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

**CLAIM NO. 2011 HCV 06697**

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| **BETWEEN** | **KEINO BARNETT** | **CLAIMANT** |
| **AND** | **ROLAND BYFIELD** | **DEFENDANT/ ANCILLARY CLAIMANT** |
| **AND** | **TYRONE CLARKE** | **ANCILLARY DEFENDANT** |

**Negligence – Motor vehicle collision – Light controlled intersection – Defendant making right turn across highway – Amber light – Meaning – Road Traffic Regulations – Evidence – Admissibility of result of a criminal trial – Contributory negligence – Damages – Fractured legs – Re-fracture – Whether second injury remote – Domestic help paid for by another – Whether recoverable by Claimant – Mitigation – Whether defendant to plead – Ancillary Claim – Whether injuries to be particularised.**

**Aon Stewart instructed by Knight Junor Samuels for the Claimant**

**Jacqueline Cummings and Chantal Bailey instructed by Archer, Cummings & Co. for the Defendant/Ancillary Claimant**

**Jean Williams for the Ancillary Defendant**

**Heard: 23rd & 24th January 2017, 3rd February 2017 and 31st March 2017.**

**COR: Batts J**

[1] On the first morning of trial counsel for the Ancillary Defendant applied to amend the Particulars of Special Damages in their Counterclaim. This was granted over the objection of the Ancillary Claimant. The following particulars were therefore added to paragraph 13 of the Ancillary Defendant's Counterclaim:

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|---|---|
| Assessor's fee | $13,120.00 |
| Storage fee | $13,400.00 |

[2] The three parties to this Claim and Ancillary Claim all gave evidence. There were no other witnesses independent or otherwise. There was, as now seems to be the norm, no objective, scientific or professional evidence to assist the court on the matter of liability. There was, for example, no evidence from the island traffic authorities as to the time sequence or delay of the traffic signals. This is all the more surprising given the location and nature of the incident which forms the subject matter of this action.

[3] It is common ground that the accident occurred on the 11th October 2010 at about 7:15 pm. The two vehicles involved were travelling along the Rose Hall Main Road in the parish of St. James. The road, at the point of the collision and for some distance in either direction, was a dual carriageway. There were two lanes for traffic going east, and two lanes for traffic going west. At the intersection where the accident occurred there was a third lane for the traffic heading east. That third lane was for vehicles turning right and intending to go across the two lanes for vehicles going in a westerly direction. The intersection was controlled by traffic signal lights. The third lane had a light which displayed a green arrow whenever the light showed red for traffic heading west.

[4] On the day in question the Defendant's motor vehicle was heading in an easterly direction. He drove his vehicle into the lane provided for vehicles making a right turn. He did make that right turn. In so doing a collision occurred with a motor bus driven by the Ancillary Defendant. That motor bus was travelling in a westerly direction along the dual carriageway. The Claimant was a passenger in the motor bus driven by the Ancillary Defendant. The Claimant brought a claim against the Defendant. He has not sought to blame the Ancillary Defendant, in whose vehicle he was travelling. It is the Defendant who brought an Ancillary Claim against the Ancillary Defendant. The Ancillary Defendant has in turn counterclaimed against the Defendant.

[5] It is common ground that the accident occurred at about 7:15 pm. Although there is some disagreement as to the state of natural light, it is common ground that the intersection was well lit. It is also common ground that the road is straight in both directions. There is no allegation that any party had failed or neglected to properly, or at all, illuminate their motor vehicle or the path on which they were travelling. The weather was good.

[6] Given the circumstances one would have thought that the entire responsibility for the accident rested with the vehicle which was endeavouring to turn across the path of oncoming traffic. Not so, urged counsel for the Defendant. She submitted that the fact that the intersection was controlled by lights makes all the difference. She asked me to find that the light facing the Ancillary Defendant turned to red while the Defendant was turning. She says the amber light had come on prior to the Ancillary Defendant entering the intersection. He was, she submitted, under a duty to stop and not enter the intersection. In those circumstances, she argued, either the Ancillary Defendant was entirely to blame or both drivers were at least equally to blame. The Ancillary Defendant is of course asserting that the light was on green when he entered the intersection. This is an important, if not decisive, issue of fact.

[7] The Defendant is a medical doctor. His witness statement dated 16th September 2016 was allowed to stand as his evidence in chief. The Ancillary Defendant objected to paragraph 23 of that witness statement which made reference to the results of a criminal trial. The statements had been served after pre-trial review and this was the first opportunity the Ancillary Defendant had to take the objection. I ruled, over the objection of counsel for the Defendant, that the paragraph was to be expunged from the witness statement and disregarded. Evidence of the result of a criminal trial on the issue of liability, is inadmissible in a civil trial save and except it is in the form of an admission as, for example, in the case of a guilty plea, see **Amos Virgo v Steve Nam Claim 2008/HCV 00201 (unreported Judgment of Evan Brown J(Ag) 1st December 2009).**

[8] The Defendant was allowed to amplify his witness statement in order to speak to other evidence in the case. His evidence in chief, as it related to the central issue, was:

> *"6. As I drove towards the vicinity of the intersection in front of the Hotel, I turned on my indicator and went into the slip or turning lane. At this time the main light was saying green and the light for the slip lane was not showing. While I was in the slip lane the main light turned to amber.*
>
> *7. I saw two vehicles approaching from the direction of Falmouth. One vehicle, a minibus was some distance behind the other. When I*

*arrived at the intersection, at the white line or right in front of traffic light the light was still saying amber. The first car coming from the other direction passed right before I arrived.*

8. *Since the light was still saying amber I decided to proceed to make the right turn because there were no other vehicle or vehicles in the intersection and I knew that the light facing the direction of Falmouth would have changed to red.*

9. *My vehicle was about half way into the Rhyne Park Main Road when I noticed headlights coming from the opposite direction, normally the direction of Falmouth, at full speed and at that point I tried to speed up to get out of the way.*

10. *I later found out that the motor vehicle approaching at top speed had registration details PA 4510 and was owned and driven by Tyrone Clarke at the material time. This was the same vehicle which I had previously noticed coming from the opposite direction at a distance behind the vehicle that had passed in front of me at the intersection.*

11. *I felt the minibus slam into the left rear end of my vehicle causing it to spin a few times and my vehicle eventually ended up in a fence at the side of the Rhyne Park Main Road."*

[9] When giving oral evidence he stated that when he saw the light change to amber the minibus was about 70 or 80 metres from the intersection. He also stated,

*"Q: You agree at no point in time while proceeding through intersection did you come to a stop*

*A: That is correct*

*Q: How fast was the minibus going*

*A: I would not be able to tell you that*

*Q: Do you recall saying that "I later find out that the motor vehicle approaching at top speed had registration number PA 4510 and was owned and driven by Tyrone Clarke"*

*A: Yes Sir*

*Q: What is top speed*

*A: I knew it was coming fairly fast*

*Q: What is meaning of term you use "top speed"*

*A: A very high speed. I can't put a figure to it*

*.Q Awhile ago you say you could not indicate what speed*

*A: Correct*

*Q: So when you first observe the minibus it was travelling at top speed*

*A: I did not say so*

*Q: When you commenced proceeding right how far was motor vehicle driven by T. Clarke from you*

*A: About 50 metres thereabouts from me"*

[10] Later the cross-examiner returned to the matter of speed of the minibus (the Ancillary Defendant's vehicle) :

*"Q: Paragraph 9 of your witness statement, you said that the vehicle you observed 'at full speed' what you mean*

*A: Very fast*

*Q: Over 50 kph*

*A: Yes*

*Q: Over 70 or 80 kph*

*A: Yes*

*Q: Over 90 kph*

*A: Likely to be*

*Q: When you started to make turn until you felt collision were you still observing [Ancillary Defendant's] vehicle*

*A: Yes."*

[11] When cross-examined by counsel for the Ancillary Defendant he said,

> *"Q: Am I to understand your evidence that you see a vehicle travelling at full speed 50 metres away and you thought it was safe*
>
> *A: At full speed is when I was already partially in the road to Rhyne Park. I was already half way there"*
>
> [and later]
>
> *"Q: Yesterday you said that a driver who wished to turn right at that intersection when turning arrow is off is to observe traffic and determine if safe enough to make the turn in their own opinion*
>
> *A: Yes*
>
> *Q: Should a collision occur in those circumstances it means the driver turning right, his opinion was faulty or flawed*
>
> *A: No I do not agree"*

[12] Therein I think lay the dilemma of the Defence. This became clear in the Defendant's answer to the court:

> *"Q: Why then did collision occur if you took precautions*
>
> *A: In making the turn the light was on amber. I anticipated the light would turn to red before I completed turning. Therefore approaching driver would have seen light change to amber and red before entering intersection. My expectation is that driver would stop at the red light."*

[13] I have spent some time on the Defendant's evidence because it does seem to me that, even on his own account, he is entirely to blame for the collision. In the first place, an amber light, as he says, faced both himself and the vehicles coming in the opposite direction. He decided to proceed on the amber. On the face of it therefore his expectation that the vehicles which faced amber from the other side would stop, is unreasonable. Furthermore, he says he expected them to stop because the amber would be shortly turning to red. It is however notorious, and judicial note can be taken, that it quite frequently happens in this country that a driver on seeing amber will often

endeavour to enter the intersection prior to the change to red. A driver of the Defendant's experience (some 48 years he said) ought reasonably to have known there was a real probability that, on seeing amber, the oncoming vehicle might enter the intersection nevertheless. The Defendant was under a duty to ensure that before turning across the path of oncoming traffic it was safe to do so. His decision to enter the intersection at a time when there was an oncoming vehicle a mere 50 to 80 metres away was clearly negligent and bordered on the reckless.

[14] All this is compounded by the evidence, supported by photographs [**Exhibits 4A** and **4G**] that the stop line for traffic heading in a westerly direction was a short distance away from the intersection and the lights controlling the intersection. This is significant because the Road Traffic Regulations (1938) state :

> "21 (c) the amber light alone;
>
> Subject to the directions specified in relation to (d) below, the vehicles shall not proceed beyond the stop line or, if there is no stop line, beyond the signals, except in the case of any vehicle which when the amber light signal first appears, is so close to the said line or signals that it cannot safely be stopped without passing the line or signals;" [Emphasis mine]

[15] In coming to a reasonable decision, as to whether the oncoming driver who had an amber light was likely to stop, the Defendant would have had to have borne in mind: (a) the distance of the oncoming vehicle from the "stop line" as against the distance from the intersection (b) the likely assessment of that oncoming driver, given his speed and distance from the stop line, of whether his vehicle could "safely be stopped without passing the line". This latter consideration might involve an assessment not only of other traffic and in particular vehicles travelling behind, but also of his own passengers and whether, for example, a sudden stop to abide the anticipated red light, would throw these passengers forward.

[16] The Defendant, it seems to me, did not give himself a sufficient or adequate opportunity to come to a fair assessment of all these factors. On his own account he entered the lane intending to make a right turn across two lanes of oncoming traffic and commenced the turn without stopping. The light facing him was on amber when he

commenced the turn. He observed two oncoming vehicles. One passed safely. The other was the minibus driven by the Ancillary Defendant. He entered the intersection and commenced turning because he anticipated that the Ancillary Defendant's vehicle would come to a stop. It did not and a collision occurred. His assessment of the situation was therefore faulty. This is not surprising given that it was night (or dusk) and he could not reasonably be expected to properly assess the relative distance of the minibus from the stop line, as against from the intersection; nor could he reasonably expect to do so, unless he had brought his vehicle to a standstill.

[17] The fact that: (a) the collision occurred in the left lane for traffic heading in a westerly direction, and (b) the impact was to the left rear of the Defendant's vehicle demonstrates that he "almost" made it across. The Defendant's counsel in her submissions resorted to saying that had the Ancillary Defendant changed lane he would have been able to safely pass. That may be so. However a driver placed in a dilemma is not to be adjudged by the standard of those seated in court with time for cool reflection. The Ancillary Defendant was proceeding along a straight dual carriageway and a major thoroughfare. He was approaching an intersection controlled by lights. He, on the Defendant's account, saw the light change to amber. He would have known that amber to red would be the expected change at that intersection. It may have come as a surprise to him that a vehicle would turn across his path whilst the light was still on amber. I certainly cannot find contributory negligence because he applied his brake rather than swerve in such circumstances.

[18] The Defendant's case, taken at its highest, leaves him entirely to blame for this accident. I am fortified in this view by the following authorities, which place the onus on the vehicle crossing the path of others to take reasonable care to ensure it is safe to proceed before so doing. In **Coca Cola Bottling Co. Of Jamaica Ltd and Errol Francis v Daniel Hurd et al (1985) 22 JLR 120,** the Jamaican Court of Appeal decided that a driver had a duty to ensure, before he made a right hand turn across the path of oncoming traffic, that it was safe so to do. It mattered not that the greater portion of the turning vehicle had already cleared the intersection when the accident occurred, per Carey JA: *"From the fact that the accident occurred before the minibus had completed its manoeuvre, it must show a great error of judgment on the part of the driver of the minibus: he was negligent."* See also **Radburn v Kemp** [1971] 1 WLR 1502, in which

the plaintiff, a pedal cyclist, entered the intersection whilst the light facing him was on green. While he was proceeding across the intersection the light facing the stationary defendant changed to green. The English Court of Appeal decided that there was no evidence that the plaintiff was contributorily negligent. The lighting was "murky" and rain was falling. The defendant did not have his car headlights on but drove only with "sidelights". The defendant conceded negligence because he had no right to proceed on green from his stationary position without first ensuring it was safe so to do, and he ought reasonably to have seen the plaintiff who was already in the act of crossing the intersection. The case at bar is distinguishable because, (a) the Defendant was turning across the path of vehicles he clearly observed (b) the Defendant commenced the manoeuvre before the light facing him turned green and before the light facing oncoming traffic turned red (c) the Defendant failed to stop before making the turn notwithstanding the presence of oncoming traffic a mere 50 to 80 metres from the intersection. In **Joseph Eva Limited v Reeves (1938) KB Div 393,** contributory negligence was discounted by the English Court of Appeal which decided that a driver who has the light in his favour is under no obligation to assume that another will break the law. Per Mackinson LJ "*If, as the judge found, the light Reeves approached was green before he reached it, he was prima facie entitled to consider himself as on the open thoroughfare, and to go forward, without any apprehension that, in breach of the prohibition from his red light, Eva's van driver or anyone else on the crossing road would be intruding upon the thoroughfare that was closed to him."* That case was adopted and applied in this jurisdiction in **Nathan Watson v The Attorney General Of Jamaica [2015] JMSC Civ 5 (Unrpted Judgment E Brown J, 30th January 2015).**

[19] It is left for me now to comment on the evidence of the Claimant and the Ancillary Defendant in the event another court takes a position, contrary to the one I have expressed, on the legal ramifications of the Defendant's account. The Claimant was a front seat passenger in the Ancillary Defendant's bus. He asserts that the Defendant entered the intersection when the filter light was on red. He is the only witness to assert that there existed a red filter light at that intersection. I reject his evidence in that regard. I find as a fact that the right turning lane only had a green arrow. This would be lit when the amber light went out. In this regard it is important to note that the Ancillary Defendant's description of the lights and their sequence accords with the Defendant's

description rather than with that of the Claimant. I therefore agree, and so find, that the Defendant did not enter the intersection when a red filter light faced him as there was no such light at the intersection.

[20] I accept as truthful and accurate the Ancillary Defendant's account as stated in his witness statement:

> *"5. As I continued with the traffic lights facing me still on green I saw the lights of a motor vehicle on the opposite side in the right turning lane and the vehicle was moving across the intersection. The vehicle ahead of me, a white Nissan Sunny motor car which was about 2 car lengths ahead of me, speeded up to avoid a collision.*
>
> *6. Suddenly I saw a black Avalanche motor truck registered 0206 DV and which was positioned across the intersection and was travelling across my path. Upon seeing this I applied my brakes in an attempt to avoid a collision but he was too close for me to stop and I slammed in the left side of the motor truck in the section of the rear wheel. This was too sudden for me to even blow my horn. I was then in the left lane. My vehicle spun around and came to rest exactly under the stoplights which were facing me.*
>
> *7. That after I passed the stop line and was in the intersection itself, the traffic light facing me had changed to amber and so I continued across the intersection. This intersection is approximately 30 feet wide. The driver of the black Avalanche motor truck disobeyed the light which was showing against him and he drove beyond the stop line although the arrow light signal which was showing against him was off and he came across the intersection at a time when it was not safe so to so."*

[21] It is fair to say that this account was not significantly shaken in cross-examination. Furthermore it was supported by the photographs insofar as they established that the stop line was some distance before the intersection and from the stop lights. Counsel for the Defendant made much of the position of the vehicles after the accident. However, I bear in mind that the situation was dynamic. The movement of vehicles after

a collision such as this may be as much the cause of the impact itself as because a driver may have continued to press the accelerator or removed his foot inadvertently from the brakes. The drivers described their vehicles as spinning. There is evidence there was contact with one or two other vehicles at the entrance to Rhyne Park Road. In the absence of expert evidence, from an accident reconstructionist or otherwise, I do not agree that the position of the vehicles after the collision cast doubt on the Ancillary Defendant's account.

[22] The Ancillary Defendant also impressed me as a witness of candour. He for example admitted to counsel in cross-examination that there was no red filter arrow in existence in the turning lane, the following exchange also occurred:

> *"Q: Once filter goes off they are covered by red ball and green ball [lights]*
>
> *A: To stop all vehicles yes*
>
> *Q: If filter light goes off and green [ball] light is on they can turn into Rhyne Park once its clear and safe*
>
> *A: Yes"*

[23] It is true that some estimates of distance may be inaccurate. This is perhaps true of all witnesses in this case. The Ancillary Defendant's estimate that the car that was ahead of him in the right lane and going in the same direction was only two car lengths ahead was inaccurate. This is because it is common ground that the Defendant entered the intersection and commenced his turn after that vehicle had already passed by. It is also common ground that the Ancillary Defendant collided with the left rear side end of the Defendant's vehicle. It means, given the speed at which motor vehicles ordinarily travel, that the Defendant's vehicle would have crossed one and a half lanes after the car ahead of the Ancillary Defendant had passed. A mere distance of 2 car lengths would not have afforded the Defendant sufficient time to travel that distance across. It is not surprising that the Ancillary Defendant's estimate of the distance ahead was inaccurate. The incident occurred at 7:15 pm in October. The failure to estimate that distance was not sufficient to cause me to doubt the account he gave of how the accident occurred.

[24] I therefore find as a fact that the Ancillary Defendant crossed the traffic line while the light facing him was on green. The change to amber occurred as he crossed that line to enter the intersection. The Defendant had already commenced his turn into the

intersection and quite possibly accelerated. The Defendant, having seen the car ahead of the Ancillary Defendant go by, proceeded with his turn because he failed to properly assess the distance away and/or the speed of the Ancillary Defendant's oncoming vehicle. He was unable to complete his crossing before the Ancillary Defendant collided with his vehicle.

[25] In the result I find the Defendant entirely to blame for this accident. I will now turn to the question of damages.

[26] The Claimant suffered injuries which were outlined in the medical report of Dr. Perez Savon of Hospiten Jamaica Limited, dated 11th May 2011(**Exhibit 1 Tab B)**. He was seen and attended to on the 11th October 2010.His injuries are described thus:

a) displaced fracture of left femur upper 1/3 and middle 1/3 junction

b) undisplaced fracture middle 1/3 right tibia

c) soft tissue injuries (multiple bruises)

The Claimant was admitted to the hospital and a full cast applied for conservative management of undisplaced fracture of right tibia .He underwent pain management. Surgery was also required and an open reduction and internal fixation (K. Nail) on fractured left femur was done. The Claimant also developed respiratory complications after surgery and required further treatment after which he was discharged on the 19th October 2010. He was given appointments for the orthopaedic clinic which he attended. The patient was for a time unable to walk without the aid of crutches or a walker. The period of rehabilitation before being able to return to work was expected to be approximately 5-6 months from the date of the medical report i.e. 11th May 2011. It was also noted that this kind of injury usually heals without obvious permanent disability or any disability at all.

[27] In a subsequent medical report, dated 19th November 2012 **[Exhibit 1 Tab A]**, Dr. Omar Savon, also of Hospiten Jamaica Limited, noted that during the rehabilitation period of the fractured left femur the Claimant attended the clinic. This was on the 17th March 2012. He reported a sudden popping sound on the left thigh days before and immediate instability sensation in the area of the fracture. On examination the Claimant showed external rotation deformity and shortening of the left lower limb. A check X-ray

confirmed re-fracture of the leg and broken K-nail. On 22nd March 2012 a second surgery was performed to remove, the broken K-nail, apply a locking nail and a bone graft from left iliac crest. He was transferred to the Cornwall Regional Hospital on the 28th March 2012 to continue medical management for a few days. On the last recorded visit to the Hospiten clinic, on the 14th November 2012, it was noted that the patient was pain free, had full range of motion, walking gait close to normal but had a lower limb length discrepancy (left shorter by approximately 1.5 cm than the right). The rate of impairment for the left lower extremity was assessed at 15% and at 6% for the whole person.

[28] By letter dated the 7th May, 2015 certain questions were put to Dr. Omar Savon. These questions and his reply were admitted as **Exhibit 18**. As it related to the re-fracture of the leg the following were the questions and answers:

> Question 5*;* *"With reference to the Medical Report dated November 1 and 8, 2012 please advise what would have caused the popping sound on the left thigh and immediate instability as well as the external rotation deformity and shortening of left lower limb.*
> Answer*:* *"It can be caused by the breaking of the implant in an unhealed fracture.*
>
> Question 6; *"Why did the k-nail break?"*
> Answer*:* *"It could be due to the fatigue of the metal work, interactive biomechanical forces of the attached muscles, premature weight bearing, accidental fall, bad quality of the implant."*

[29] With respect to pain suffering and loss of amenities counsel for the Claimant submitted that an award of $3,500,000.00 was appropriate. He relied on the authorities of: **Wayne Howell v Adolph Clarke (t/a Clarke's Hardware) [2015] JMSC Civ 124 (Unrpted Judgment Dunbar-Green J (Ag) 19th June 2015)** and **Annmarie Ewan & Tiffany Campbell (b.n.f. Annmarie Ewan) v Devon Reid & Kameka Ryan Carlos Cl No. 2005HCV 1476 (10th December 2007) annotated in Khan Vol 6 page 25**.

[30] Counsel for the Defendant submitted that an award of $1,500,000.00 would be appropriate taking into consideration *"that the chain of causation between the accident of 10th October 2010 and the fractured femur* was *broken in March 2012 when the Claimant re-fractured his femur".* Counsel also argued that the initial medical report had noted that the injuries were likely to heal without obvious permanent disability or any disability at all. She relied on the authorities of **Michael Hughes v Hazel Jarrett & Victor Jarrett (13th June 1997) annotated in Khan Vol 5 page 66, James Cowan v New Era Homes Jamaica Limited & Mr. Matthews (19th November 2004) annotated in Khan Vol 6 page 72** and **Lindel Garibaldi v Anthony Nicholson(8th April 1997) annotated in Khan Vol 4 page 82.**

[31] I will now address the Defendant's submission that the chain of causation was broken. It is true that the rule regarding remoteness in tort limits the recovery of losses to that which was reasonably foreseeable at the time of the tort, **The Wagon Mound No. 1 [1961**] **AC 388**. However so long as the type of physical damage which has resulted was reasonably foreseeable at the time of the negligent act, neither the actual manner in which it came about nor its actual extent needs to have been reasonably foreseeable, **Hughes v Lord Advocate [1963] AC 837**.

[32] The medical reports state that the kind of injury suffered by the Claimant usually healed without obvious permanent disability or any disability at all. It was also stated that the Claimant would have to undergo physiotherapy during the recovery process and that he was for a time unable to walk without crutches or a walker. It is to my mind reasonably foreseeable that someone in such a condition may fall or otherwise further injure himself. In this regard it is important to consider the evidence as to the cause of the second fracture. The Claimant in his witness statement (at paragraph 7) was content to say that while walking with his cane he started feeling pain and it felt unusual. In cross-examination the following exchange occurred:

> "*Q:* *March 2012 the other fracture of leg was* because *nail broke*
>
> *A:* *yes*
>
> *Q:* *Not accident*
>
> *A:* *It is*
>
> *Q:* *Doctor did not put nail in properly*

*A: It is*

*Q: How it broke*

*A: They say first time they see it break. I was doing light walking with cane*

*Q: Bad cane*

*A: No"*

[33] On that evidence, it is impossible for me to find there has been a break in causation. The doctor was not cross-examined as to the correctness of his methods, procedures or tools or as to the probabilities that a K-nail might break. The doctor's response to the questions posed does not suggest that the occurrence was unforeseeable. The Claimant has said he was walking with his cane when the K-nail broke. There is nothing to contradict that account or to suggest it is not true. I have no reason on the evidence before me to doubt it. There is no evidence that the use of a cane was ill-advised or in any way contributed to the breaking of the K-nail. I do not find that the use of a cane by the Claimant was unreasonable or unforeseeable, nor am I able to on the evidence before me. Therefore it seems to me the original injury is merely the setting in which the broken K-nail occurred. The second surgery was a reasonably foreseeable consequence of the accident.

[34] As to the quantum to be awarded for general damages I find the authorities of **Wayne Howell v Adolph Clarke (t/a Clarke's Hardware)** (para 29 above) and **Annmarie Ewan et al v Devon Reid et al** (para 29 above) most helpful. The Claimant in the former case had a comminuted fracture to the right tibia and fibula with post-operative infection and resultant 7% whole person impairment. The court awarded $3,000,000.00 for general damages. Updated using the most recent CPI, January 2017 (237.3) that amounts to approximately $3,159,786.95. The Claimant in the latter case was a minor who sustained a fractured right femur and right humerous. She was left with hyperpigmentation and hupertopic scarring. Scar revision would provide only 50% improvement. That award for pain suffering and loss of amenities was $1,500,000 when updated approximates to $3,000,000.

[35] The injuries in all the cases cited involved injury to only one leg. The Claimant in the **Michael Hughes** case (para 30 above) however had traction applied and was

hospitalised for 3 months. His resultant disability was 25% function of the leg. He also had an injury to his head. His award was $300,000 for pain suffering and loss of amenity (reduced by 50% due to contributory negligence). When updated that award approximates to $1,600,000. It is fair to say that that 1997 award is out of sync with awards for this type of injury today, see for example my decision in **Dorrett Gayle Willis v Attorney General of Jamaica et al [2017] JMSC Civ 17 (unrpted 9th February 2017)** and the cases referenced at paragraphs 20 and 21 of that judgment.

[36] In assessing the appropriate award in this case I take into consideration the injuries sustained by the Claimant, the length of time he was immobilized, the fact that he had to undergo a second surgery (due to the re-fracture) and the resultant 6% PPD of the whole person. Also of note is his inability to perform as a drummer in the manner he previously did. He was accustomed to dancing while drumming which is his vocation and one he no doubt enjoyed. He even feels embarrassed going on stage because of his limp. He is also no longer able to enjoy the playing of football as a pastime. His evidence in this regard I accept as truthful. It is my considered decision that an award for pain suffering and loss of amenities of $3,500,000 is appropriate to the circumstance of this Claimant.

[37] Counsel for the Claimant submitted that an award totalling $2,688,397.00 should be made for special damages which included among other things costs for domestic assistance, transportation, loss of earnings and medical expenses. On the other hand, counsel for the Defendant submitted that an award of $481,897.00 would be appropriate. It was submitted that the costs claimed for domestic assistance ought not to be allowed as they reflect rates higher than the minimum wage. The rate paid was exorbitant and excessive. The Claimant it was submitted breached his duty to mitigate. It was also submitted that on the evidence the claim to lost earnings should cease after March 2012 when the re-fracture occurred. It was further submitted that it was the Claimant's parents who spent the money for domestic help and transportation and there was no evidence they expected to be repaid by him. As regards the claim for travelling the Defendant's counsel submitted that it should be disallowed to the extent an unlicensed taxi was used. In relation to the travel to and from court this was remote and not reasonably foreseeable. Finally any amount for lost earnings, she submitted, ought to be reduced for the incidence of taxation.

[38] It is true that a Claimant is not entitled to recover a greater amount than that which he reasonably needs to spend for the purpose of making good his loss. In the words of Lord Pearson, *"..he is fully entitled to be as extravagant as he pleases ,but not at the expense of the defendant "* **Darbishire v Warran** [1963] 3 All ER 310 @315 . The Claimant has provided sufficient documentary evidence in support of his claim for amounts spent for domestic assistance **[Exhibit 2 or Tab T of Exhibit 1]**. I do not agree that $10,000 per week is either unreasonable or extravagant given that the Claimant required assistance, not only with household chores but also help of a more personal nature, because his injury was to both legs. There is no evidence as to the market rate for such services, sometimes referred to as "practical nursing" or "domestic" assistance. A law stating the minimum wage is not proof that that is the amount paid in the market for such services, it may be, but no evidence was presented that it is.

[39] The Defendant did not plead failure to mitigate and that is therefore another reason to reject the submission. In the absence of an appropriate plea of failure to mitigate it is not open to the court to make a finding adverse to the Claimant on the issue, see **Terrence Calix v Attorney General of Trinidad and Tobago [2013] UKPC 15.** There should have been prior notice so that the Claimant would have been aware of the need to provide further evidence to support his claim. An alleged failure to mitigate is a matter which ought to be pleaded and examined through admissible evidence, per Lord Bingham in **Geest plc v Lansiquot [2002] UKPC 48 (at paragraph 16)** who, having disapproved of the Board's own previous decision in **Selvanayagam v University of the West Indies [1983] 1 AllER 824 ,**put it succinctly:

> *"It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it .If there are no pleadings notice should be given by letter"*

[40] There is however a lacuna in the evidence. The Claimant has stated it was his parents who bore the expense. They sent the money from abroad. He said this although the receipts tendered in evidence were in his name. There is no evidence that his parents expect to be repaid, and that is of course not surprising. It is not his loss. It is well

established that there can be recovery for the value of services rendered even when same is provided by a relative who did not require payment, see per Lord Denning M.R. in **Cunningham v Harrison and another [1973] Q.B. 942 at 951-952**, approved by the House of Lords in **Hunt v Severs [1994] 2 A.C. 350**. Is it any different where a parent provides the wherewithal for the expense incurred? I think not. I therefore award $870,000 for the cost of domestic assistance. In this regard the receipts, on my addition, total $924,000 but I award the amount pleaded. Consistently with the decisions cited the amount awarded is to be held by the Claimant in trust for his parents.

[41] As regards the claim for transportation I do not agree that travel to and from court is unreasonable or unforeseeable. It must be within the contemplation of any driver involved in a collision that criminal proceedings may follow. The Claimant was on the evidence required to give evidence in the traffic court. This necessitated travel from his home 100 or so miles away. Nor do I think it unreasonable for the Claimant to return to Montego Bay for his physiotherapy. That is after all where he was treated after the accident and, he is entitled to attend the medical professional of his choosing. The evidence of the $550,000 claimed for the cost of transportation is a bundle of receipts **[Exhibit 3 or Exhibit 1 Tab U]**. On the other hand I agree with the submission that this court ought not to endorse illegality. The Claimant admitted that Mr. Haase, one of the drivers he retained, was not legally operating as such. This was not a friend who gave him a lift and whom he compensated for the petrol used. This was someone illegally operating a taxi or charter service. I therefore decline to make an award for transportation costs related to that person. That is with the exception of the trip on the 25th May 2011 ($10,000) on which, the Claimant says, his (the Claimant's) van was driven by Mr Haase. I therefore award $101,000 for transportation costs.

[42] I do not agree with the Defendant's submission that the claim for lost earnings should end at the time of the second fracture. For reasons explained in paragraph 33 above the original injury continued to be an effective cause. The evidence is that the Claimant was unable to return to work for approximately 13 months. His loss is proved by a letter dated 21st October 2010 **(Exhibit 1 Tab C)** from his employer. I agree that the award is to be reduced by the incidence of taxation. This I assume to be one third. I therefore award $60,000 X 13 reduced by a third, $520,000.

[43] The Defendant has taken no issue with the medical expenses claimed of $508,098.50 (and supported in **Exhibit 1**). I make no award for items not pleaded in the Particulars of Claim.

[44] I now turn to the Ancillary Claim and the Ancillary Defence and Counterclaim. It follows from my decision on liability that the Ancillary Claim brought by the Defendant against the Ancillary Defendant is dismissed. There will be Judgment for the Ancillary Defendant against the Defendant on the Ancillary Defendant's Counterclaim. The Defence to Ancillary Claim was filed on the 4th March 2014. The Counterclaim attached to that document referenced injuries but did not particularise them. The special damages were particularised and totalled $1,468,500. The Ancillary Defendant as we have seen in paragraph one of this judgment amended his claim to special damages. There has been no application to insert particulars of injuries received. The Defendant's counsel submits that I should make no award as the injuries have not been particularised. I reluctantly agree. It is true the Ancillary Defendant's witness statement indicates the injuries he suffered and this was filed on the 16th May 2016. It is also true a medical report was put in evidence **(Exhibit 17).** However neither a witness statement nor an exhibit can take the place of a pleading. It is necessary, in order to make an item a part of the claim, to introduce a statement of case to that effect. I therefore decline an award to the Ancillary Defendant for pain suffering and lost amenities. In the event I am wrong however and should another court be of a contrary view I will indicate my considered award. The injuries as per medical report dated 16th December 2010 were *"pain and numbness in right upper limb"*. I think guidance can be had from the case of **Wint v Goloub Vol 4 Khan p 211 (suit 1993 W110, 4th December 1995).** In that case $30,000 was the award for severe tenderness over lower back with pain on bending. When updated that approximates to $195,000. Those injures were to my mind more serious than the Ancillary Defendant's. My award for general damages for pain suffering and loss of amenities to the Ancillary Defendant would have been $100,000.

[45] With regard to special damages the documentary evidence does not support the stated claim for the value of the motor vehicle. The Ancillary Defendant relied on his receipt proving that he purchased the vehicle on the 15th February 2010 for $500,000 **[Exhibit 9].** On the other hand the expert assessor's report **(Exhibit 14)** states the vehicle's

pre-accident value at $300,000. The assessor recommends *"that the matter be settled on a total loss basis and have provided relevant figures for your consideration".* Those figures were $340,000 for the value of the unit and $90,000 for the value of the salvage. The report does not explain how the "Total Loss value of unit" is arrived at. On the other hand it says *"The pre-accident value shown is based directly on current local market values and takes into consideration the overall condition of the vehicle prior to the accident*". It seems to me, consistently with **Darbishire v Warran (paragraph 38 above) ,** that is what the Ancillary Defendant has lost. The value of the salvage which he retained (see paragraph 11 of his witness statement) is to be deducted. In assessing the market value of the vehicle prior to the accident and the value of its salvage, I place great weight on the expert opinion. There may have been reasons having nothing to do with market value which motivated the Ancillary Defendant to pay a higher price, or the bus at the time of the accident may no longer have been in the condition it was when purchased. Similarly, and as he admitted in cross-examination, the sale of the salvage was a "fire sale'. He may not have taken care to obtain the best price reasonably obtainable for the salvage. The assessors report was put in by the Ancillary Defendant. I accept the opinion of the expert assessor as to what was the true market value of the vehicle before the accident, and of its salvage after the accident. I therefore award $210,000 for motor vehicle damage/loss.

[46] The Ancillary Defendant claims loss of use for 104 days. This is apparently the period of time he was unable to operate as a bus operator, until he obtained another vehicle. The evidence in that regard was very sparse (see paragraph 17 of his witness statement). 3 months strikes me as an unreasonably long time. Perhaps 6 weeks (42 days) would be a more reasonable time in which to acquire a replacement vehicle. The Ancillary Defendant was not however cross examined on this nor was evidence presented as to the availability in the market of similar vehicles for purchase or lease, nor as we have seen was a failure to mitigate alleged. I do not think I am therefore at liberty to reduce the amount claimed. The Ancillary Claimant says he earned approximately $9000 per day (paragraph 2 of his witness statement). I accept that figure but agree it should be reduced for taxation. The award for loss of use is therefore $ 626,000. The claims for doctors visit, wrecker fees, assessors fee and storage

charges were adequately supported by documentation and were not challenged. I therefore award those also.

[47] In the result my decision is as follows:

(a) Judgment on the Claim against the Defendant in the following amounts:

General Damages:

| | |
|---|---|
| Pain, suffering &loss of amenities | $ 3,500,000.00 |

Special Damages:

| | |
|---|---|
| Cost of medical treatment & expense | $ 508,098.50 |
| Cost of accident report | $ 1,000.00 |
| Cost of domestic assistance | $ 870,000.00 |
| Transportation | $ 101,000.00 |
| Lost earnings | $ 520,000.00 |
| Total | $ 5,500,098.50 |

Interest on General Damages at a rate of 3% per annum from the 25th November 2011 until the date of Judgment and on Special Damages at a rate of 3% per annum from the 11th October 2010 until the date of Judgment.

(b) The Ancillary Claim is dismissed and there is Judgment on the Ancillary Defendant's Counterclaim against the Defendant as follows:

Special Damages:

| | |
|---|---|
| Total loss of motor vehicle | $ 210,000.00 |
| Wrecker fee | $ 28,500.00 |
| Loss of earnings/use | $ 626,000.00 |
| Doctors Visit | $ 2,000.00 |
| Assessors Fee | $ 13,120.00 |
| Storage Fee | $ 13,400.00 |
| Total | $ 922,220.00 |

Interest will run on special damages at a rate of 3% per annum from the 11th October 2010 until the date of Judgment.

**David Batts**
**Puisne Judge**