested that he had the knowledge and was exposed to the precautions that should be taken when utilizing the road as a pedal cyclist. At this juncture, the Court indicates that it finds that the Claimant in this matter failed to take ordinary care for his own safety when utilizing the road and that this failure was a contributory factor to the collision.

**[40]** The Claimant has indicated in his evidence that he ensured that it was safe before he proceeded onto May Day Main Road from Housen Heights Road. The Claimant stated that he ensured it was safe by stopping at the intersection of May Day Main Road and Housen Heights Road looking left then right, and listening left then right. This was buttressed by the evidence of Mr. Briscoe who said he saw when the Claimant came to a complete stop before proceeding unto May Day Main Road.

**[41]** The Court's view is that it is unlikely that the Claimant would not have seen or heard the Defendant's motor vehicle coming considering the speed at which the Defendant was approaching the intersection of May Day Main Road and Housen Heights Road. Further, considering the area and point of impact, the Court is not satisfied that the Claimant waited until it was safe before he proceeded onto May Day Main Road. In light of this, the Court finds that both the Claimant and the Defendant are liable for the accident.

**[42]** To determine the apportionment, the Court must consider which of the Parties' actions contributed most to the collision. The Court finds that the Defendant speeding on May Day Main Road and failing to keep a proper lookout was the main cause of the collision. Further, if the Defendant was driving with due care, the accident could have been avoided. However, the Court is of the opinion that

the actions of the Claimant and the Defendant are not significantly more egregious than the other and as such believes that a fair apportionment of liability is 30% to the Claimant and 70% to the Defendant.

## **ASSESSMENT OF DAMAGES**

### **General Damages**

**[43]** The Claimant was examined at the Mandeville Regional Hospital where the following injuries were noted:

- (a) Cerebral Concussion;
- (b) Facial Laceration;
- (c) Fracture of the Lateral Right Maxillary Sinus;
- (d) Laceration to the Right Shoulder; and
- (e) Pain to the Right Leg.

The Claimant was hospitalized for three (3) days and treated with intravenous fluids and his lacerations were sutured.

**[44]** The Claimant gave evidence that after he was released from the hospital he had to go to the face clinic at the Kingston Public Hospital about five (5) times and only stopped because he received no more appointment dates. Mr. Simpson indicated that he was feeling very bad pain in his right foot which was swollen. He notes that he feels pain to this day and that standing on the foot for long hours would result in it being swollen. He states that he can no longer play football with his friends and ride a bicycle which he loved to do because of the pain in his right foot.

**[45]** Additionally, the Claimant noted that he cannot run too hard as the foot will start to hurt. He states that he walked and limped because of the pain he still feels in his foot and that he would sometimes have to sit and elevate his foot to ease the pain.



[46] After his injuries healed, the Claimant was further examined by Dr. Leighton Logan, a plastic surgeon, regarding the physical effects of the injuries he sustained. Dr. Logan in his reports indicated that:

- a. Mr. Simpson's left face has extensive scarring over his cheek, at the lateral angle of his mouth, chin and submandibular region;
- b. That Mr. Simpson's right chest has scarring to the right anterior portions of his chest in the upper region 5 cm x 4 cm; and
- c. That the scars are hypertrophic in nature and complete scar eradication would not be possible.

[47] Mr. Simpson indicated that the scars in his face and on the front of his shoulder are ugly. The Claimant recounts his feelings about the scars in this way:

*"I feel bad about the scar in my face, because when people look at it some ask if I am a criminal. I am ashamed to look in peoples face. I have been on job interviews and had to be explaining how I got the scar in the face. I tend to hold down my face or hide the left side of my face. If I have to take a picture, I try not to let the left side show... I want to have the surgery done so that the scar to my face can be made less ugly or removed."*

[48] It is settled law that the sum of money that should be awarded as general damages to the Claimant for injuries sustained due to the negligence of the Defendant, ought to be a sum that as "nearly as possible" puts the Claimant in the same position he would have been in if he had not sustained the wrong (see: **Livingstone v Rawyards Coal Co. [1880]** 5 AC 25 at 39).

[49] Additionally, the headings of damages developed by Wooding CJ in **Corniliac v St. Louis** [1965] 7 WIR 491 remain relevant and will be used to assist the court in awarding general damages to the Claimant. These headings that will be particularly used are:

- (i) The nature and extent of the injuries suffered.
- (ii) The nature and gravity of the resulting physical disability.
- (iii) The pain and suffering endured.
- (iv) Loss of amenities.

[50] In this regard, a number of authorities were cited by Counsel in the matter and these have been reviewed accordingly. These authorities have greatly assisted and guided the Court in coming to a decision on the quantum of damages to be awarded. The Court found the following cases particularly helpful in arriving at a decision for the quantum of damages:

- (i) **Florence Samuels v Michael Davis** reported at Khans Volume 4 on page 151 which Counsel for the Parties relied on. In this case, the Claimant suffered injuries which included unconsciousness, pain in the head, chest, and back, cuts on the right knee, and multiple lacerations to the face. The wounds healed with much scarring and keloid formation. The Claimant was awarded \$380,000.00 on the 28<sup>th</sup> day of March 1996 for pain and suffering and loss of amenities. This amount updates to \$3,389,395.97 using the CPI for September 2023 at 132.9.
  
- (ii) **Charley Brown v Byron Cummings & Anor CL 1989/B0261** reported at page 61 of Assessment of Damages for Personal Injuries by Harrison and Harrison. In this case, the Claimant suffered lacerations and abrasions to the face, fracture of the left mandible and left cheekbone, and multiple abrasions over the body including the upper and lower body. There was also permanent deformity of the left side of the face and disability of the function of the jaw. The Claimant was awarded an amount of \$50,000 on January 10, 1992 which updates to \$1,329,000.00 using the CPI for September 2023 at 132.9.
  
- (iii) **Constance Johnson v Exclusive Holiday of Elegance Ltd & Ors** reported at Khan Volume 6 on page 188. In this case, the Claimant suffered loss of consciousness, swelling of face, abrasions to the left shoulder, arm and hand, and a fractured mandible. The Claimant was left with no significant residual symptoms, just scarring in a few areas. The Claimant was awarded \$800,000.00 on May 23, 2008 which updates to \$2,174,233.13 using the CPI for September 2023 at 132.9.

[51] Counsel for the Defendant submitted that the injuries sustained by the Claimants in the cases relied upon were more serious and extensive than those suffered by Mr. Simpson, the Claimant in this case. The Court disagrees with this position. While there are some slight differences between the injuries sustained by the Claimant in this matter and the Claimant in those cases above, the Court is of the view that the injuries sustained, and the nature and extent of same, are similar.

[52] The Court's decision on the amount to be awarded for general damages is premised upon the Claimant's evidence in relation to his loss of amenities, pain and suffering, and his injuries. Further, the medical report of Dr. Logan and Dr. Carey was relied upon in relation to the nature and extent of the Claimant's injuries. Consequently, using the aforesaid cases as guides and bearing in mind that there are slight differences in the injuries sustained by the Claimant in this case and the cases mentioned above, the Court believes an appropriate award would be **Three Million Dollars** (\$3,000,000.00).

[53] The Court has duly considered the submissions of Counsel for the Defendant that the award for pain and suffering and loss of amenities should be discounted if an award for the future medical care of the Claimant is made, especially considering the projected percentage of improvements. The Court is not of the belief that this is a good basis for discounting the award and will refrain from doing so. However, taking into account the contributory negligence of the Claimant, the aforesaid award is reduced by 30%. The Court therefore awards the Claimant the sum of **Two Million, One Hundred Thousand Dollars** (\$2,100,000.00) for General Damages with interest thereon, at the rate of three percent (3%) per annum from June 20, 2009 to the date of this judgment.

#### **Future Care Costs**

[54] The Claimant indicates in his evidence that the scars has greatly affected his physical appearance and his own social confidence. The Claimant sought the assistance of Dr. Logan who noted in his medical report dated February 22, 2010

that the treatment which he recommends for the Claimant's scars will result in a 75% to 80% improvement of them. This treatment would cost approximately **Six Hundred and Ninety-Four Thousand Dollars** (\$694,000.00) as estimated by Dr. Logan in his medical report. It was further indicated in the particulars of claim that an estimate for transportation costs would be **Twenty-Four Thousand Dollars** (\$24,000.00). Therefore, the total estimate for future care costs is **Seven Hundred and Eighteen Thousand Dollars** (\$718,000.00) as pleaded by the Claimant. The Claimant and his mother have indicated in their evidence, that they are unable to afford this and as such, have claimed this money for future medical expenses.

[55] Counsel for the Defendant submitted that the Court must carefully consider this claim. Counsel further submitted that if the Court is minded to grant the Claimant this amount, the Court should take into consideration the projected improvement and discount the general damages to be awarded accordingly. Counsel indicated that to do otherwise would be to doubly compensate the Claimant. The Court disagrees with this position and does not believe that it is a basis for discounting the award for general damages. While the surgery is cosmetic, the Court takes into consideration the emotional and psychological toll that these scars have had and will continue to have on the Claimant as the findings of Dr. Logan indicate that the scars will never be permanently removed.

[56] Nonetheless, the Court is satisfied that the hope that there will be some 75% to 80% improvement with the proposed care is enough for the Court to be satisfied that such care is reasonable in the circumstances. Additionally, the cost of transportation is also reasonable. The Claimant has previously provided a receipt in the amount of **Ten Thousand Dollars** (\$10,000.00) for roundtrip transportation from their home address in Mandeville to the Kingston Public Hospital (KPH) in Kingston. Dr. Logan's practice is located in Kingston and is within the proximity of KPH. Dr. Logan has noted in his medical report that two (2) operations are required plus a follow-up. This would total three (3) trips to Kingston from their

home address in Mandeville. It is likely, therefore, that the Claimant may have to pay approximately **Eight Thousand Dollars** (\$8,000.00) for each trip.

[57] Further, the Court takes the position that there are no bars to a sum being awarded for future care costs in this matter. The evidence to prove the future medical care is adequate in the circumstances, the transportation amount is reasonable and the amount being sought has been pleaded and particularized in the Claimant's case. The Court must however, take into consideration the contribution of the Claimant in causing the accident and as such the amount claimed for future care costs will be discounted by 30%.

[58] Therefore, the Court awards the Claimant the sum of **Five Hundred and Two Thousand, Six Hundred Dollars** (\$512,600.00) for future care costs with no interest thereon, as is usual.

### **Special Damages**

[59] The following items being claimed as special damages, for which evidentiary proof is provided, are not being contested:

(i)	Transportation Costs	\$42,000.00
(ii)	Medical Costs	\$26,635.24
	<b>Total</b>	<b>\$68,635.24</b>

[60] There is an additional amount for **Nine Thousand Dollars** (\$9,000.00) for which the Claimant claimed for transportation which Counsel for the Defendant argues should not be allowed. The Claimant in their Notice of Intention to Tender Hearsay Statement made in a Document filed on the 13<sup>th</sup> day of May 2015, the Claimant exhibited three (3) receipts in the amount of **Three Thousand Dollars** (\$3,000.00) each for transportation for roundtrips to the Mandeville Regional Hospital from Housen Heights on the 30<sup>th</sup> of June, 21<sup>st</sup> of July and 24<sup>th</sup> of August 2009.

- [61] Counsel for the Defendant submitted that these costs for transportation should be rejected because there is a major discrepancy between the Claimant's evidence and the documentary evidence. Counsel argues that the Claimant's receipts indicate that he travelled to the hospital on those 3 occasions, but there are no receipts or other evidence from the doctor they saw, Dr. Gilman, or the hospital to indicate that he visited the hospital and received treatment on those dates.
- [62] Further, Counsel submitted that neither of those dates were mentioned in the medical report of Dr. Gilman dated the 9<sup>th</sup> of February 2015 as being a date on which he saw the Claimant. Therefore, Counsel for the Defendant argues that the Claimant has failed to prove on a balance of probabilities that he received treatment for injuries related to the accident and needed to travel to the Hospital on the dates in question.
- [63] It is trite law that special damages must be strictly proven. However, there are exceptions in instances where it is deemed unrealistic to expect the Claimant to keep records or sufficient records to substantiate his/her claim (see: **Walters v Mitchell** [1992] 92 JLR 173).
- [64] The Court is of the view that this is not a case where an exception applies. The Claimant was in a position to and did supply documents to support his claim. However, the Court agrees with Counsel for the Defendant that it would be unreasonable to award the Claimant transportation costs which cannot be proved to be in connection with the matter at bar.
- [65] The evidence of Miss Simone May introduces the visits to the Hospital on the said dates mentioned in paragraph [51], to receive treatment from Dr. Gillman, who she claims had treated the foot of the Claimant. Miss May indicated that the Claimant had complained of pain in his right foot and it was swollen. Miss May's evidence is that the Claimant's right foot was fractured and treated by Dr. Gillman.

Further, Miss May states that she cannot find the receipts for the payments she made in connection with these treatments.

[66] Though it is not uncommon for persons to lose receipts, the Claimant did not make a claim for any monies spent in connection to any treatment received from Dr. Gillman. Therefore, no award for special damages will be made in relation to this.

[67] Dr. Gillman indicated, in his medical report, that he saw the Claimant on the 28<sup>th</sup> of July 2009. He makes no indication of any other dates or times on which he saw the Claimant. He further indicated in his report that he ordered an x-ray of the right foot that was in a cast. He mentions nothing of further treatments or future treatments or whether he received the x-ray ordered. In light of this, the Court is unable to conclude that the visits on the dates in question were to Dr. Gillman or were in any way related to the injuries sustained in the accident.

[68] Therefore, the Court will not award the special damages of **Nine Thousand Dollars** (\$9,000.00) claimed for transportation to and from the Mandeville Regional Hospital on the 30<sup>th</sup> of June, 21<sup>st</sup> of July and 24<sup>th</sup> of August 2009.

[69] Considering the contributory negligence of the Claimant the court will discount 30% of the uncontested sum of **Sixty-Eight Thousand, Six Hundred and Thirty-Five Dollars and Twenty-Four Cents** (\$68,635.24) for special damages. Consequently, the court awards the Claimant special damages in the sum of **Forty-Eight Thousand, Forty-Four Dollars and Sixty-Eight Cents** (\$48,044.68) with interest thereon at a rate of 3% per annum from the 20<sup>th</sup> of June 2009 until the date of this judgment

#### **COUNTERCLAIM/ ANCILLARY CLAIM**

[70] The crux of the Defendant's counterclaim, who will be referred to as the Ancillary Claimant in this portion of the judgment, against the Ancillary Defendant, Miss Simone May, is for the negligence of her son and next friend, Mr. Keino Simpson,

the Claimant. The Defence of Miss May is that a claim in this regard cannot be maintained against her as she did not instigate, ratify, contribute to or cause the accident nor was her son an agent of hers at the material date and/or time.

[71] Rule 18.1(2) of the **CPR**, states that:

*“An “ancillary claim” is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes –*

- (a) a counterclaim by a defendant against the claimant or against the claimant and some other person;*
- (b) a claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and*
- (c) a claim by an ancillary defendant against any other person (whether or not already a party).”*

The rule clearly indicates what an ancillary claim is and who it may be brought against.

[72] There is no question that Miss May is not a party to this claim by virtue of her being the next friend of the Claimant, Mr. Keino Simpson. Her position as a next friend meant that the claim, though being brought in the name of Mr. Simpson, was conducted on the Claimant's behalf by her as at the genesis of the claim, Mr. Simpson was not yet at the age of majority (see also: CPR 23.2(1) and 23.3(1)). This next friend relationship ceased prior to the beginning of these proceedings as the Claimant had attained the age of majority (see: CPR 23.11(1)). Nevertheless, an Ancillary Claim may be brought against the Ancillary Defendant by virtue of CPR 18.1(2)(b).

[73] Therefore, the issue here is whether an action for negligence may succeed against Miss May who, on the evidence of the parties, was not a primary actor in the accident.

[74] Generally, a parent would not be liable in tort for the actions of their children (see: **Donaldson v McNiven** [1952] 2 All ER 691 at 692; **Halsbury's Laws: Children and Young Persons** Vol. 6 at paras 26 and 97; and **Halsbury's Laws: Tort** Vol.



97 at para 437). There is an exception to this general rule in circumstances where vicarious liability is made out based on the ratification of the child's action by the parent (see: **Moon v Towers (1860)** 141 ER 1306).

**[75]** Further, the Court may find a parent liable for a tort committed by their child in instances where the parent's negligent control of the child resulted in the tort being committed. These are especially in circumstances where:

- (a) The parent fails to properly/adequately supervise the child;
- (b) The parent has control of a dangerous thing which causes the tort; and
- (c) The parent is negligent, either in permitting the child to use a dangerous thing or in not exercising control or supervision of the child with the dangerous thing.

**[76]** The Ancillary Claimant argued that he received a phone call from the Ancillary Defendant accepting liability for the accident. He noted that Miss May indicated that she would pay for the damage to his motor vehicle. He argued that there were several failed attempts to contact Miss May regarding this, and he received certain instructions that suggested a course of action that was adverse to him. Perhaps unsurprisingly, Miss May denies that such communication was had and maintains her position that she was not involved in the accident, save that in the aftermath of same she was financially responsible for her son's medical care.

**[77]** The Court is of the view that in these circumstances a discussion between two (2) parties or a concession of one (1) party cannot create a legally enforceable agreement where there is no liability in law. Further, the Court is mindful that this was not an admission of liability during the proceedings, but an alleged admission over the phone before the initiation of any proceedings. Such an admission, if any, may be withdrawn. Put simply, if after an accident a person accepts liability outside of court in circumstances where they did not seek legal advice, they cannot be bound by that admission if after seeking legal advice they realise that they are not liable.

[78] Therefore, if there was a conversation between Mr. South and Miss May where she admitted liability, in these circumstances, the Court is not of the view that it ratified the actions of Mr. Simpson and bound Miss May. Consequently, the exceptions noted in paragraphs 74 and 75 herein do not exist in the case at bar.

[79] The Court is also unwilling to find judgment against Miss May for the negligence of Mr. Simpson in circumstances where the law allows for Mr. Simpson, the actual actor, to be pursued. In this jurisdiction, the CPR allows for children to be sued in tort, as there is no minimum age for civil liability. As such, the Court is of the view that Miss May was not the proper person for the Ancillary Claim to be brought against. The correct Ancillary Defendant would have been the Claimant in this case, Mr. Keino Simpson, who would have been sued through his mother and next friend, since at the time of the Ancillary Claim the Claimant had not yet attained the age of majority. That is the usual practice.

[80] In these circumstances, the Court forms the view that an action for negligence could not be maintained against the Ancillary Defendant and as such the Counterclaim/Ancillary Claim must fail.

## CONCLUSION

[81] The Court hereby makes the following orders:

1. The Claimant is awarded general damages in the sum of **Two Million, One Hundred Thousand Dollars** (\$2,100,000.00) with interest thereon, at the rate of 3% per annum from June 20, 2009 to the date of delivery of this judgment.
2. The Claimant is awarded the sum of **Five Hundred and Twelve Thousand, Six Hundred Dollars** (\$512,600.00) for future care costs with no interest thereon.
3. The Claimant is awarded special damages in the sum of **Forty-Eight Thousand, Forty-Four Dollars and Sixty-Eight Cents** (\$48,044.68) with

interest thereon at a rate of 3% per annum from the 20<sup>th</sup> of June 2009 until the date of this judgment

4. The Defendant's Ancillary Claim fails.
5. The Claimant is awarded 70% of his costs to be taxed if not agreed.
6. Costs of the Ancillary Claim is awarded to the Ancillary Defendant to be taxed if not agreed.