IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 04428

BETWEEN	**TREVOR DAVIS**	**CLAIMANT**
AND	**KENBURN GORDON**	**1ST DEFENDANT**
AND	**LEROY THOMAS (incorrectly named LEE ROY THOMAS)**	**2ND DEFENDANT**
AND	**KENBURN GORDON**	**1ST ANCILLARY CLAIMANT**
AND	**LEROY THOMAS (incorrectly named LEE ROY THOMAS)**	**2ND ANCILLARY CLAIMANT**
AND	**CARLTON BURTON**	**ANCILLARY DEFENDANT**

AND CONSOLIDATED WITH:
CLAIM NO. 2015 HCV 03272

BETWEEN	**SHANTE DRICKETTS**	**CLAIMANT**
AND	**KENBURN GORDON**	**1ST DEFENDANT**
AND	**LEROY THOMAS (incorrectly named LEE ROY THOMAS)**	**2ND DEFENDANT**
AND	**KENBURN GORDON**	**1ST ANCILLARY CLAIMANT**
AND	**LEROY THOMAS (incorrectly named LEE ROY THOMAS)**	**2ND ANCILLARY**

		CLAIMANT
AND	**CARLTON BURTON**	**ANCILLARY DEFENDANT**

AND CONSOLIDATED WITH:

CLAIM NO. 2014 HCV 04429

BETWEEN	**BRITNEY MCKENZIE (a minor by her mother and next friend AMARIL MCKENZIE)**	**CLAIMANT**
AND	**KENBURN GORDON**	**1ST DEFENDANT**
AND	**LEROY THOMAS (incorrectly named LEE ROY THOMAS)**	**2ND DEFENDANT**
AND	**KENBURN GORDON**	**1ST ANCILLARY CLAIMANT**
AND	**LEROY THOMAS (incorrectly named LEE ROY THOMAS)**	**2ND ANCILLARY CLAIMANT**
AND	**CARLTON BURTON**	**ANCILLARY DEFENDANT**

AND CONSOLIDATED WITH:

CLAIM NO. 2014 HCV 04572

BETWEEN	**NAJEEM MCDONALD (a minor by KADIAN TRESTON his sister and next friend)**	**CLAIMANT**
AND	**KENBURN GORDON**	**1ST DEFENDANT**
AND	**LEROY THOMAS (incorrectly named LEE ROY THOMAS)**	**2ND DEFENDANT**
AND	**KENBURN GORDON**	**1ST ANCILLARY CLAIMANT**

AND	**LEROY THOMAS (incorrectly named LEE ROY THOMAS)**	**2ND ANCILLARY CLAIMANT**
AND	**CARLTON BURTON**	**ANCILLARY DEFENDANT**

IN OPEN COURT

Mr Jason Jones and Miss Tiffany Barrett instructed by Nigel Jones and Co. for the claimants

Miss Raquel Dunbar instructed by Dunbar and Co. for the defendants

February 10, 11, 12 and 13, 2020 and September 25, 2020

Motor Vehicle Accident - Negligence - Causation - Contributory negligence- Ancillary claim - Contribution - Assessment of Damages.

PETTIGREW COLLINS J

THE CLAIMS

[1] These consolidated claims arise out of an incident which took place on the 20th of November 2013 along the Trinity main road in the parish of St Mary. The claimants are seeking damages for negligence as a result of injuries received by each of them, against the first and second defendants. The defendants are seeking contribution and/or indemnity against the ancillary defendant. The accident involved three motor vehicles; a Toyota Coaster motor truck (hereinafter referred to as the Coaster), a Toyota Hiace Motor truck, which will be referred to as the Hiace and a Toyota Corolla motor car, hereinafter called the Corolla.

[2] It is alleged in the statement of claim of each of the three then minor claimant Britney McKenzie, Shante Dricketts and Najeem McDonald who initially brought the

claim by next friend, that he/she was a passenger in a vehicle that was travelling behind another vehicle that was being driven by the second defendant.

[3] It is not in dispute that the vehicle travelling behind that which was being driven by the second defendant was the Hiace which is commonly described as a minibus, registered PE 3318 and was being driven by Mr Trevor Davis. Subsequent to the filing of the claim, the claimant Mr Trevor Davis died. The claim on behalf of his estate has been pursued by his court appointed administrator ad litem, Ms Belinda Grant.

[4] It is also not disputed that the vehicle which was being driven by the second defendant Mr Leroy Thomas was the Coaster, routinely described as a bus registered PD4188. This Coaster was owned by the first defendant Mr Kenburn Gordon.

[5] It is alleged in the statement of case of each claimant that the Hiace was travelling from Ocho Rios direction heading to Highgate, and upon reaching Trinity, in the vicinity of the Cool Oasis gas station, the Coaster suddenly made a right turn in an attempt to enter the gas station compound and thereby obstructed the path of the Corolla which was travelling in the opposite direction. The Corolla collided into the Coaster and the impact of that collision pushed the Coaster into the Hiace, causing injuries to each claimant. The Corolla motor car is registered PE5918 and was owned and driven by Charlton Burton, the ancillary defendant in the ancillary claim brought by the first and second defendants.

THE DEFENCE

[6] The first and second defendants' defence was filed on the 8th of April 2015. The defendants agreed that there was a collision involving the three vehicles, but denied that there was a direct impact between the Toyota Coaster and the Toyota Hiace. It was admitted that the second defendant Mr Leroy Thomas turned right to enter into the Cool Oasis gas station but denied that the manoeuvre involved any negligent conduct on the part of the second defendant.

[7] It was asserted that the second defendant indicated his intention to turn right, then he stopped and waited for the way to clear, and upon ascertaining that the way was clear, proceeded to turn right into the gas station. Further, that it was after he had finished turning right and had almost completed his entrance into the gas station compound, that there was an impact to the rear bumper of the motor vehicle he was driving.

[8] It was admitted that at the material time, the second defendant (who will be referred to by name or as the second defendant) was the servant and/ or agent of the first defendant and that the second defendant was acting within the scope of his duties and with the first defendant's permission. There is no question then, that if the second defendant is found liable for the accident, then the first defendant is also liable.

THE ANCILLARY CLAIM

[9] Pursuant to an order of Master P. Mason made on the 19th day of April 2017, the defendants were permitted to issue an ancillary claim against Mr Charlton Burton the driver of the Toyota Corolla motor car involved in the accident. The Ancillary Claim was filed on the 26th of May 2017.The defendants allege negligence on the part of the ancillary defendant and stated that any injury loss or damage suffered by the claimants was not due to any negligence on the part of the defendants, but was caused solely by or substantially contributed to by the ancillary defendant. The defendants therefore claimed an indemnity and /or contribution against the ancillary defendant.

[10] The defendants provided an affidavit of service showing that the ancillary defendant was served. The affidavit of one Claudine Silvera is to the effect that on or about the 16th of December 2017, she attended at the home of the ancillary defendant and personally served him with the claim form and the attendant documents. The ancillary defendant has not filed an acknowledgement of service nor a defence to the ancillary claim.

[11] The defendants filed a Notice of Application for court orders and an affidavit in support on the 5th of February 2020 seeking to have judgment by default entered against the ancillary defendant in their favour, on account of his failure to file an acknowledgement of service.

THE EVIDENCE REGARDING LIABILITY

The Claimants' Account

[12] Each of the three minor claimant stated in his/her witness statement that the 2nd defendant made a sudden right turn in an attempt to enter the gas station.

[13] The claimant Najeem McDonald in his initial witness statement asserted that he was a passenger in the Hiace motor vehicle. In his supplemental witness statement filed on the 12th of February 2020, Mr McDonald indicated that he had made an error in his original witness statement and that in fact, he was a passenger in the Toyota Corolla at the time of the collision. He also said in the supplemental statement that the second defendant made the turn when the Corolla was some 40 metres away and that the driver of the Corolla swerved right in an attempt to avoid the collision. He also stated that he could not recall hearing any loud screeching of tyres at the time of the accident and that the driver of the Corolla was travelling at a moderate speed.

[14] Mr McDonald when cross examined, acknowledged that although he had signed a statement saying that he was travelling in the Hiace bus, that statement was in fact incorrect because he lives in Hampstead and on the occasion of the accident, he was on his way to school at Iona High, travelling from Hampstead in a Hampstead taxi. According to him, the only collision he remembers is the one involving the taxi and the Hiace. He disagreed that the taxi hit the Hiace with great force and stated that the taxi was travelling at a moderate speed. It was suggested to Mr. McDonald that the driver of the Corolla was speeding and the corolla had gotten out of control. He disagreed that that was what transpired.

[15] Ms McKenzie insisted in cross-examination that the coaster turned suddenly on the vehicle in which she was travelling (the Hiace). When she was asked if at the time of the collision between the Corolla and the Coaster, there was enough space in the right lane for the Corolla to drive, she was unable to say, but she disagreed that the Coaster was not blocking off the right lane. She also stated that she could not remember hearing screeching of tyres just before that collision. She also could not recall if the Coaster had on a right indicator or if the Corolla was speeding and lost control.

[16] Unlike Miss McKenzie, Mr McDonald stated that he wouldn't agree that the majority of the Coaster was on the gas station compound when it was hit by the Corolla. When asked if he agreed that some of the Coaster was already on the gas station compound, he stated that the Coaster was about to enter the compound. When pressed, he stated that the face or the front of the Coaster was on the compound but the passenger door/door panel had not made it onto the compound. He disagreed that at the time the Corolla swerved, there was sufficient space for the Corolla to pass between the back of the Coaster and the Hiace.

[17] Mr McDonald also accepted that when coming from Port Maria, one cannot see all the way around the curve, presumably, the last curve that the Corolla negotiated before the accident. When cross-examined, Britney McKenzie stated that there was no collision between the coaster and the Hiace bus in which she was travelling. She was asked to point out where the collision that she saw took place. She did so on a photograph shown to her, and she indicated that she had pointed out the area where the collision between the Coaster and the Corolla took place. She later stated that she did not see the collision take place but that she heard it.

[18] Ms McKenzie having indicated that the collision was to the back of the coaster, it is reasonable to infer that the area she pointed out on the photograph as the point of impact was the location of the back of the bus at the time of the collision. This area was almost off the roadway. She stated that most of the bus was on the gas station compound at the time and that it was a small portion of it that was still on the roadway.

Curiously, despite her evidence in that regard, she disagreed with the suggestion that the Coaster had cleared the majority of the right lane at the time the Corolla collided into it. She also agreed that from where she was sitting, she could not see if it was the front of the Corolla that had hit the coaster but she agreed that it was the back bumper at the left side of the Coaster that was hit. She also agreed that the car that hit the coaster was coming from the opposite direction. She also stated that she could not tell whether the car that hit the Coaster was coming fast.

The Defendants' Account

[19] The witness statement of the second defendant, Mr Leroy Thomas was filed on the 7th of October 2019. He stated that he is employed to the 1st defendant and he is the driver of a 19 seater coaster bus. He explained that using the 'flip down seats', the bus could carry 26 passengers. He stated that the bus is some 20 ft. long and some 7-8 ft. wide. He said that on the day in question, he drove from the Port Maria HEART Academy with a view to getting gas at the Cool Oasis gas station in Trinity. He said it was raining at the time and so the road was wet. He was alone in the bus. He explained that the area of the road way where the incident occurred, had two lanes for traffic, each going in opposite direction and the roadway is about 24 ft. wide.

[20] His account of the incident was that the gas station was to his right so he put on his right indicator, 'middled' the road and stopped. He stated that he had to stop because traffic was coming down from the opposite direction. He said that because the road is narrow, other vehicles behind him stopped and were waiting. A Toyota Hiace bus was immediately behind him while he was waiting to make the turn. He stated that he could see up to the bend in the road. He estimated the distance from the gas station to the bend as being between one chain and half of a chain.

[21] According to him, he waited for a couple of minutes until the road was clear before he made the turn. He asserted that when he made the turn, the road was clear, no vehicles were coming from the opposite direction. He said the surface of the

entrance into the gas station was bad so he was going into the gas station slowly. He stated that most of the Coaster was in the gas station compound, when he heard the loud screeching of tyres as if someone was trying to stop. He then felt an impact to the back of the bus to the left side. He said he continued into the gas station then he stopped. When he was in the process of doing so, he heard a second impact behind him.

[22] His account was that when he exited the bus, he observed that a car had hit into the front of the Hiace bus that was behind him when he was waiting to turn and that the Hiace bus was still in its correct lane facing the Highgate direction. He observed that it was a white Toyota Corolla motor car that had hit into the front of the Toyota Hiace. He noticed that the Hiace was slanted across the road with the back in the right lane facing Highgate direction. He further stated that the front right door and the corner at the front of the Hiace were damaged. He said he looked at his bus and noticed that the back bumper was torn off and hanging down. It was still partly attached to the bus on the right. He noted that there were children in the Hiace bus and they were screaming at the time. He stated that he knew the driver of Hiace before the incident and that he is now deceased.

[23] In cross examination, the Second defendant stated that when he started to turn, there were no vehicles in the roadway coming from the opposite direction and there were none in the same lane in front of him. He stated that he had no idea of how many vehicles had passed.

[24] He also stated that he was unable to say if the distance between where he had turned and an area marked on a photograph that was exhibited (the beginning of the corner beyond which point, the driver of the coaster would not have had a view of traffic coming from the direction from which the Toyota was travelling) was approximately 200 metres. Strangely, the second defendant stated that based on where he had stopped, he did not have a view of the area indicated to him.

[25] During cross examination, the second defendant was asked to indicate where in the road he is saying that he had stopped before turning. He identified the area by pointing it out on a photograph and described the area as the middle of the road. However, the position is more accurately described as being in the middle of his left lane. Asked to indicate where the collision took place, he indicated a spot that is consistent with the evidence of Ms Britney McKenzie. Asked to indicate the length of time he had waited after stopping before turning, Mr Thomas said that it was about five seconds. This evidence is inconsistent with his evidence that he had waited a couple of minutes before the road was clear. It is to be noted that his view of the meaning of the words ‘couple minutes’ is about four minutes, but he also stated that it could be more or it could be less.

[26] He also accepted that the appearance of the general area remained the same as seen in the photograph as at the time of the occurrence of the accident. He later qualified that statement by saying that the nature of the road surface had changed since then in that the surface as seen in the photograph was smooth, whereas at the time of the accident the surface of the roadway was bad. He said that the roadway has since been paved but he agreed that at the time of the incident a vehicle would not have to descend in order to get into the gas station premises. The defendant also agreed that at no point before the impact did he see the Corolla. When asked if he would agree that since he had not seen the Corolla before the impact, he was not then in a position to say that the Corolla was speeding, he stated that he concluded that it was speeding because of the tyre squeaking that he heard and that there was a terrible drag mark on the road. He agreed that there was nothing blocking his view of the gas station on the day in question.

[27] He stated that he did not know what portion of his bus was still on the roadway when the collision took place. He was asked to give an estimate of the space that remained between the tail of his bus and the middle of the road. He stated that it was a car length.

THE LAW

[28] We are here concerned with a claim in negligence. In **Blyth v Birmingham Waterworks** [1856] 156 ER 104, Alderson B. defined negligence as;

> *"The omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."*

[29] It is the Claimant who has the onus of satisfying the court on a balance of probabilities that the necessary elements of negligence have been established. The Claimant must prove

(a) The existence of a duty of care owed to the Claimant bt the Defendant;

(b) Breach of that duty of care;

(c) That damage which is not too remote resulted from that breach.

[30] As it relates to the duty of care, in **Caparo Industries plc v Dickman** [1990] 1 ALL ER 568, the principle was stated as follows:

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."*

The Duty of Care

[31] It is trite law that all users of the road owe a duty of care to other users of the road. A driver is required to exercise reasonable care in order to avoid injury or damage to other road users. Reasonable care as it relates to driving is the care which an

ordinary skilful driver would exercise in the circumstances. Such care of course includes, keeping a proper look out and observing all the rules of the road.

Breach of Duty

[32] All road users owe a duty of care to fellow road users and will be held to be liable in negligence if breach of that duty causes damage.

[33] In **Foskett v Mistry** (1984) R.T.R. 1C. A 660, it was stated that all drivers have a duty to keep a good lookout and a driver who fails to notice in a timely way that the actions of another person have created a potential danger is quite likely to be found negligent.

[34] The starting point in determining whether there is a breach of duty in the context of road users is the law regulating the use of roads which is the Road Traffic Act. Sections 51(1), 51(2), 57 and 95 of The Road Traffic Act are relevant. Section 51(1) provides as follows:

> (1) The driver of a motor vehicle shall observe the following rules – a motor vehicle
>
> (a)…
>
> (b)…
>
> (c)…
>
> (d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;
>
> (e)…

(f) proceeding from a place which is not a road into a road or from a road into a place which is not a road, shall not be driven so as to obstruct any traffic on the road.

[35] Section (51(2) states:

> *Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action so as may be necessary to avoid a collision, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.*

[36] Section 57(1) states:

> *The driver of a motor vehicle constructed to be steered on the right or offside thereof, shall, before commencing to turn to, or change direction towards the right, give the appropriate signal so as to indicate that direction.*

[37] By virtue of the provisions of section 95(3) of the Road Traffic Act, failure to observe the rules of the road is only evidence, whether in criminal or civil proceedings in establishing liability. In other words, a breach of the provisions of the Road Traffic Act is not conclusive proof that one is without more, liable.

ANALYSIS REGARDING LIABILITY

[38] Based on evidence put forward during the course of the trial, it became readily apparent that there was no direct impact between the Coaster and the Hiace. I accept that what in fact transpired was that the Corolla collided into the Coaster and the impact of that collision caused the Corolla to then collide into the Hiace.

[39] Secondly, I accept that the claimant Najeem McDonald was in fact a passenger in the Toyota Corolla motor car, and not in the Hiace bus as was the implication from the pleadings and as was stated in Mr Mc Donald's first witness statement. I have come

to this position partly because I accept that at the time of the incident, Mr McDonald was a student living in Hampstead and was on his way to school at Iona High School. Based on the location of Hampstead in relation to his school, he would have been travelling in the opposite direction to that in which the Hiace was travelling.

[40] Britney's evidence as well as that of Mr Leroy Thomas is to the effect that the collision between the Coaster and the Corolla took place close to the edge of the right lane that is, at the entrance to the gas station.

[41] There was no effective challenge to the defendants' position that it was the rear of the Coaster that the Corolla collided with. The defendants' position is that given this evidence, coupled with the unchallenged evidence that the road was 24 feet wide, it means that there was sufficient space for the Corolla to have passed between the back of the coaster and the Hiace without impacting the Coaster.

[42] It is true that Ms McKenzie said that she saw when the Coaster made the sudden turn across the road. I will return to that point momentarily. Having said that she did not see when the collision took place, she is hardly in a position to give credible and reliable evidence as to the point of impact. She could only have pointed out where the respective vehicles were when she looked and saw them after the collision. In any event, when asked if after the two impacts, she didn't observe the position of the car or the coaster, she said no.

[43] She had also said that from where she was sitting, she couldn't see if it was the front of the car that hit the back of the Coaster. Her evidence was that she heard the first collision and felt the impact from the second. Her evidence that she saw none of the collisions must be accepted over the implication from her initial response that she saw where the collision took place. Therefore, the fact that she pointed to an area almost off the roadway as being the point of collision between the Corolla and the Coaster cannot be regarded as cogent evidence on that issue such that this court can come to any decision in reliance on her evidence on the matter. It must be borne in mind that the second defendant had stated that he did not stop immediately but drove

further onto the gas station compound before he stopped. Ms McKenzie's evidence on the point is confusing at best.

[44] Although in his witness statement Mr Thomas said that most of the bus was off the road when the impact took place, in cross examination he was not so clear on this point. He was asked if he would agree that about 12 feet of his bus would have been on the roadway at the time of the collision. His response was that he had no idea. He was asked whether it could be about 10 ft. His response was that he didn't want to say the wrong 'amount' but he knows it was only a small part. He was pressed on the matter and asked to estimate the portion of the bus that was still on the roadway but insisted he had no idea. This is someone who was able to give the length of his bus as well as the width of the roadway. In light of how that aspect of the evidence unfolded, I reject the suggestion that there must have been sufficient space for the Corolla to pass between the Coaster and the Hiace. Even if the greater portion of the Coaster was off the roadway, it is to be remembered that the evidence in cross examination from Mr Thomas is that the Coaster was either 20 or 28 feet long. Clearly both measurements could not be correct.

[45] Assuming the road to be 24 feet wide as Mr Thomas said, and both lanes to be roughly the same width, if any portion greater than 5 or 6 feet of the Coaster remained on the roadway, the space remaining would not have been sufficient for a Corolla to pass between the back of the Coaster and the Hiace.

[46] It is difficult for me to accept that Britney in fact saw when the Coaster made the turn in light of her overall evidence. I shall examine Mr Thomas' evidence on the point.

[47] It is accepted that there was no effective challenge to Mr Thomas' evidence that he stopped before he made the right turn. I say this fully recognizing that Britney said that he turned suddenly. I am mindful that there is an absence from these proceedings of any of the other two drivers who were present at the time of the incident. Again, Mr Thomas' evidence must be critically examined. Regarding the length of time he had waited after stopping before turning, it is accepted that he was giving an estimate of the

time, there is no expectation that he should be precise but surely there is a big difference between minutes and seconds when estimating time in the context of a driving manoeuvre. He stated that when he started to turn there were no vehicles in the roadway coming from the opposite direction and there were none in the same lane in front of him. He stated that he had no idea of how many vehicles had passed.

[48] He also stated that he was unable to say if the distance between where he had turned and an area marked (the beginning of the corner beyond which point, the driver of the coaster would not have had a view of traffic coming from the direction from which the Toyota was travelling) was approximately 200 metres. Strangely, the second defendant stated that based on where he had stopped, he did not have a view of the area indicated to him. Being as familiar as I am with that area of the roadway and especially having regard to the fact that even from the photographs tendered in evidence, it would have been evident that unless there was some obstruction in the roadway itself, Mr Thomas would have had a clear view from his position right up to the area which was being pointed out too him. His evidence was that there was no obstruction on the roadway. He was asked this question “Would you have been able to see that area at any point in time while you were turning. His response was “if I looked up.” The question which followed was “so you didn’t look up?” His response was “no because it was clear so I proceeded to go across.”

[49] Based on the first defendant’s evidence, the general lay out of the roadway had not changed compared to how it appeared in the photographs. The photographs admitted in evidence reveals that there was a clear view from the point where the second defendant indicated that he had turned into the gas station to the point indicated on the photograph (the beginning of the corner). Even if the driver of the Toyota was travelling at very high speed, he could not have travelled from a point beyond the corner, or indeed the entire distance covering the area over which there is a clear view between the corner and the point of impact in order to hit the Coaster before it turned. The Corolla must already have cleared the corner at the point in time when the Coaster was turning into the gas station in order for it to have hit the Coaster.

[50] What is more probable than not is, as the second defendant perhaps inadvertently admitted, he did not look up and so would not have seen the Corolla approaching. It is difficult to understand the rest of his response which is that he did not look up because it was clear. A reasonable and prudent driver would have ensured that the way was clear before he made the right turn across a main road. He failed to take the necessary precaution. There was very clearly to my mind, negligence on the part of the second defendant. I unequivocally reject any evidence, suggestion or submission to the effect that the Coaster proceeded to turn before the Corolla had come around the corner.

[51] There can be no question of any negligence on the part of the driver of the Hiace bus. The question which remains to be resolved is whether there was any negligence on the part of the driver of the Toyota Corolla.

THE ANCILLARY CLAIM

[52] Mr Thomas's evidence is that the Corolla was speeding. His basis for saying so is that he heard tyres squeaking. He also began to explain that there was a drag mark on the road and that examiners were conducting a spot check but was not allowed by counsel to complete the point. He agreed that he had not seen the Corolla before the impact. There was no evidence as to where the drag mark was seen. Further, the fact that there is a squeaking sound when brake is applied, does not necessarily mean that one would have had to be speeding when the brake was applied. There is also the likelihood that squeaking may be caused from defective brakes or a sudden application of the brakes, possibly with force. If his brakes suddenly became defective, the onus would be on the driver of the Corolla to establish that fact by way of evidence. If one's brake is defective and one nevertheless decides to drive with that defective brake, then there would be negligence on his part. There is no basis on which this court could come to a conclusion that his brake was defective. I have made that observation regarding defective brakes simply to rule out any such factor as a plausible explanation

for the failure of the Corolla to stop. There remains the likelihood that the brake was suddenly applied with force.

[53] It was clearly the case that Mr Thomas set in motion the set of circumstances which led to the accident. He turned and created an obstruction in the path of the Corolla. The driver of the Corolla however had a duty to "look out for traffic which is or may be expected to be on the road, whether in front of him, behind him or alongside him, especially at crossroads, junctions or bends". While the incident did not occur where any of these features intersect the main road, a gas station is certainly a premises into which it is expected that vehicular traffic might turn.

[54] In all the circumstances, the evidence suggests that the driver of the Corolla was more probable than not, driving at a higher rate of speed than he should have been travelling in what was clearly a 50 kilometre per hour zone. It was the back of the Coaster that was hit. As indicated before, the Corolla would very clearly have passed the corner in question at the time the Coaster commenced crossing the road. The driver would therefore have had a clear view of the Coaster after he passed the corner. There is no evidence in relation to the distance the Corolla was from the Coaster when the driver of the Corolla would have first observed the Coaster crossing the road.

[55] There is no evidence contradicting Mr Thomas' evidence that he was travelling slowly going in the gas station because the surface of the entrance was bad. Mr Thomas did however accept that he did not have to go 'down' to get into the gas station but he maintained that there were potholes in the area entering the gas station and that he was driving slowly.

[56] The fact that it was the back of the Coaster that was hit is an indication to my mind that there was an opportunity for the driver of the Corolla to bring his motor vehicle to a stop before it impacted the Coaster, if he was travelling at a speed which permitted him to do so. I am mindful that allowance must be made for reaction time after sighting of a potential obstruction. I will state the obvious which is that the slower the speed at which one is travelling, the easier it is to stop.

[57] In coming to the position that the driver of the Corolla is in part to be blamed, a combination of four factors support that view. Firstly, the undisputed evidence of the damage being to the rear section of the Coaster, secondly, that there is no credible evidence to contradict Mr Thomas' evidence that most of the Coaster was off the road when it was hit and thirdly, there is an absence of evidence contradicting his account that he was driving slowly to get into the gas station compound. Lastly, the Coaster is a relatively long vehicle. In regard to the third and fourth points, in the absence of evidence to the contrary, I find that the time that it took to clear the greater portion of the Coaster out of the driving path of the Corolla would have allowed for sufficient opportunity for the Corolla to come to a stop. This is against the background that the accident happened in what was clearly a built up area, thus making the maximum permissible speed in that area 50 kilometres per hour.

[58] The onus was on the driver of the Corolla to put forward a defence. He has failed to do so. I say this fully alert to Mr Mc Donald's evidence that much of the Coaster was still on the roadway at the time of the collision. This aspect of his evidence cannot however be reconciled with his evidence which also emanated from cross examination that he recalls only one collision which is that which took place between the corolla and the Hiace. If he is unable to recall the collision between the Corolla and the Coaster, how then can he speak to the position of the Coaster at the instant the collision between the Corolla and the Coaster took place? He cannot.

[59] At paragraphs 65 and 66 of her judgment in **Natalie Gray v Donald Pryce and Noel Newsome and Donald Pryce v Noel Newsome** [2015] JMSC Civ. 118, P. Williams J as she then was, stated that:

> *65. "In determining the apportionment of liability one instructive authority is that of Brown v Thompson [1968]2 All ER 708 as noted in Bingham's and Berryman's Motor Claim Cases, 10th edition paragraph 22. It was there held inter alia:*
>
> > *"… regard must be had not only to the causative potency of the acts or omissions of each of the parties, but to their relative blameworthiness (citing The Miraflores 1967 1 AC 826."*

> *66. I also bear in mind the point made by Lord Pearce in **Uden v Associated Portland Cement Manufacturing Ltd.** [1965] 2 All ER 213 at page 218. He reminded us that the question of apportioning blame "is one of fact, opinion and degree."*

[60] The extent of the blameworthiness of the driver of the Corolla is significantly less than that of the driver of the Coaster. I am of the view that the latter is 80% to blame for the accident.

DAMAGES

[61] Having determined that there is liability on the part of the defendants and ancillary defendant, the question of assessing damages is the next task at hand. I shall assess damages separately in relation to each claimant.

BRITNEY Mc KENZIE

Special Damages

[62] As the defendant's Attorney at Law pointed out, there was no evidence to prove a claim for special damages in relation to Ms McKenzie. The claimant indicated in her witness statement that $10,000 was spent for medical expenses. The onus is on the claimant to show that she incurred expenses. She is required to strictly prove her expenditure. **Lawford Murphy v Luther Mills** (1976) 14 JLR 119.It was practicable for her to have done so. She could easily have produced receipts evidencing such expenditure. She has not done so, therefore, there will be no special damages awarded to her.

General Damages

[63] In her witness statement, Britney McKenzie said that she was born on the 24th of January 2001 and that she was at the time of the incident a 12 years' old student attending Mary Mount High School. She stated that after the collision she was experiencing a lot of pain and noticed that her left leg was swollen. She also felt pain to her back and leg. She was taken to the Port Maria Hospital. She also stated that she was subsequently examined by Dr Milton Forbes at Newmill Medical Centre and that she incurred medical expenses of $10,000.00.

[64] In amplifying her evidence at the time of the trial, Ms McKenzie stated that to date, she still suffers from injuries received at the time of the accident in that she still experiences back pain when she stands for long periods of time and that that did not happen before the accident.

[65] A medical report from the Port Maria Hospital dated March 10, 2014 was tendered and admitted in evidence. The report indicates that Ms McKenzie was examined on the 20th of November 2013, the day of the accident. The findings of the doctor were that she had soft tissue injury over her left leg and that no other abnormalities were noted on physical examination on all systems of the body. The prognosis in part was that she would not have any future medical expenses in relation to injuries suffered in the accident.

[66] The claimant was examined by Dr Milton Forbes on the 21st of November, the day following the accident. Dr Forbes gave a medical report dated 20th of December 2013. This report indicates that on the 21st of November, the claimant complained of pain to her neck, back and left lower limb and that an examination of her musculoskeletal system revealed reduced mobility to the neck on flexion and extension. It was also stated that there was multiple blunt trauma to her back and that her range of movements were painful and reduced.

[67] The report also indicates that the claimant was reviewed on the 6th of December 2013, and that she then complained of severe back ache and severe cramp to left lower limb. She was again reviewed on the 15th of December 2013 when it was noted that the

back ache had decreased in intensity but was still felt occasionally, but that she still complained of pain in the left lower limb. Dr Forbes' opinion and prognosis was that Ms Mc Kenzie's illness had a protracted and recurrent course.

[68] Under the heading "assessment", the doctor noted the following injuries: nuchal spasm, lumbosacral muscle spasm generalized muscle contusion, generalized abrasions to left lower limb. It is not particularly clear whether this was the assessment made on the first visit or whether that position represents an assessment as at the date of the final visit. The doctor noted that no x-ray was done because the claimant lacked the financial means.

[69] There is a third medical report in respect of Ms McKenzie. She was examined for the first time on the 14th of June 2016 by Dr Denton Barnes. Dr Barnes indicated that at the time of the examination, Ms McKenzie reported pain to the neck, extending to the upper back with a pain score of 8 out of 10. He said that she was experiencing shooting pain down her legs and pain radiating to the thigh and there was also tingling and numbness to her legs. He stated that she also reported experiencing difficulties with activities such as bathing and dressing, sitting for long periods, standing for long periods, walking, climbing stairs and running and lifting heavy objects. She was also according to the report, experiencing disturbance to her sleep because of pain.

[70] Among Dr Barnes' findings at the time of examination, were that she was experiencing mild tenderness of the interscapula region, she had mild scoliosis of her thoracolumbar spine and tenderness of the left leg anteriorly to deep palpitation and hypersensitivity to touch. The claimant was assessed as having mild whiplash injury of the neck with muscle strain to the lumbar region. The doctor opined that the pain to the neck that the claimant was experiencing at the time of examination did not limit her level of activities.

[71] It is also Dr Barnes' opinion that based on the claimant's soft tissue injury to her leg with 'sharing'(sic) of the skin and soft tissue from the bone with residual hypersensitivity, she has suffered a 2% impairment of the right lower extremity which is

equivalent to 1% whole person impairment. The doctor also opined that the fact that the claimant has scoliosis has caused her to have baseline pain and that this pain has been aggravated by her injury.

[72] The defendants' Attorney at law submitted that the claimant can only prove that her injuries are a direct result of the accident by showing treatment for injuries at a time that is contemporaneous with the accident. Counsel also alluded to the fact that Dr Barnes' report speaks to the claimant's involvement in an accident which occurred on the 11th of November 2012. She is in essence asking that Dr Barnes' report be ignored.

[73] The defendants' Attorney at Law has asked the court to consider four cases to assist the court in assessing general damages for pain and suffering for Ms McKenzie. Two of those cases reflect awards made for whiplash injuries only and are therefore in my view, not particularly helpful. I make no further reference to those two cases.

[74] In **Lascelles Allen v. Ameco Caribbean Incorporated & Peter Perry** 2009 HCV 03883 (Unreported), the claimant was awarded the sum of $600,000.00 in January 2011 for whiplash injury, bruising and swelling to the right side of the body and occasional numbness to the left hand. That sum converted to $963, 647 in February 2020.

[75] In **Peter Marshall v Carlton Cole and Alvin Thorpe,** reported at page 109 of Khan volume 6, the claimant suffered moderate whiplash, a sprained swollen and tender wrist and left hand and moderate lower back pain and spasm. She was discharged after 16 weeks of medical care. She was awarded $350,000.00 in 2006. That sum updated to $945,140 in February 2020. Counsel submitted that based on the medical report from the hospital as well as that of Dr Forbes, an award of $600,000.00 is a reasonable sum.

[76] The claimants' Attorney at Law commended the cases of **Dalton Barrett v Poncianna Brown**, page 104 of Khans Volume 6 and **Bruce Walford v Garnett James Fullerton et al** Claim no. 2011 HCV 00705 as being of assistance to the court in considering an appropriate award for Ms Mc Kenzie.

[77] In **Dalton Barrett,** the claimant experienced tenderness around the eye and face, tenderness in the lumbar spine, tenderness to the left hand, pain to the lower back, left shoulder and left wrist and contusion to lip, lower back and left wrist. He experienced continued pain in his lower back which prevented him from driving. He was diagnosed with mechanical back pains and mild cervical strain but no permanent disability. He was awarded $750,000.00 for pain and suffering and loss of amenities. That sum updated to $2,014,307 in January 2020.

[78] **In Bruce Walford,** the doctor's report stated that the claimant suffered lower back pain with abrasions to his gluteal region. The claimant's evidence was that he felt serious pain to the neck, lower back and bottom, consequent on the accident and that he was unable to do basic household chores for a period of time. Bending was quite painful for him. He was unable to work for four weeks. Damages was assessed in December 2012. He was awarded the sum of 700,000.00 for pain and suffering. That sum updated to 972,727 in January 2020.

[79] Counsel for the claimant submitted that the sum of $2,400,000 represents a reasonable award.

Analysis

[80] There is no issue that all the persons who medically examined Ms McKenzie are qualified medical practitioners. The credentials of each was outlined in the respective medical report. This court is of the view that if the defendants took the view that Dr Barnes' report should be ignored, then objection should have been taken to the admission of the report. Such objection would have alerted the claimant to the challenge to the contents of the report. The claimant gave adequate notice of the intention to tender the reports in evidence. Not only was there no objection filed, but the documents were put in evidence by agreement. The claimant was effectively deprived of the opportunity to address the matter.

[81] In the case of **Cherry Dixon- Hall v Jamaica Grande Limited,** SCCA No. 26/2007, Harrison JA (as he then was) cited the case of **Harrison v Liverpool Corporation** [1943] 2 All ER where Lord Greene MR explained at page 450 of the judgment that:

> *"… the phrase "agreed medical report" means and means only, a report where the facts stated are agreed as true medical facts, or other facts as the case may be, and the medical opinions expressed are accepted as correct."*

[82] Harrison JA also alluded to the dictum of Omerod LJ in **Eachus v Leonard** [1963] Solicitor's JournalVol.106 Part 2, page 918 where he stated that:

> *"The effect of agreeing medical evidence was to avoid the necessity of calling doctors at the trial and of discussing medical matters which might be controversial. The reports were evidence of the plaintiff's symptoms and condition at the time they were made, but prognosis in a report either had to be specially agreed as an agreed fact or else it was no more than an intelligent estimate by experienced doctors of a plaintiff's future condition. The prognosis in this case fell into the latter category, and in such circumstances, a judge had to form a conclusion on the basis of all available evidence, including that of the injured plaintiff…."*

[83] The above statements of the law do not of course mean that the judge must not carefully scrutinize a medical certificate to which there has been no objections, and consider the contents in conjunction with all the evidence presented, and thereafter make a determination whether any or all of its contents should be rejected. Having scrutinized the report, I recognize the discrepancy between the evidence and certain aspects of the report regarding the date of Dr. Barnes' examination. There was no attempt on the part of the claimant to clarify the anomaly regarding the date referred to in Dr Barnes' report.

[84] I note however that in the report from Dr Milton Forbes, it was indicated that Ms McKenzie had no significant past medical history. That position must have been arrived at based on what was related to the doctor as well as based on his own examination of her. Dr Forbes made that observation on the occasion he first examined the claimant in 2013. Surely, if Ms McKenzie had been involved in an accident in 2012, there would have had to be some reference to that incident by Dr Forbes. I find on a balance of

probabilities that the reference by Dr Barnes to an accident in 2012 was a careless error on his part. I also find that there was a failure to be sufficiently meticulous on the part of the claimant's Attorney at law and that failure resulted in the matter not being addressed at any stage, whether before or after the trial began. This discrepancy does not establish sufficient basis on which to reject the contents of the report.

[85] I also disagree with the defendant's position that any report produced in relation to an injured person's status post - accident must be a contemporaneous report. Undoubtedly, there is need for a contemporaneous report. However, I am of the view that it is good practice that a medical report reflecting the status of a claimant's injury as close as possible to the trial date should also be produced, particularly where the claimant purports to be still suffering from injuries allegedly received at the time of the incident giving rise to the claim. A court is usually greatly assisted by such a report in assessing damages for pain and suffering and loss of amenities.

[86] There is no inherent inconsistency between the findings of Dr Forbes and Dr Barnes. However, I fully recognize that the doctor at the hospital was of the view that the claimant would not have any future medical expense as a result of the accident. I consider that such opinion was more probable than not, premature. As early as the day following the incident, the claimant complained of injuries other than the soft tissue injury to her left leg which admittedly, was the only injury observed by the doctor at the Port Maria Hospital on the day of the incident.

[87] I would be hesitant to accept such opinion over and above the findings of a doctor who examined the claimant the very next day and made findings that would indicate that there were other injuries. Those injuries might not have been detected at the time of the initial examination. It is not unknown that that certain injuries that are not obvious to the eyes may not necessarily manifest themselves immediately after an accident. I am mindful of course that given the nature of the injuries complained of on the day after the accident, the doctors' findings would in some measure be dependent on what the claimant reported to him. I have no reason to believe that the claimant's complaint to the doctor was false or misleading.

[88] Having considered Dr Barnes' report in conjunction with the rest of the evidence, I find no basis on which to reject it. On a balance of probabilities, I accept that the claimant was affected as she reported to Dr Forbes on the day following the incident.

[89] The first matter to note is that the scoliosis referred to is clearly not attributable to the accident. However, the principle that a negligent tortfeasor should take his victim as he finds him is applicable.

[90] The claimant's injuries most nearly resemble those that the claimant in **Bruce Walford** stated that he received**.** It is noted that the award in that case was relatively low. It is also observed however that there was some difference between the claimant's evidence as to his injuries and the findings of the doctor in that regard. The Learned judge in assessing damages, must have had regard to the doctor's findings. I believe that the sum of $2,000,000.00 represents a reasonable award for pain and suffering and loss of amenities.

NAJEEM MCDONALD

Special Damages

[91] Mr McDonald said that medical cost of $90,000.00 was incurred on his behalf and that $10,000.00 was incurred in transportation expenses. One receipt was tendered and admitted in evidence in relation to expenses incurred in respect of Mr McDonald. That receipt is however in the sum of $95,000.00. The defendants' attorney at law is of the view that he ought not to recover that sum. I disagree. In circumstances where there were no objections to the receipt, it is taken that no issue arose in relation to it. It would be unreasonable for the court to entertain what in essence are objections taken for the first time through the medium of written submissions. The claimant, by virtue of the defendants' agreeing to certain items of evidence would have been led to assume that the aspects of the claim relating to documents agreed were not in dispute. In the absence of some other cogent reason to deny the claimant this sum, he is to be

reimbursed the amount. . Regarding the expenditure of $10,000.00 for transportation expenses, there was a mere assertion in the witness statement without more. That sum will not be recovered.

General Damages

[92] In his witness statement, this claimant gave his date of birth as the 26th of August 1999. He stated that he was a 13 years' old grade 8 student at Iona High School at the relevant time. He said that after the accident, he began feeling pain and that he was taken to the Port Maria Hospital. At the hospital, he was examined by Dr Hayden-Peart. He stated that he felt the pain mostly to his head and his right hand. He said he was given an injection, x-rayed and his right hand was fitted with a cast. He stated that he was later examined by Dr Ameeraly. The claimant said that he was a member of his class football team and he was unable to play football for approximately three weeks after the accident.

[93] Two medical reports were submitted in respect of Mr Mc Donald. One came from the Port Maria Hospital and a second from Dr Ameeraly. The report from the hospital indicated that the claimant sustained swelling and bruising to his right wrist and his wrist had to be placed in a splint. An x-ray revealed that his right distal radius was fractured. He also complained of pain to his forehead.

[94] Dr Andrew Ameerally, a Consultant Orthopaedic Surgeon, examined the claimant on the 5th of February 2015. He reported that he reviewed the medical certificate issued from the Port Maria Hospital and he said that at the time of his examination, there was no swelling to the wrist, there was full range of motion, and the claimant had good grip strength. (V/V). The doctor further stated that the claimant continued to suffer from pain to his right wrist. He opined that the claimant was not adequately treated for his injury and had therefore not achieved maximum medical improvement and noted that the claimant would benefit from further treatment. The

doctor also observed that a permanent partial disability rating could not be ascribed because of the need for further treatment.

[95] The case of **Leroy Robinson v. James Bonfield & Anor,** reported at page 99 of Khan Volume 4 was commended to the court by both sides as a useful guide in deciding a reasonable award for damages for pain and suffering. He was awarded the sum of $269,438 in September 1996. In February 2020, that sum updated to $1,763,748.00. .

[96] That claimant according to the defendants' Attorney at Law, suffered similar but more severe injuries than Mr McDonald. It was submitted by the defendant's Attorney that $1,500,000.00 represents a reasonable award.

[97] The claimant's Attorney at Law also directed the court's attention to the case of **Samuel Durrant v United Estates** Suit No. Cl. 1986/D216 reported at page 259 of Harrison's Personal Injuries. The claimant in that case suffered injuries to both wrists. The award at first instance was $45,000.00 in June of 1991. On appeal, that sum was increased to reflect the fact that both arms had been injured. The claimant is accordingly guided by that factor and is relying on the award of $45,000.00 as a guide to calculating the present claimant's entitlement. That figured updated to $1,390,011 in January 2020. It was submitted that an award of $1,750,659.83 is a reasonable sum.

Analysis

[98] In light of the authorities presented, and given the fact that the claimant in the present case also complained of pain to the forehead, an award of $1,750,000 will be made for general damages.

SHANTE DRICKETTS

Special Damages

[99] Exhibits 5 through 25 are receipts evidencing expenditure in relation to Shante Dricketts. Those sums amount to $69,219.40. The defendants' Attorney at Law submitted that the sums in relation to receipts from Great House Pharmacy and Ocho Rios Pharmacy, as well as the receipts from the physiotherapist should not be accepted because there is no indication as to what was purchased at the pharmacies, and there is no evidence to link Ms Dricketts' visits to the Physiotherapist with the accident. For the same reasons given in relation to Najeem McDonald, this claimant will recover the sums evidenced by the receipts as special damages.

General Damages

[100] In her witness statement, the claimant Shante Dricketts said that at the time of the accident, she resided in Harrison Town in St Ann and was on her way to school. She also stated that as a result of the accident, she began to bleed from her upper lips and she experienced severe pain to her neck, back and chest. She was taken to the Port Maria Hospital where she was examined by Dr Maurice Sloley and was given an injection and a prescription. She said she was later examined by Dr Rushauy Watson of Mr Rehab Physical Therapy Complex and Rehabilitative Supplies. She stated that she incurred medical expenses of $68,213.40 for physical therapy treatments, radiology scans, medications and medical reports.

[101] A medical certificate from the Port Maria Hospital was tendered and admitted in evidence. It was therein revealed that Ms Dricketts received a whiplash injury and experienced musculoskeletal pain. She attended at the hospital on the day of the incident. It was indicated in the report that her prognosis was good.

[102] There was no other report from a medical doctor in respect of this claimant. There is however, a report from a registered Physiotherapist, one Mr. Rushauy Watson (DPT, RPT). His qualification is indicated as BSc Physical Therapy (UWI). Mr Watson states in the report that he has worked at the Kingston Public Hospital and the University Hospital of the West Indies as a Physiotherapist but did not state for how long

he has been working in this capacity. He also said that he first assessed the claimant on the 6th of September 2014. On that occasion he said, the claimant complained of pain at her cervical, thoracic and lumbar spine, increased pain at her cervical spine at night, inability to lift objects secondary to increased pain at cervical and lumbar region and inability to function at school secondary to pain at cervical and lumbar region. According to the report, the claimant upon assessment was found to have pain at the cervical, thoracic and lumbar region with all ranges, muscle spasm at the upper trapezius muscle group and para spinal muscle group at the thoracic lumbar region, decreased active range of motion for all ranges at left shoulder secondary to pain and tenderness on palpitation at the upper trapezius muscle, with the pain to the left side being greater than to the right side.

[103] The claimant received seven sessions of treatment but did not return for treatment after March 2015. The prognosis was that the claimant was likely to continue to experience symptoms, especially when she participated in physical activities. He also opined that activities of daily living such as sitting and lifting objects could result in increased symptoms. These symptoms he said, should reduce gradually but that the claimant would need to partake in an exercise programme.

[104] The claimants' Attorney at Law cited a number of cases in support of the claim for damages. Among them is the case of **Christopher Russell and Shirley Russell v Patrick Martin and Sheldon Ferguson** Claim no. 2006 HCV 03322 at page 118 of Khans Volume 6. In that case, the claimant had neck pain, pain to the right wrist, tenderness of the trapezius muscle on lateral flexion and rotation of the neck and tenderness of the dorsal aspect of the right wrist. He received physiotherapy for intermittent neck pain. His PPD was determined at 5%of the whole person. He was awarded $1,655,805.17. That figure updated to $3,645,496.98 in January 2020.

[105] Wilford Williams v Nedzin Gill and Christine Forrest, Suit no. Cl 1999 W 169 cited at page 148 of Khans Volume 5 was also cited. The claimant suffered whiplash injury and was awarded the sum $350,000. In January 2020 that sum updated to $1,655,805.17.

[106] The case of **Peter Marshall v Carlton Cole and Alvin Thorpe** Claim no. 2006 HCV 1006 was also commended. In that case, the claimant suffered moderate whiplash, a sprained swollen and tender wrist and left hand with moderate lower back pain and spasm. The award was $350,000.00. That sum updated to $938, 126.25 in January 2020.

[107] The claimant's Attorney at Law submitted that $2,000,000 represents a reasonable award for pain and suffering and loss of amenities.

[108] The defendants' Attorney at Law commended the case of **Roger McCarthy v Peter Calloo** [2018] JMCA Civ 7 as a guide to damages for pain and suffering for Ms Dricketts. Counsel observed that in that case the court examined back injuries and whiplash cases and concluded that for a case involving moderate whiplash injury, an award of $500,000.00 is a reasonable sum. She observed that Shante was referred to the Physiotherapist by a Doctor David Lambert on the 1st of September 2014 and first seen on the 6th of September, and that physiotherapy was commenced some 10 months after the accident.

Analysis

[109] It is observed that there was no report from Dr David Lambert whom the Physiotherapist said referred the claimant to him. It is a well-known fact that an injury such as a whiplash is not likely to disappear suddenly and will often require the injured individual to undergo therapy. It is therefore not particularly strange that the claimant required therapy.

[110] Upon a perusal of the medical from the hospital, it was not stated that the musculoskeletal pain referred to was confined to the cervical area, as counsel for the defendant seem to suggest. Musculoskeletal pain may refer to pain in any area of the musculoskeletal system to include muscles, cartilage, joints and bones. The thoracic and lumbar spine are areas of the body that form part of the musculoskeletal system.

Therefore, the pain to her cervical, thoracic and lumbar spine which the Physiotherapist said the claimant complained about, is in keeping with the reference to musculoskeletal pain in the medical report. On a balance of probabilities, I accept Ms Dricketts' evidence that at the time of the accident, she experienced pain to her neck, back and chest.

[111] The defendants' submission as to her entitlement does not adequately reflect the injuries which were noted from inception. There is nothing inconsistent between her initial report of pain on the day of the accident and what she apparently told the Physiotherapist.

[112] Ms Dricketts admitted in cross examination that she had been afflicted by the chikungunya virus. Although by no means patently clear from the report, and although when asked, the claimant failed to recall when it was that she contracted the virus, the implication from the Physiotherapist's report is that the claimant would have contracted the virus sometime after she received the injury and probably between her visit prior to the 21st of March visit, and the 21st of March 2015.

[113] The claimant complained of experiencing pain subsequent to the accident but prior to contracting the virus, as well as after contracting the virus. Without medical evidence on the matter, one cannot say that absent the underlying injury, the claimant would not have suffered pain as a consequence of contracting the chikungunya virus. However, it is a fair conclusion that the virus aggravated her condition. I make this observation because it is stated in the Physiotherapist's report that "at her final session on the 21st of March 2015 [the claimant] had reported that due to prior illness, (chikungunya), she had increased pain at cervical and lumbar region. She however stated that she was doing much better prior to her episode of chikungunya".

[114] It is difficult to say to what extent her condition was aggravated. There is no question of the virus being an intervening cause so as to operate to eclipse the defendants' liability totally but any increased pain as a result of the virus is not compensatable. See **Jobling v Associated Dairies Ltd. [1982] AC 794.** Considering the injuries received by the claimants in the cases cited and the awards made, in all the

circumstances, I believe that a fair award for damages for pain and suffering and loss of amenities is $1,600,000.00.

TREVOR DAVIS

[115] The medical certificate in respect of Mr Davis from the Port Maria Hospital indicates that he had swelling to the left eyebrow and upper right eyelid. He was treated with analgesic and topical antibiotics. There is no other evidence regarding Mr Davis' injury except for that of the Administrator ad litem to the effect that she saw him in the hospital and he could barely open his eyes, and that he had swelling above one of his eyes.

[116] On behalf of this claimant, it was submitted that the case **of Melvin Smith, Carson James and Calbert Gordon v Deneice Brooks (An Infant by her next friend Karen Hyatt) and Karen Hyatt** should offer some guide to the court. In that case the minor sustained swelling to the face as well as minor cuts and bruises and was hospitalized for 5 days. She was awarded $200,000.00 for general damages. In January 2020 that sum updated to $1,079,935.41. The court is being asked to say that a similar amount should be awarded to the estate of Mr Davis.

[117] The defendant's Attorney at law submitted that the court should be guided by the decision of **Shaquille Forbes v Ralston Baker & Others** Claim no. 2006 HCV 02938 delivered March 10, 2011, although the injury was not necessarily on point. Counsel noted that the claimant suffered a 6 cm laceration to his forehead and experienced pain to the area. He was awarded $400,000.00. In February 2020 that sum updated to $638,248.00 It was submitted that this sum should be discounted on account of the fact that the claimant in the instant claim received no laceration.

Analysis

[118] It is my considered view that the sum awarded to the infant claimant in **Melvin Smith** would have reflected the fact that she had been hospitalized for 5 days whereas the claimant in the instant case was hospitalized for only a day. The evidence is that the infant claimant's swelling was quite severe. I believe a reasonable award for Mr Davis's injury would be $700,000.00

CONTRIBUTION

[119] The claimants are entitled to recover damages and costs against the first and second defendants jointly and or severally. Having found that the defendants are 80% to blame for the accident, the defendants are entitled to recover 20% of the damages and costs awarded against them in respect of each claimant from the ancillary defendant.

CONCLUSION

[120] In light of my findings, the first and second defendants are liable to the claimants. The ancillary defendant is partly to be blamed for the accident. Consequently, the first and second defendants are entitled to recover from the ancillary defendant, 20% of the damages and costs for which they are liable.

ORDERS

[121] Based on the foregoing, I make the following orders:

1. Judgment for the claimants against the first and second defendants jointly and/or severally.

2. Damages are assessed as follows:

Re Britney McKenzie

(a) No Special damages awarded.

(b) General damages in the sum of$2,000,000 with interest at the rate of 3% per annum from the 21st of July 2015 until judgment.

Re Najeem McDonald

(a) Special Damages in the sum of $95,000 with interest at the rate of 3% per annum from the 20th of November 2013 to the date of judgment.

(b) General damages in the sum of $1,750,000 with interest at the rate of 3%per annum from the 21st of July 2015 until judgment.

Re Shante Dricketts

(a) Special damages in the sum of $69,219.40 at the rate of 3% per annum from the 20th of November 2013 until judgment.

(b) General damages in the sum of $1,600,000 at the rate of 3% per annum from the 21st of July 2015 until judgment.

Re Estate of Trevor Davis

(a) No Special damages awarded.

(b) General damages in the sum of $700,000 with interest at the rate of 3%% per annum from the 21st of July 2015 until the date of judgment.

3. The first and second defendants is entitled to recover 20% of the damages and costs awarded against them from the ancillary defendant.

4. Costs of the proceedings to be paid to the claimants by the first and/or the second defendant and are to be taxed if not sooner agreed.