



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CONSOLIDATED CLAIMS 2010HCV04291 AND 2010HCV01840

BETWEEN	Marian Brown	1st Claimant
	Anna Kay Knowles	2nd Claimant
	Lynford Kerr	3rd Claimant
	Leydon Kidd	4th Claimant
AND	Gavin Harry	1st Defendant
	Dennis Patterson	2nd Defendant
	Denver Blair	3rd Defendant
	Ian Douglas	4th Defendant

Negligence – Motor Vehicle Collision – Claimants passenger in a bus owned and driven by 1st and 2nd Defendants – bus collided with rear of truck owned and driven by 3rd and 4th Defendants – blind corner – agony of the moment – whether all Defendants or any of them liable - Damages

June Thomas instructed by Shelards for the 1st, 2nd, and 3rd Claimants

Kevin Paige instructed by Paige and Haisley for the 4th Claimant

Norman Hill QC and Raymond Samuels instructed by Samuels and Samuels for the 1st and 2nd Defendants.

Jacqueline Cummings and Chantal Bailey instructed by Archer Cummings and Co. for the 3rd & 4th Defendants.

Heard: 1st, 2nd, 3rd, 4th & 11th March 2016

Coram: Batts J

- [1] On the first morning of the hearing of these consolidated claims all parties indicated a state of readiness. I ordered that the consolidated suits be renamed in the manner indicated above. It is to be noted that the 1st and 2nd Defendants have an ancillary claim against the 3rd and 4th Defendants. Having heard the evidence and submissions I gave my decision on the 11th March 2016. I promised then to put my reasons in writing. This judgment is the fulfilment of that promise.
- [2] The claim concerns a motor vehicle accident which occurred on the 31st August 2009 along the Grants Pen main road in the parish of St. Thomas. The Claimants were all passengers in a bus owned by the 1st Defendant and driven by the 2nd Defendant. It is common ground that the 1st and 2nd Defendant's bus (hereinafter the bus) collided into the rear of a box truck (hereinafter referred to as the box truck) owned by the 3rd Defendant and driven by the 4th Defendant. It is also common ground that the collision occurred in the vicinity of a left hand blind corner at a time when the road was dry and it was still daylight. There is however a marked divergence as to when and how the vehicles were impacted and hence as to the cause of the collision.
- [3] All four Claimants gave evidence. So did the driver of the bus the 2nd Defendant. The 3rd and 4th Defendants also gave evidence. There was no evidence from anyone not a party to the claim. No police officer gave evidence nor did anyone from the fire department. There was no evidence from an accident reconstructionist nor was there any evidence from any motor vehicle loss adjuster as to the areas of damage or possible force or place of impact. A motor vehicle accident report dated 30 September, 2009 was put in evidence, see **Exhibit 1 page 11**, it is singularly unhelpful. It contains no measurement

and the police officer writing the report gave no indication that he attended the scene of the accident or whether any admissions were made to him by either driver. Although listing several passengers he listed only two 'witnesses', neither of which was the 2nd or 3rd Defendants. I therefore paid no heed to the police officer's account of the accident as stated in that report which really has no probative value. Once again, therefore this court is called upon to decide on factual issues without the assistance of any objective evidence of any sort. It may be that the lapse of time, between the accident 31st August 2009 and the trial of the claim, is to be blamed as I am sure counsels' industry is not wanting. I bear in mind of course that at all times the burden of proof rests on the Claimants and this on a balance of probabilities.

- [4] I will not in the course of this judgment restate all the evidence that was presented. I will however reference such of the evidence as I deem necessary to explain my conclusion.
- [5] Each Claimant, as is to be expected in such a situation, gave slightly differing accounts of what transpired. The first Claimant was seated towards the middle of the bus and on the left hand side. She says the bus was 'overfull' of passengers. She stated that when the bus left Kingston it was driving fast, thereafter it slowed down but just before the accident, it picked up speed again. She asserts that the bus came upon a line of slow moving traffic at a curve. The driver applied his brake suddenly and stopped. This caused her face to be slammed against a rail in the bus. This rendered her unconscious. This witness asserted that "at some time prior to the accident" the bus driver (1st Defendant) was using his cellular phone. She did not know for how long he was on the phone.
- [6] When cross-examined the 1st Claimant stated that the line of traffic was moving. She admitted the curve was a blind curve and she was unable to see around it. The following exchange occurred:

“Q: As the bus approached the curve the driver applied the brake
A: I cannot say I know driver was going around and I heard the slam
Q: Paragraph 7 of your witness statement read it. Do you say” as we approach the curve driver applied his brake.”
A: Yes
Q: Is that correct
A: Yes
Q: Brakes was sudden
A: Yes
Q: So the driver of your bus applied his brake before he went around the corner
A: I don’t know if it is exactly around the curve”

In answer to counsel for the 3rd and 4th Defendant she said.

“Q: Say what cause your face to slam.
A: The brake jam
Q; Did you see the bus collide with the truck
A: Mi no see it collide
Q: Did you see the bus hit the truck
A: no”

[7] The 2nd Claimant was seated at the front of the bus beside the window. Another female passenger was between herself and the driver of the bus. She too says that all 25 seats in the bus were occupied. She stated that the bus was travelling fast around the curve when it approached the line of traffic. The driver slammed the brake immediately as he went around the curve. She stated:

“I am not aware as to whether the driver of the [bus] was being inattentive because the passenger who was seated beside me was very talkative. As a result of this during most of the journey enroute to Morant Bay St. Thomas, had turned my face towards the window to my left.”

This Claimant be it noted was not wearing a seat belt. After the impact her forehead hit the windshield or the dashboard of the bus. She says that she exited the bus through the window to her left. She stated,

“I noticed the [truck] immediately after going around the curve. The driver of the [bus] jammed this brake suddenly. However the bus hit the truck and I was thrown forward immediately. “

[8] In cross examination by Mr Hill QC:

“Q: the collision occurred as soon as you enter the curve at curve on the Yallahs side.

A. yes”

And later:

“Q: what was distance between truck and bus before it got to the curve.

A: I don't remember

Q: you don't recall seeing truck

A: at one point way before the accident I saw truck back in Bull Bay.”

And finally,

“Q: You state that you did not actually see the collision

A: No I saw it I remember easing up.

Q: Was that because truck was reversing towards the bus.

A: I could not tell

Q: could have been

A: could have been”

When cross-examined by Miss Cummings the following answers were of interest:

“Q: How long bus travel behind truck before reaching corner

A: Saw it maybe two minutes

Q: Before the curve

A: No, on curve. Saw truck when we leave to St. Thomas in Bull Bay

Q: Travelling one behind the other

A: Truck was away off when I saw it.

Q: You saw when truck went around that curve

A: No”

[9] The third Claimant stated that he was seated at the rear of the bus on the right hand side. He says that the bus was travelling at a fast speed. He says the bus [para 5-6 witness statement]:

“Came up on a line of traffic and a curve. The traffic was standing still.... The motor vehicle immediately in front of the [bus] drove to the right from behind another motor vehicle which was in front of the one immediately preceding the [bus] and the [bus] also drove to the right in an effort to go around the motor vehicle which was immediately in front of it when it went around the curve. In doing so the bus collided into the rear of the said motor vehicle.”

The third Claimant denied that the driver of the bus was on a phone or otherwise inattentive.

[10] When cross-examined the 3rd Claimant also said that the bus was fully loaded with passengers. He stated,

“I never know if another vehicle was before my vehicle. When my vehicle go round he go buck up on it.”

[11] The 4th Claimant, when cross examined stated:

“I was just coming off 24 hrs work so I was not sleeping but a bit tired so I couldn't tell what goes on.”

He too was sitting in the rear of the bus. He said in answer to counsel for the 3rd and 4th Defendants:

“Q: How come to your knowledge

A: The other driver of the other vehicle know I was a passenger and came to my work place and told me what happen.

Q: what you actually saw when bus came around bend. Did you see truck before collision.

A: No

Q: what you saw when you went around the bend

A: I did not see anything.

Q: You did not know what [bus] hit

A: No”

[12] The Claimant’s evidence therefore reflects varying versions of the accident, with varying degrees of reliability. One gets the impression that it was the sudden application of brakes, which first alerted the Claimants to the unfolding incident. I do not form the view that the bus was travelling at an excessive or dangerously fast speed. Indeed the second Claimant while sitting in front was sufficiently comfortable to turn her back to the excessively talkative passenger beside her. One would have expected that had the bus been going at an excessive speed she would have been paying greater attention to what was ahead. Nor did herself, or any other passenger, beseech the driver to reduce speed. I do not find that the bus was travelling too fast, given the weather and road conditions at the time. It does appear that the 1st to 3rd Claimants are saying the truck was not visible immediately prior to the bus entering the curve and that the bus came suddenly upon the truck.

[13] The evidence of respective drivers is therefore of paramount importance. Both drivers admit to pleading guilty before the traffic court to careless driving. Both acknowledged that some 6 miles or so prior to the collision, the box truck overtook the bus. The box truck was also admittedly empty while the bus was full.

[14] The 4th Defendant (the driver of the box truck) asserts that prior to his going around the curve, he was some distance away. He said he could see it blowing:

“ a whole heap of smoke”,

He described the bus as being about

“two to three car lengths” behind.

He said

“each time I ‘prip’ my mirror he was getting closer.”

Interestingly and contrary to the position taken in his witness statement, the 4th Defendant stated.

“Q: your witness statement that says he [the bus driver] fled the scene was false

A: When police come and ask for him I was the only driver there.

Q: that means he fled

A: I don’t know .When police ask me I say I don’t know where he is.”

[15] This witness be it noted, denied conversing with the other driver at the scene of the accident and denied seeing the bus papers. He asserted that when he came around the bend he saw a stationary line of traffic. A Honda motor car was immediately ahead of him, he then applied his brake and swerved to his right and successfully avoided colliding with the Honda. That manoeuvre resulted in the front of the [box] truck being partially in the right lane for the traffic coming in the opposite direction. In his witness statement he says “soon after” he stopped the bus collided into the rear of his vehicle. In oral evidence, he said that it was immediately upon stopping that the impact occurred. That impact to his rear pushed his box truck into the rear of the Honda as well as onto the other side of the road where it collided with an oncoming motor vehicle, a Toyota corolla. This Defendant admitted that he knew Leeden Kidd (the 4th Claimant) and had seen him at the scene of the accident as well at the police station. He denied going to Mr. Kidd after the accident to tell him how it went.

[16] I have little hesitation in rejecting the 4th Defendant's version of how the accident happened. He gave evidence in a confident way speaking assertively and clearly. In a strange way he was far too assured of the account he gave. I was not satisfied he was speaking the truth. More importantly that account was to my mind improbable. He admitted overtaking the bus while going up an incline. The location of the accident was some six miles further on. It occurred at a curve that followed a stretch of straight roadway. He says the bus was blowing a lot of smoke. The box truck he was driving was empty. The evidence suggests that the bus was full of passengers. It is to me improbable that the fully loaded bus was gaining on the empty box truck at the scene of the accident. Particularly as he says the box truck was going at 50 – 60 kilometres per hour as he approached the bend. I have no expert evidence before me however judicial notice can be taken that when a motor vehicle blows smoke it very often indicates an engine in need of servicing. The fact that the box truck was able to overtake the coaster bus supports the position that the bus was not operating at full power. I do not accept that the bus was two to three car lengths behind the box truck when it was approaching the bend. This is because a few minutes before giving that evidence the 4th Defendant said this :

“Q: You pass bus at about how far from the scene of the accident.

A: About five to six miles

Q: Were you able to see bus in rear view mirror afterwards.

A: Yea, a few times I spot bus in rear-view mirror.”

One does not “spot” a vehicle, which is two to three car lengths away on a straight stretch of road. Such a vehicle ought to be visible clearly and consistently. In this regard it is significant that none of the Claimants saw the truck ahead of the bus prior to the collision. A truck 2 to three car lengths ahead ought to be clearly visible.

[17] The 2nd Defendant (the driver of the bus) gave evidence with his eyes cast downwards. He was either slightly intimidated by the proceedings or was sulky and resentful about coming to give evidence. I was however impressed by the evidence he gave. I find that he endeavoured to speak the truth. I can understand an innocent party being upset about having to go through a trial because others will not admit their wrong doings. He stated, that he was unable to see around the left hand bend. He observed the box truck reversing towards him and was unable to avoid a collision. I accept as truthful his statement that :

“when I came out of my vehicle, I saw that there was another accident. The driver of the motor truck which crashed into my motor bus told me that he knew I was coming and tried to clear the way”.

He explained his guilty plea at the traffic court thus,

“as the time it would take to come to trial and the amount of time I would have to give up to attend court I decided to pay the fine so as not to keep attending court.”

In this regard although both the box truck driver and the bus driver pled guilty before the criminal court, I accepted their explanations and do not view the plea as determinative of their respective liabilities.

[18] When cross-examined the 2nd Defendant said that the first time he saw the truck after it overtook him was when he collided with it. He denied travelling too close behind the truck..

“Q. But you did not stop in time.

A. That truck was coming towards me reversing.
The time I blew my horn fast and by the time I see that truck I brake.”

His account of what occurred after the accident also rang true.

“Q: After the accident you exchange particulars with other driver.

A: No

Q: What you did

A: I was in pain and shock and nobody come to me. I was sitting there trying to help myself.

Q: you find out who the driver of the truck was

A: yes he came to me

Q: On the scene

A: yes,

Q: When driver of truck came to you what did he do

A: He was talking about the accident and then a guy on the bus took out bus papers and gave it to I think the driver of the truck.”

The 2nd Defendant admitted that there was an apparently disabled truck some distance ahead on the left hand side. That it was which caused other vehicles including the Honda motor car to come to a stop.

[19] Having regard to my view of the witnesses and their evidence, I make the following findings of fact.

- a. “On the 31st August 2009 a collision occurred between the 1st and 2nd Defendant’s bus and the 3rd and 4th Defendant’s box truck along the Grants Pen main road in the parish of St. Thomas.
- b. The box truck was some distance ahead of the bus prior to the collision.
- c. The box truck entered a left hand bend that could be described as a “blind corner”

- d. The box truck came upon a Honda motor car in a stationary line of traffic. The traffic was stationary because of a disabled truck on the left hand side and the presence of oncoming traffic.
- e. Due to the speed at which the box truck was travelling as it approached the corner, it was unable to come to a full stop behind the Honda motor car. The driver of the box truck attempted to avoid hitting the Honda and braked and swerved out into the roadway.
- f. In doing so, the box truck made contact with the Honda car as well as an oncoming Toyota Corolla. Neither impact was serious.
- g. However because the box truck was partially in the right hand lane the driver of the box truck attempted to reverse it so as to properly reposition it in the left lane.
- h. The bus entered the bend while the box truck was being reversed. The driver of the bus was in consequence unable to avoid colliding with the box truck which he was unable to see prior to going around the bend.
- i. The collision was caused by the 4th Defendant who was the driver of the box truck. He carried out a dangerous manoeuvre in that he reversed without sounding his horn or otherwise providing any warning although he was aware that the corner was blind to approaching traffic, in particular the bus which he knew was somewhere behind him.
- j. The 2nd Defendant, in the emergency which faced him as he came around the blind corner, acted in a manner which any driver faced with that circumstance would have: he blew his horn and pressed suddenly on his brake.

[20] I am fortified in my findings by the fact that although suffering injures none of the Claimants' injuries were such as might have been expected had the bus been travelling at an excessive speed. A collision with the rear of the box truck while

travelling at a fast rate of speed might be expected to result in a front seat passenger who was not wearing any seatbelt, going through the windscreen of the bus. I find that but for the fact that the box truck was reversing, the bus might have been able to avoid the collision. I for similar reasons did not accept that the impact to the bus was such as to push the box truck into the Honda and across the road causing it to collide with another motor vehicle. I find that the 4th Defendant the driver of the box truck was at all material times the servant or agent of the 3rd Defendant and was entirely to blame for this accident.

[21] I therefore turn to the matter of damages. The 1st Claimant's injuries are outlined in a medical data form from the Princess Margaret Hospital and in medical reports from Dr. D. Anthony Lewis and Dr. Holmes. See **exhibit 1 pages 6 and 14** respectively. The injuries were a fractured alveolar process of maxillary bones. Lacerations to gingiva. Looseness of upper incisors, and canine teeth and a fracture of the incisors 1/3 crown of maxillary right first incisors. Dr. Lewis who saw her on the 10th September 2009 expected healing to take place over 24 weeks but stated further treatment was required. He regarded her injury as serious and gave estimates for her future medical costs. By report dated 1st September 2009 Dr. P. Holmes diagnosed fractured alveolar segment first upper left, laceration to upper lips. Fracture of tooth left upper central incisors. The Claimant had been seen on the 31st August 2009 at the Princess Margaret Hospital.

[22] The 1st Claimant asserts that the medical reports do not take into account her continuing pain. No reason is given nor is an explanation offered for this. Nor is a further or up to date report presented. The 1st Claimant does say however that she has not done the recommended further treatment because she is unable to afford same. She describes the considerable pain experienced after the accident and says that she continues to experience pain and bleeding in the gum when attempting to chew hard foods such as dumplings or crackers. Her front teeth she says are discoloured. She takes anti-inflammatory medication for pain.

She says she experiences pain in her teeth when the climate is cold. She complains of pain in lower back and in her hands. There is however, no pleading in relation to her back and hands nor is there any medical report in support. I therefore disregard that aspect of her claim.

- [23] The 1st Claimant's counsel argued for an award of \$1.6 million dollars for Pain, Suffering and Loss of Amenities. I found the authority of **Odane McIntyre v. Treasure** CLHCV01471/2006, 2014 JMSC Civil 15, of relevance. The award was \$1,550,000 dollars in February 2014 updated it is approximately \$1.7 million dollars. That Claimant however lost three permanent upper incisors, one milk tooth and had two fractured teeth. The loss of permanent teeth resulted in a lack of oral bone growth. Surgery was advised. Queen's Counsel for the 1st and 2nd Defendants in written submissions as well as counsel for the 3rd and 4th Defendants relied on **Nelson Walters Engineers Limited v. David Noel; Harrison's Assessment of Damages for Personal Injuries** pg. 62. There the Claimant was awarded \$40,000 in 1992 for a fractured right central maxillary incisor, Split right upper incisor, avulsed left maxillary central incisor, missing left upper incisor, two facial lacerations and abrasions and abrasion of cornea of the eye. The award when updated approximates to \$650,000.00. I did not find the other cases cited particular helpful. When regard is had to the authorities and the continuing pain and discomfort experienced as well as the injuries suffered by the 1st Claimant I award \$800,000.00 for the Pain, Suffering and Loss of amenities. In respect of future medical care I award \$140,000.00 in accordance with the doctor's recommendation of 2009, see pg. 7 of the agreed bundle of documents - **Exhibit 1**. For future loss of earnings, I accept the evidence that she now earns \$2,000 less per week than she did before the accident. At 38 years of age a multiplier of 7 is appropriate. However, the surgery to be done will have some impact and in all likelihood will allow her to resume full time employment. I therefore discount the award for future loss of earnings by 50%. The award is therefore \$364,000.00 that is $52 \times 2000 \times 7 \times 50\% = \$364,000.00$.

[24] As regards the 1st Claimant's Special Damages I award (as *per the schedule of special damages* filed pg. 363 of the core bundle)

a.	Medication	\$44,932.06
b.	X-rays	\$15,640
c.	Medical report	\$1000
d.	Initial dental treatment	\$10,000
e.	Dental treatment	\$1,000
f.	One pair eyeglasses	\$20,000

In this regard, I accept the evidence that the pair she owned was destroyed in the accident and she has been unable to afford another.

- g. Past loss of earnings, I accept that the Claimant was paid as she admitted whilst on sick leave. Those certificates totalled 11 days or 2 weeks. The calculation for past loss of earnings is therefore for the period 31st August 2009 to 30th September 2009 four weeks by \$8000 per week less \$16,000 (or 2 weeks pay) total \$16,000.

I accept that she continues to be unable to work on a full time basis due to the pain. Indeed, I observed her in court and saw her discomfort even after her evidence had concluded and on the following days. She continued to earn \$2000 less per week from the 1st October 2009. I award the amount claimed for the period 1st October 2009 to 5th February 2013. 176 weeks x 2000 = \$352,000.00.

[25] The 2nd Claimant's injuries are as outlined by the medical report **Exhibit 3 pg. 4** were -

- a. Tenderness over medial aspect of right foot proximally
- b. Painful right ankle with complete range of movement,
- c. Bruise to right leg
- d. Splinters on face
- e. Eyes normal

- f. X-rays revealed no abnormalities. There were no significant injuries. Her treatment consisted of her eyes being irrigated with normal saline. A Voltarine injection and Cataflam tablets for pain.

[26] Her evidence is that she experiences severe pain along her spine, right ankle and right leg. She says that she is unable to walk for long distances. She asserts that splinters entered her eyes and she is unable to read or watch television for any protracted period. She is unable to see objects clearly at a distance. She says she has headaches, everyday. She says she visited the Princess Margaret Medical Centre on several occasions for further treatment and an x-ray was prescribed. She has no documentation to support these assertions and did not do the x-rays for want of funds. I do not accept this aspect of her evidence and even if true without a medical opinion there is no nexus established between the back pain and or the affected vision, and the accident. I observe that the 2nd Claimant was slightly obese.

[27] Counsel relied on the authority of ***Wilks v. Phillips*** Suit CL 1990W176 **Harrison's Assessment of Damages** pg. 375 14th January 1992. In that case, the 50 yr. Plaintiff fell from a bus as it drove off. She had a wound to the ankle, wound to her leg with multiple contusions. The award for pain and suffering was \$30,000, which updated on counsel's calculation amounts to \$531,000 approximately. The 2nd Claimant was not as badly injured. The 3rd & 4th Defendants commended to me the case of ***Delroy Williams v. Adina Bailey*** 30th March 1992 annotated in **Harrison's Assessment of Damages for Personal Injuries** pg. 213. That plaintiff had multiple bruises and abrasion, swelling and pain to the right ankle with a permanent disability of 5% of the right lower limb. The award was \$40,000 which counsel updated to \$625,135.00 using the January 2016 CPI. This case also concerns a more serious injury. The 1st and 2nd Defendants reference two relevant authorities. The 1st was ***Lenroy Lee v Commissioner of Police*** 4th November 1991 **Harrison's Assessment of Damages for Personal Injuries** pg. 375. The injury consisted of a sprained ankle. Damages for Pain Suffering and Loss of Amenities were assessed at

\$8,000.00. When updated it amounts to \$160,000. The other case was **Reginald Stephens v. James Bonfield et al Khan 4d pg. 215** 23rd September 1996 in which the plaintiff suffered an abrasion to the left leg, bruise to the right foot with pain for four weeks. The award was \$40,000 which counsel submitted updates to \$224,736.14

[28] In the case at bar the 2nd Claimant has both a bruise and an injured right ankle, albeit not diagnosed as a sprain. Although less serious than the **Delroy Williams** case I find her situation worse than either **Lenroy Lee** or **Reginald Stephens**. I therefore award her \$300,000 for Pain Suffering and Loss of Amenities.

[29] As regards Special Damages, I make no award and I do not accept that her injuries were such as to cause her to discontinue her course of study at the Institute of Academic Excellence. Nor do I accept that the transportation costs as alleged in relation to her injuries were incurred. There is absolutely no documentary support for these claims. When regard is had to the medical report, and on a balance of probabilities, I reject this aspect of her claim.

[30] The 3rd Claimant suffered the following injuries as detailed in the medical report see **exhibit 4. Pg. 2, 6 and 7.**

- a) A wound, or abrasion below the mid right leg anteriorally, which was almost healed by the 10th September 2009.
- b) A wound and laceration to anterior aspect of left leg.
- c) Superficial abrasion with swelling to face.
- d) The laceration to the left leg was measured at 5 cm.

I accept the third Claimant's evidence that due to pain he sought further medical attention. Indeed the medical report is there to confirm that this is so. I accept that his disability due to the pain continued for at least one month after the accident. In support of the claim to \$1,900,000 to \$2,000,000 Claimant's counsel relied on **Shelia Richards v. Vincent Kinlocke** CL 1989 R012 in 15th February

1992 report annotated in **Harrison's Assessment of Damages** pg. 363. In that case, the patient suffered a severe contusion to the left leg, ankle and foot, lacerations to left foot, left hand and multiple abrasions to right leg with moderate contusions on left forearm. She was admitted to hospital on the 26th September 1987 and discharged on the 22nd October 1987. She had permanent scarring on muscles and difficulty climbing stairs and hills due to diffused fibrosis. The award for Pain Suffering and Loss of Amenities was approximately \$60,000 which when updated according to counsel is \$1,965,000 Counsel for the 3rd Claimant also cited the case of **Beckford v Doyley Harrison's Assessment of Damages** pg. 209 the individual in that case suffered lacerations to his face, scalp, abrasion to head, right hand, neck and keloid scarring to scalp and forehead. The award was \$90,000 in July 1991 when updated this award approximates to 2.2 million dollars. The 3rd Claimant's injuries and their *sequelae* were less severe than in the cases cited.

[31] The 3rd and 4th Defendants' counsel again referenced the matter of **Stephens v Bonfield** cited at Para. 27 and above and **Hamilton v Singh Harrison's Assessment of Damages** pg. 291 12th March 1991. That plaintiff had wounds and abrasions and bruises laceration to the feet and right proximal forearm. He was unable to work for 5 weeks and could not wear shoes for the period. \$27,000 was the award for Pain, Suffering and Loss of Amenities updates to \$421,966.21. The 3rd and 4th Defendants relied on **Coombs v. KSAC** October 1986 annotated in **Harrison's Assessment of Damages for Personal Damages Second Edition at pg. 11**. That plaintiff had a 3 cm laceration on the mid thigh anterior aspect of right leg and 4 cm laceration on the anterior aspect of the right distal third of right leg with ugly scarring on the right leg. The award was \$7500 which updates to \$449,417.

[32] I find that the 3rd Claimant's injuries approximates to those in the **Hamilton v Singh** and were less severe than those in **Coombs v KSAC**. He was I think

more severely injured than the Plaintiff in **Reginald Stephens** I therefore award \$350,000 to the 3rd Claimant for Pain, Suffering and Loss of Amenities.

[33] As regards the 3rd Claimant's Special Damages I award medical report \$2,500 travel to doctors \$5,000. I award four weeks for past lost earnings as there is no medical report to suggest that he was unable to work until the 31st October 2009, I award \$30,000.

[34] The 4th Claimant's medical report **exhibit 5A** and **5b** details his injury as follows:

- a. Loss of consciousness
- b. Left knee swollen and tender anteriorly
- c. Nose bleeding
- d. ½ inch Laceration of lower lip
- e. Loss of first right upper incisor tooth
- f. Loosening of teeth – (He was advised to see a dentist)
- g. 1 inch diameter bruise with collection of blood on left knee

His treatment entailed an x-ray, which revealed no fractures, and respiration of knee which showed 20 millimetre of blood was evacuated. The injuries were described as grievous but otherwise than the missing tooth not regarded as permanent. By an undated document **Exhibit 6 (1)** an estimate of cost of complete mandibular and complete maxillary dentures was provided. There was also a receipt proving a visit to Dr. Peter Glaze on the 18th November 2009 **Exhibit 6E**. In giving evidence, the 4th Claimant stated that he was unable to obtain further medical treatment for his dental injury due to financial constraints.

[35] The 4th Claimant's counsel argued that 1.2 million was an appropriate award for Pain, Suffering and Loss of Amenities. He relied on:

- a. **Simpson v. McMillan** Khan's Volume 4 pg. 206 (14th June 1994). The plaintiff in that case a bicyclist was in a collision with a motor car and sustained a head injury with loss of consciousness. 8 cm laceration to lateral aspect of left parietal

region of scalp, multiple 3 cm lacerations to left side of face, 3 lacerations to right side of face 5 – 7 cm in length, abrasion to lateral aspect of right thigh and left knee. He was admitted to hospital for the period 8th February, 1987 to 16th February, 1987. He had swelling to left side of face which went down after seven days. The award for Pain Suffering and Loss of Amenities was \$180,000 which updates to approximately \$1.5 million dollars.

- b. **Damion Campbell v Kathleen Dyke** Khans Volume 4 page 149 decided on the 18th May 1995. That 7 yr. old plaintiff was injured in a motor vehicle accident. He had bleeding from the mouth. Three upper permanent teeth were knocked out, he had a 'mash mouth' appearance. Lost some taste for food teeth and experienced some difficulty speaking. The medical evidence was that loss of the teeth for a child was significant as it would need dentures which would have to change as his jaw grew. Such devices were cumbersome and injurious to other teeth in the jaw. At 18, he would require a fixed bridge. The award for Pain Suffering and Loss of Amenities was \$225,000 which updates to \$1,700,000.
- c. **Fenton v Lewis** decided on the 12th July 1991 **Harrison's Assessment of Damages for Personal Injuries** page 207. That plaintiff suffered laceration to the face. Right side of neck and right knee with loss of skin. He spent one week in hospital. The award was \$35,000 for Pain Suffering and Loss of Amenities when updated that approximates to \$887,000.

[36] The 1st and 2nd defendants relied on **Tomah South v George Ergos** 14th March 1997 annotated **Khans** Volume 4 pg 215 and **Gilbert McLeod v Keith Lemard** **Khans Volume** 4 pg 205. The injured Claimant in **Tomah South** had injuries to his swollen left knee, tenderness over the medial tibial condyle and subcutaneous haematoma. She was temporarily disabled for three months. The award for pain suffering and loss of amenities was \$60,000. This updates to \$325,240.28. The plaintiff in the **Gilbert McLeod** case had pain to the right side

of the chest, multiple lacerations to the right thigh, knee and leg. A 4cm laceration to right side of the forehead, 5cm laceration to right foot; loss of consciousness. He was hospitalised for 2 days. \$100,000 was the award, which updates to \$593,685.83.

- [37] The 3rd and 4th defendants referenced ***Nelson Walters Engineering v. David Noel*** 6th February 1992 annotated in **Harrison's Assessment of Damages for Personal Damages** pg. 63 and ***Hermina Harvey v Amy Rigabie CLH049 of 1991*** unreported judgment of Jones J, 2 December 2003. The injuries and awards in the former case are outlined in paragraph 23 of above. The latter case involved a pedestrian who was struck by a motor car. She received the following injuries: pain and tenderness to right side of body, tenderness to right shoulder diffused swelling with superficial abrasion to the posterior aspect of the right forearm, mild swelling and tenderness to the right knee. The injuries were described as soft tissue injuries. Due to continuing pain the Claimant consulted Dr. Humphrey and Dr. Akshai Mansingh. Both Doctors opined that her injuries were likely to have permanent sequelae. Dr. Mansingh was of the opinion that there were tears in the supraspinatus and subscapularis muscles as also an anterior cruciate ligament tear and a lateral meniscal tear. Physiotherapy was recommended. The award for pain suffering and loss of amenities was \$240,000 which updates using the January CPI to \$751,171.00.
- [38] The 4th Claimant's orthopaedic injuries were comparable to those in the ***Nelson Walters Engineering*** case. His injuries were less serious than those suffered by Hermina Harvey were. The cases cited by the 1st and 2nd defendant's counsel were not particularly helpful. The authorities of **Simpson, Damian Campbell** and **Fenton** cited by the 4th Claimant's counsel contained more serious injuries and sequela.
- [39] When regard is had to the authorities and the fact that the recommended surgery for which an award will be made should positively impact his condition, I award

\$950,000 to the 4th Claimant for Pain suffering and loss of amenities. For future medical care I award \$47,000 see **exhibit 6H**.

[40] As regards the 4th Claimant's special damages for medical expenses the agreed receipts total \$17,200; transportation \$8000. I accept that this amount was spent going to and from the doctors, as the documentation from the doctor corroborate the visits.

[41] Before closing this judgment, I make some observations. There was an ancillary claim by the 1st and 2nd Defendants against the 3rd and 4th Defendants. This included a claim for an indemnity and damages. No evidence emanated from the 1st and 2nd defendants as to damages and I have found that they were not liable to the Claimant. No question of an indemnity therefore arises. Having heard, further submissions from counsel, I decided to make no order on the ancillary claim. Secondly, I must indicate that the witness statement filed by the 3rd defendant stated that the box truck was owned by him and he also stated the name of his insurance company. Whilst the witness was in the witness box I indicated to all parties and I reiterate now that, it is inappropriate and not a good practice to reference the matter of insurance at a trial for negligence involving motor vehicles. This is because it may lead to prejudice if a tribunal deciding the issue believes that the deep pocket of an insurance company will support one party or another. In this case, I have directed my mind to the irrelevance of that evidence and it played no part in my arriving at my decision.

[42] Finally, in the course of trial, each witness gave evidence as to relative distances and some even pointed out distances. I found those estimates generally unreliable and that is perhaps to be expected of lay witnesses travelling in moving motor vehicles.

[43] In the result there is judgement for the 1st, 2nd, 3rd and 4th Claimants against the 3rd and 4th Defendants. With damages assessed as follows –

1st Claimant -**General Damages**

Pain Suffering and Loss of Amenities	\$800,000
Future medical care	\$140,000
Future loss of earnings	\$364,000

Special Damages

Travelling to and from doctors	\$20,000.00
Medication	\$44,932.06
X-rays	\$156840.00
Medical report	\$1,000.00
Initial dental treatment	\$10,000.00
Dental treatment	\$1000.00
One pair eyeglasses	\$20,000.00
Past loss of earnings (31 September 2009 - 30 th September 2009)	\$16,000.00
Past loss of earnings 1 st October 2009 to 5 th February 2013	\$352,000.00

2nd Claimant:**General Damages**

Pain Suffering and Loss of Amenities	\$300,000
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3rd Claimant**General damages**

Pain Suffering and Loss of Amenities	\$350,000
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Special Damages

Past Loss of Earning	\$230,000.00
Medical Report	\$2,500.00
Travel to Doctors	\$5,000.00

4th Claimant:**General damages**

Pain Suffering and Loss of Amenities	\$950,000.00
Future Medical Care	\$47,000.00

Special Damages

Medical Expenses	\$17200.00
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Transportation to Doctor

\$8000.00

[44] With respect to the 1st, 2nd and 3rd Claimant's interest will run at 3% on General Damages from the 14th July 2010 and in respect of the 4th Claimant interest to run on General Damages at 3% from the 6th December, 2010 both to the date of this decision (11th March 2016). Interest is to run on Special Damages for all Claimants at 3% from the 31st August 2009 until the date of this decision, which is the 11th March 2016.

[45] Costs to the Claimants and the 1st and 2nd Defendants against the 3rd and 4th Defendants to be taxed or agreed.

David Batts
Puisne Judge
15th April, 2016