

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV2018/0535

BETWEEN:

GLENDA WILLIAMS

Claimant

and

**FRANCIS WILSON
AUGUSTE ETIENNE
JULIANA ETIENNE**

Defendants

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Lydia Faisal of Counsel for the Claimant

Ms. Cleopatra Mc Donald of Counsel for the Defendants

2020: February 6;
February 18,19; (written submissions)
September 4.

JUDGMENT

Background

- [1] **CENAC-PHULGENCE, J:** This claim is predicated upon a motor vehicle accident that occurred along the Castries/Gros Islet Highway (“the Highway”) on 9th November 2015 at approximately 6:20 p.m., when motor vehicle registration number PE2087 (“the vehicle”) driven by the first defendant Francis Wilson (“Mr. Wilson”) and owned by the second and third defendants Auguste Etienne (“Mr. Etienne”) and Juliana Etienne (“Mrs. Etienne”) respectively, collided with the claimant, Glenda Williams (“Ms. Williams”) as she proceeded to cross the Highway.

- [2] Ms. Williams alleges that the accident was caused by Mr. Wilson's negligence as a result of which she suffered injury, loss and damage. She alleges the following particulars of negligence against him: (a) driving too fast in the circumstances; (b) failing to pay sufficient attention to the nature and use of the road; (c) failing to pay attention to the fact that the road dissected a business and residential area and that both pedestrians and vehicles use the road throughout the day on a daily basis; (d) failing to swerve around her or to take any other evasive action; (e) failing to apply brakes in a timely manner or at all; and (f) failing to control the vehicle competently so as to avoid the collision. She therefore claims against the defendants, special damages, general damages, interest and costs.
- [3] She further claims that Mr. Wilson drove the vehicle as servant or agent of Mr. and Mrs. Etienne or was driving with their knowledge and consent and was a permitted driver under the insurance policy in respect of the vehicle.
- [4] The defendants deny negligence and allege that Ms. Williams crossed the Highway in a manner that was unsafe and thereby created a sudden danger, which Mr. Wilson could not have reasonably been expected to foresee or avert. The defendants therefore contend that the injury suffered by Ms. Williams was caused wholly, or in the alternative contributed to, by her own negligence. They allege the following particulars of negligence against her: (a) attempting to cross the Highway in circumstances when it was unsafe to do so; (b) failing to keep any or any proper lookout for oncoming traffic; (c) failing to heed or exercise due care and attention in crossing the Highway; (d) failing to wait until the Highway was clear in both directions before attempting to cross; (e) failing to keep well clear of oncoming traffic; (f) failing to wear high visibility clothing, alternatively wearing dark clothing such as was likely to diminish the ability of others to see her; (g) failing to see and/or heed the cast of the vehicle's headlights as Mr. Wilson approached her; (h) failing to hear and/or heed the sound of the vehicle's engine as he approached her; (i) crossing the highway in a reckless fashion such as was likely to result in injury; and (j) failing in the circumstances to take any or any adequate care for her own safety.

- [5] The defendants allege that Ms. Williams ought not to have crossed the Highway without first satisfying herself that all oncoming vehicles in both directions had stopped to permit her to cross. They contend, therefore, that she voluntarily or willingly accepted the risk of injury when she proceeded to cross the Highway in the manner she did. Taking into account the exigencies of the situation, they aver that Mr. Wilson took all reasonable care; and in the face of Ms. Williams' negligence, could not possibly have prevented the accident by the exercise of ordinary care, caution and skill.
- [6] Ms. Williams denies the allegations of negligence against her as well as the suggestion that she accepted the risk of injury by crossing the road as she did.

The Issues

- [7] Three issues arise for determination:
- 1) Whether Mr. Wilson, through any negligence on his part, caused the collision; or whether Ms. Williams, by any negligence on her part caused or contributed to the collision ("Liability").
 - 2) Whether Mr. and Mrs. Etienne are vicariously liable for any negligence found on the part of Mr. Wilson ("Vicarious Liability")?
 - 3) Whether Ms. Williams is entitled to damages and if so the quantum ("Damages")?

Issue 1: Liability

The Evidence

Ms. Williams

- [8] Ms. Williams' evidence is that on 9th November 2015 at 6:20 p.m., she was attempting to cross the Highway from the left side (facing Castries) to the right side in the vicinity of Bois D'Orange. She was waiting on the said left side for a chance to cross when a minibus driver, driving towards Castries, stopped and motioned to her to cross. She started crossing, and when she got to the center line of the road, stopped and awaited traffic flowing towards Gros Islet to ease so that she could complete crossing the Highway. Ms. Williams says she looked to her left, then to her right, and then to her left again before continuing. At the time she started to cross the latter half of the road, there was no vehicle in sight coming from the direction of Castries. She says she considered that she would

have sufficient time to cross the road because she could see approaching vehicles from the direction of Castries for a long distance and none were in sight. She proceeded; however just as she was almost finished crossing and only about 6 inches from the edge of the road (the left side facing Gros Islet), the vehicle collided with her, hitting her on the left side of her body. She says she fell onto the ground to the left of the road and not onto the road itself.

- [9] Ms. Williams says that at the time, she was wearing a long white blouse with light coloured stripes and a black skirt. The area where the accident occurred was well lit as bright streetlights were on at the time. She was accustomed to crossing the road in that area as she had done each day for more than two months in order to get her bus to go home from work. To her knowledge there was no pedestrian crossing anywhere near that area.

Mr. Wilson

- [10] Mr. Wilson's evidence is that at the material time he was driving northbound on the Castries/Gros Islet Highway. It was sunset and darkness had fallen. There was a light drizzle, the headlights of the vehicle were on, and traffic was heavy and slow moving towards Gros Islet at between 20 to 25 mph. Traffic in the southbound lane was also slow moving. Mr. Wilson says he was driving at 20 mph and careful to keep well behind the vehicle in front of him.
- [11] He says that as soon as he passed the Bois D'Orange bridge and upon approaching a garage around the bend, he suddenly saw a shadow fall across the windscreen. He did not know what it was and immediately jammed the brakes. Since he was driving at 20 mph, the vehicle came to an immediate and complete stop. He turned off the ignition and came out of the vehicle and saw a woman lying on the road in front of the point where he stopped. He noticed that she was wearing all dark clothing. He assisted her to the side of the road and awaited the arrival of the police. He gave his account of the accident to the officer, identified the point of impact and where Ms. Williams fell, and the officer took measurements. By his account, the distance between the left side of the road (facing Gros

Islet) and the point of impact measured 3 feet 7 inches, and the distance from the point of impact to the center line of the road measured 8 feet 10 inches.

- [12] In response to Ms. Williams' statement that she stopped at the median point of the Highway and waited for northbound traffic to permit her to cross, Mr. Wilson says that southbound traffic was moving slowly and just before the point of impact there were no signals of danger such as flashing lights or hazard lights from the oncoming traffic. He says he became aware of Ms. Williams' presence only at the moment of collision. Mr. Williams stated that Ms. Williams created a sudden danger to herself by crossing the Highway in a manner and at a moment when it was unsafe to do so. Her actions gave him no time or space to avoid the collision and there was nothing that he could have done. Thus, she caused the accident.

Police Constable 630 Lloyd Louisy ("PC Louisy")

- [13] PC Louisy is the investigating officer who was on duty on the evening of 9th November 2015 and attended the scene of the accident. He is the officer who took Mr. Wilson's and Ms. Williams' statements and took the measurements. PC Louisy clarified that the traffic accident report, which was not prepared by him but was prepared from the notes he recorded in his pocketbook, contained a discrepancy. The traffic accident report stated the measurement from the point of impact identified by Ms. Williams to the left side of the road as 6 feet, but the distance shown to, measured, and recorded by him in his pocketbook was 6 inches. He therefore confirmed that 6 feet was an error that ought to read 6 inches.

The Law

- [14] Articles 985 and 917A of the **Civil Code**¹, contain the relevant law on negligence. Article 985 provides that:

"985. Every person capable of discerning right from wrong is responsible for damage caused either by his or her act, imprudence, neglect or want of skill, and he or she is not relievable from obligations thus arising."

¹ Cap 4.01 of the Revised Laws of Saint Lucia.

- [15] Article 917A provides that the law of England for the time being relating to torts shall *mutatis mutandis* extend to Saint Lucia, and that article 985, *inter alia*, shall as far as practicable be construed accordingly.
- [16] Article 986, which the defendant suggests is applicable to this case, is according to the dicta of Sir Vincent Floissac CJ in the case **Northrock v Jardine**² inapplicable. In that case, Floissac CJ explained the distinction between liability for damage caused by a defendant's own acts, neglect or want of skill, which falls under article 985 of the Code and requires a plaintiff to prove fault; and liability for damage caused by the autonomous act of a person or thing within the care and control of a defendant, which falls under article 986. The latter he said creates a presumptive or defeasible liability on the part of a defendant and exempts a claimant from proving fault. This presumptive liability is rebutted by a defendant proving that he was unable to prevent the damage by any reasonable means. The vehicle which was being driven by Mr. Wilson is not an autonomous thing and the accident, to the extent of Mr. Wilson's liability if any, would have been caused by his own acts or neglect in how he manoeuvred the vehicle. Thus, article 985 applies and fault must be proven by Ms. Williams, in accordance with the English Law of negligence, which requires a claimant to prove that (i) the defendant owed a duty of care, (ii) the defendant breached that duty, and (iii) that the damage suffered was caused by the breach and was foreseeable.
- [17] It is well established that the duty and the standard of care applicable to drivers of vehicles on or near a highway is to drive with the skill and care of a reasonably competent and experienced driver.³ Thom J in **Semol May v Lancelot Stevenson**⁴ quoting from Rawlins J in the case of **Cheryl Edwards (Administrator of the Estate of Janique Lewis) v Ethel Mills**⁵ explained the duty in the following terms:

"Drivers of motor vehicles are under a duty to exercise due care on the road. They are expected *inter alia* to determine what other users of the road are doing. They are expected to manoeuvre their vehicles in order to prevent and avoid accidents... They must exercise due care and attention at all times. This might at

² (1992) 44 WIR 160 at 161-162, 165-167.

³ *Nettleship v Weston* [1971] 3 All ER 581.

⁴ Civil Claim No. 8 of 2005 (Saint Vincent and the Grenadines, delivered 3rd July 2006).

⁵ Claim No. ANUHCv1998/0168 (delivered 28th November 2002).

times require a driver to stop in order to have a proper look out so as to determine whether it is safe to proceed or to overtake another vehicle. It all depends upon the circumstances including the weather, visibility, the number of vehicles on the road, the presence of pedestrians and the state of the road."⁶

[18] Thus, I accept that drivers have a particular duty of care to look out for and avoid pedestrians. It is also accepted that pedestrians, as road users, have a duty to exercise due care when using the road.

[19] The case of **Rodney Williams v Rohand De Roche**⁷ shares some similarities to the instant case. In that case, the claimant alleged that as he was about to cross the road and after looking to see that it was clear to cross, stepped out and the defendant's motor car went over his left foot. He claimed that his resulting injury was the result of the defendant's negligence. The defendant denied that the accident was due to his negligence and alleged that the accident was due to the claimant's negligence in that: (a) the claimant attempted to run across the road when it was unsafe to do so and did not look to ensure that there was no traffic on the road; and (b) he had little time to adjust mentally and to avoid striking the claimant who in effect ran directly into his vehicle.

[20] Thom J adopted the principle stated in the **Cheryl Edwards** case that drivers of motor vehicles have a duty to take care when driving on the public road. They have a duty to be on the look-out for pedestrians using the road. She held that if it was correct that the defendant was driving at a slow pace with his foot on the brake and he had seen the claimant when he exited the bus, then he would have been able to avoid the accident. She emphasized, that it was not a situation where the claimant suddenly appeared from in front of the van and the defendant had not seen him. She also held that the claimant misjudged the speed at which the defendant's motor vehicle was approaching and attempted to cross the road. She noted that there is no pedestrian crossing in that area which is very busy and that a pedestrian is required to take due care before crossing the road. The defendant was negligent in that he did not keep a proper lookout. He was approaching an area that was very busy particularly during the period between 4-5 p.m.,

⁶ May v Stevenson, at paragraph 17.

⁷ Claim No.: SVGHCV2008/111.

and the accident occurred by a bus stop. In the circumstances, she found that both the claimant and the defendant were negligent and apportioned liability 50/50.

Analysis

- [21] On the evidence presented, I accept that the traffic was heavy in both directions on the Highway, as stated by Mr. Wilson and corroborated by both Ms. Williams in cross examination and PC Louisy in his Police Witness Statement dated 14th November 2016. Traffic would therefore have been moving slowly. I also accept that Mr. Wilson was driving at approximately 20 mph which remains unchallenged. In those circumstances, I find that, if Ms. Williams had stopped at the center line and looked up and down the road as she says she did, she would have seen the vehicle approaching. I so conclude as, using the point of impact identified by her, PC Louisy measured the viewing distance to vehicles travelling from Castries as 147 feet 9 inches. Indeed, Ms. Williams emphasized that she could see a long distance towards Castries. When asked what she meant by this in cross examination, she admitted that *"they were very far and I could see lights coming."*
- [22] Thus, keeping the look-out she says she did, and given the distance over which she would have been able to see and that traffic was heavy and slow moving, the vehicle must have been in her view at the time she proceeded to cross the latter half of the road. As she admitted to seeing the lights coming, I find that that she saw the vehicle approaching but thought that she would have had enough time to complete crossing the road before the vehicle reached her. She therefore misjudged the distance and the amount of time it would have taken the vehicle to reach her or for her to cross the road and must bear some responsibility for the accident.
- [23] Further, I must take into account that Ms. Williams chose to cross the Highway just after a bend in the road, which would affect the visibility of any driver. She was also crossing the road at a point where there was no pedestrian crossing, and albeit that there was none in the vicinity, it was incumbent on her to ensure that she exercised due care to ensure that it was safe before doing so. After all, Ms. Williams admitted in cross examination that it

would have been safer to wait until traffic had stopped in both directions to permit her to cross the Highway before proceeding to do so. I therefore find Ms. Williams contributorily negligent.

[24] I accept that at the time of the accident, it was already dark, although I also accept that the road was well lit by streetlights. No doubt this would have affected Mr. Wilson's visibility to some degree. However, I find that Ms. Williams was wearing a white blouse as shown in the picture taken shortly after the accident and exhibited to her witness statement. Therefore, there was no issue of Ms. Williams wearing dark coloured clothes which would have affected her visibility, as alleged.

[25] Mr. Wilson must also bear responsibility for the accident, because if he was paying proper attention, he ought to have seen Ms. Williams earlier than he did, given that she had crossed the majority of the left side of the road (facing Gros Islet) when the collision occurred. I so conclude even though I accept his evidence that she was 3 feet 7 inches away from the edge of the road, in preference to her evidence of 6 inches, which is highly improbable. I also accept that the traffic in the opposite direction (towards Castries) was heavy and as Mr. Wilson explained in cross examination, Ms. Williams came out from the traffic. This means that his visibility would likely have been affected by vehicles travelling towards Castries. Nonetheless, I find that Mr. Wilson would have been able to see her, at least from the point in time that she moved off from the center line of the road. This was a distance of 8 feet 10 inches from the point of impact identified by him. In the circumstances, I cannot accept as submitted by counsel for Mr. Wilson, Ms. Cleopatra McDonald ("Ms. McDonald") that Ms. Williams walked out suddenly in front the vehicle and created a sudden danger, which was unavoidable. The instant case is therefore distinguishable from the cases of **Brophy v Shaw**⁸ and **Barlow v Entwistle**⁹ cited by her, where the respective plaintiffs darted into the road.

⁸ (1965) Times, 25 June.

⁹ [2000] Lexis Citation 1676 (15th May 2000).

[26] Although, I accept that the accident occurred just after a bend in the road and that his visibility may have been affected by this factor and also by the oncoming traffic and the relative darkness of evening, had Mr. Wilson been paying proper attention and keeping a proper lookout, he should have seen Ms. Williams before the point of impact, given that he was driving at 20 mph and was able to stop immediately upon becoming aware of her presence as he stated in his evidence. The Highway is a busy road and the collision occurred during peak hours. Pedestrians frequently use and cross the Highway such that greater vigilance was required. Whilst not the ideal, a pedestrian seeking to board a minibus heading in the direction of Gros Islet has no choice but to attempt to cross the road with the necessary care and vigilance, there being no pedestrian crossings along that part of the Highway.

Defence of *Volenti Non Fit Injuria*

[27] It was argued on behalf of Mr. Wilson that the defence of *volenti non fit injuria* was applicable to this case, in that the cross examination of Ms. Williams established to the civil standard that she had full knowledge of the nature and extent of the danger she risked in crossing the Highway in the manner she did, yet, she freely and voluntarily nevertheless proceeded to take that risk.

[28] Ms. McDonald cited the Privy Council case of **Letang v Ottawa Electric Railway Co**¹⁰ in support. That case was brought for damages for personal injury suffered owing to the negligently dangerous condition of a stairway in a railway station, on which the appellant's wife fell. The defence of *volenti non fit injuria* failed as it was held that "*it is plain that knowledge may not be conclusive evidence... but when it is a knowledge under the circumstances that leaves no inference open but one, namely, that the risk has been voluntarily encountered, the defence seems to me complete.*" A similar case was cited therein, in which it was considered relevant that the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps. In **Letang**, the Board held that there was no evidence whatsoever that the appellant's wife, holding as best as she could to the handrail, had full knowledge of

¹⁰ [1926] A.C. 725.

the nature and extent of the danger. The Board found that she was merely traversing the same steps and under the very same circumstances as many hundreds of tramway passengers. The Board commented that it appeared that the judgments, insofar as sustaining the defence, were based solely upon the fact that there was some danger from slipperiness that would be apparent to anybody on the steps. However, unless the defendant could establish that she fully knew and understood the nature and the extent of the danger and resolved voluntarily to undertake the risk, the defence failed.¹¹

[29] I do not find that the evidence establishes that Ms. Williams accepted the risk of injury, albeit that she did not exercise the level of care required of her. All that has been established is that she may have had the common knowledge of the risk of injury that could result from crossing the Highway if one is not careful. The evidence does not suggest that she appreciated the extent of the danger or difficulty she would have encountered. In fact, it suggests the quite the opposite. Thus, I do not find that the defence has been made out.

[30] Based on the foregoing, I apportion liability for the accident in the following proportions: Mr. Wilson 60% and Ms. Williams 40%.

Issue 2: Vicarious Liability

The Evidence

Auguste Etienne and Juliana Etienne

[31] Mr. and Mrs. Etienne's witness statements are identical and merely state that they are the registered owners of the vehicle.

The Law

[32] In respect of the law of vicarious liability, Lord Donovan in the Privy Council decision of **Rambarran v Gurrucharran**¹² distilled the following principles:

- i. "The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his

¹¹ See also *Nettleship v Weston* [1971] 3 All ER 581.

¹² (1970) 15 WIR 212 at pages 214-215. See also *Barnard v Sully* (1931), 47 TLR 557, DC, 36 Digest (Repl) 104, 524; and *Hewitt v Bonvin* [1940] 1 KB 188.

servant, his friend, or anyone else. **If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern.**¹³

- ii. The onus of proof of agency rests on the party who alleges it.
- iii. Ultimately the question of service or agency is always one of fact.
- iv. **An inference may be drawn from ownership that the driver was the servant or agent of the owner. This inference may be drawn in the absence of all other evidence bearing on the issue, or if such other evidence as there is fails to counterbalance it.**
- v. The fact of driving with the consent of the owner does not of itself establish service or agency." (my emphasis)

Analysis

- [33] Ms. Williams' statement of claim clearly raises the issue of vicarious liability on the part of Mr. and Mrs. Etienne by alleging that Mr. Wilson drove the vehicle, owned by them, as their servant or agent and/or with their knowledge and permission. However, neither Mr. nor Mrs. Etienne has denied the allegations or stated the circumstances in which Mr. Wilson was driving the vehicle. As noted above, in the absence of any evidence refuting such allegations, an inference that Mr. Wilson was driving the vehicle as their servant or agent may be drawn from the fact of their ownership of the vehicle. Therefore, in the absence of evidence rebutting the inference, Mr. and Mrs. Etienne must be held vicariously liable for Mr. Wilson's negligence by virtue of being the registered owners of the vehicle, and I so find.

Issue 3: Damages

The Evidence

Ms. Williams

- [34] Ms. Williams' evidence is that upon being hit by the vehicle she fell to the ground and lost consciousness for a short time. When she regained consciousness, she was in a lot of pain, could not see out of her left eye, felt a loose tooth in her mouth, and her nose, mouth

¹³ See *Ormrod and Another v Crosville Motor Services Ltd and Another (Murphie, Third Party)* [1953] 2 All ER 753.

and right knee were bleeding. She tried to stand up but felt as if her leg was dislocated at the knee. She was transported by ambulance to the Victoria Hospital (“the Hospital”) where she was admitted and hospitalized for 4 days.

[35] She says that as a result of the collision she suffered injuries to her head, face and left leg. She suffered massive swelling of the left side of her face, one broken and one loosened tooth, dislocation of her left eyeball, and her vision was affected resulting in near blindness in the left eye. In support, she exhibited her admission sheet to the Hospital, which I note states presentation with motor vehicular accident polytrauma, left eye injury, head and face injury, ligament injury and damaged tooth. Ms. Williams also says that on 10th November 2015, the Hospital requested an X-ray of her skull, pelvis and back to determine the extent of her injuries. She exhibited the request form.

[36] She says that she visited the eye clinic of the Hospital on 21st June 2016 since her left eye was still quite painful and she could not see from it. She exhibited the medical report from that visit dated 21st June 2016. This report, signed by Dr. Darra Burt, states that Ms. Williams was seen on 10th November 2015 with a history of motor vehicular accident. On examination, she had received trauma to the left eye and complained of pain and blurred vision. Present were periorbital edema, subconjunctival haemorrhage and traumatic mydriasis of the left eye. It states she was given antibiotic eye drops and pain medication and was to follow up in clinic in one week. I note that this report only states her condition and treatment when she was examined the day after the accident and does not address her condition at the date of the visit some 7 months later when she was complaining of continued pain and inability to see.

[37] Ms. Williams says she also visited the Saint Lucia Blind Welfare Association (“the Association”) seeking treatment for her left eye. The problem with her left eye was confirmed and spectacles were prescribed. She exhibited the report from the Association dated 16th February 2017. Therein, Dr. Darra Burt states the Ms. Williams was seen on 24th November 2016 and that her best corrected vision is 20/20 in both eyes. However, she had exotropia of the left eye of approximately 15 dioptres deviation. Spectacles were

prescribed and lubricating eye drops given with follow-up appointment in 6 months and continued care with her usual physician.

- [38] Ms. Williams says she obtained an invoice for prescription glasses from Family Eye Care on 8th September 2017, following a free examination offered by the Centre. She had no money and had to go from place to place looking for what was the cheapest option. She exhibited the invoice for the cost of the prescription glasses in the sum of \$1,466.97 for which she seeks an award.
- [39] She says she also visited the Saint Lucia Eye Centre ("the Centre") where she was informed that although the vision in her left eye had improved, she required surgery to correct the dislocated eyeball which could not be done in Saint Lucia. She exhibited the report from the Centre dated 13th July 2017. That report states that Ms. Williams was evaluated on 21st June 2017. She complained of double vision and pain intermittently in the left eye. Her history was noted including a visual field test done at the eye clinic of the Hospital on 17th August 201[6]¹⁴ which showed abnormality in the left eye. On examination, the following findings were made: visual acute without glasses right eye 20/80 and left eye 20/50; exotropia left, cornea clear, anterior chamber deep, paralytic mydriasis left eye; IOP's 16MMHG (normal in both eyes); fundus right eye essentially normal, left eye optic nerve well-defined, slightly pale; CD ratio 0.55/0.6, no exudate, no haemorrhage. She was asked to return for refraction, which was done on 4th July 2017. Her vision improved 20/25 in both eyes, but exotropia (outer deviation of the left eye) and diplopia persist. It states that a possible solution could be corrective surgery to her left eye and that she needs to be evaluated by a specialist in the area of ophthalmology overseas.
- [40] Ms. Williams says that she received, through the Centre, a breakdown of the cost of the surgery from a Cuban Hospital where it could be performed, which she exhibited. She has been informed by her counsel Mrs. Lydia Faisal ("Mrs. Faisal") and believes that according to the invoice, the total cost of the surgery and accommodation, including the cost of accommodation for someone to accompany her to Cuba is US\$3,751.00 or EC\$10,191.10 for which she seeks an award. She says she was advised by the doctor at the Centre that

¹⁴ This date was stated as 17th August 2015 which is prior to the date of the accident which must be an error.

she would need to have someone accompany her to Cuba for the surgery and her mother is willing and able to do so. The cost of the flight to Cuba is \$2,690.00 per person making the total airfare cost of EC\$5,380.00 for which she also seeks an award. She exhibited an invoice from Travel and Leisure Centre dated 15th August 2019 in support.

[41] I have examined the invoice pertaining to the cost of the surgery and accommodation and note that it indicates that two initial consultations will be required, costing 100.00 CUC¹⁵ and 250.00 CUC respectively. The total cost of the surgery per eye is 1,305.00 CUC. It notes that the patient is required to stay between 1 week and 10 days. In respect of accommodation, the first part of the programme may be performed in an out-patient regime and optional accommodation is offered. Once the patient is approved for surgery, she must be hospitalized and the cost of accommodation and three meals per day for the patient is 60 CUC and the companion is 40 CUC per day. The additional burden of 10% is only in respect of the US dollar, while other currencies attract a burden of 8 % and the invoice recommends using other currencies.

[42] Ms. Williams says that as a result of the accident she also lost a tooth close to the front of her mouth and the next tooth to it was pushed forward. She is very conscious of the gap in her teeth that shows whenever she laughs or smiles. Further, when the tooth broke off, she suffered great pain. She says that the cost of an artificial replacement tooth in the form of an implant has been assessed by Dr. Kent Glace, Dental Surgeon. The total cost of all the reconstructive work is EC\$6,000.00 for which she seeks an award. She exhibited an invoice from Kent Glace & Associates dated 11th March 2019.

[43] Ms. Williams says she wore a knee brace for several weeks to assist with the healing of the ligament in her left knee. However, despite the passage of nearly three years, her left leg sometimes feels loose at the knee and drags along when she tries to lift it. As a result, she consulted with Dr. Dagbue, a bone specialist, who confirmed that she can perform most activities of daily living like bathing, cooking and washing, but with difficulty. She states that she has pain whenever she climbs up or down stairs or walks even short

¹⁵ Cuban Convertible Pesos, which is the currency accepted in Cuba for commercial transactions. The claimant has provided evidence that the exchange rate of the CUC to USD is 1:1.

distances. Her knee continues to buckle, sometimes without warning, resulting in near falls. She exhibited a report from Dr. Dagbue dated 15th June 2017.

- [44] The report of Dr. Dagbue dated 15th June 2017 states that Ms. Williams presented to him on 20th February 2017 and gave a history of motor vehicular accident in which she sustained injury to her left hip, chest, head and right shoulder. I find the history given by her very peculiar as this is the first time that there has been any complaint or allegation of injury to her hip, chest or shoulder. None of these injuries were complained of immediately after the accident, during the period of hospitalization, or anytime thereafter up until 20th February 2017 when she first saw Dr. Dagbue, some 15 months after the accident. Dr. Dagbue noted that she complained of loss of vision to the left eye, headaches, and pain to both hips and left knee.
- [45] Dr. Dagbue's clinical and radiological assessment of 20th February 2017 revealed mild osteoarthritis to both hips, post traumatic chondromalacia to left knee, post-traumatic stress syndrome and visual disturbances. On her subsequent visit and assessment of 12th June 2017, she was found to have the same symptoms. As to treatment, he stated that she is being managed with non-steroidal anti inflammation medication and physiotherapy. She was referred to the ophthalmologist for treatment of her eye condition.
- [46] Regarding the stability of her clinical condition, Dr. Dagbue stated that she is stable and not expected to suffer any sudden incapacitation over the next year as a result of the injuries she sustained in the accident. He noted that her mild osteoarthritis of the hips is a degenerative condition; it could however be triggered by trauma as she described. The chondromalacia patella on the other hand is a condition well known to occur after trauma to the knee and requires treatment with physical therapy and rehabilitation. He also mentioned that she requires psychotherapy by a psychiatrist for management of her post traumatic stress syndrome.
- [47] With respect to the effect of her clinical condition on work and leisure, Dr. Dagbue states that she can perform most activities of daily living like bathing, cooking and washing but

with some difficulty, as she would have pain whenever she climbs stairs or walks distances. With respect to impairment, he stated that she has had a period of temporary partial impairment from the time of accident to the date of his report. However, assessment of permanent impairment could not be done at the time, as she had not reached maximum medical improvement, which would take about 2 years from the date of the accident, and she is expected to improve to some extent with the recommended treatment.

[48] Further, on 1st April 2019, she again visited Dr. Dagbue for a final update on her condition. He provided a report dated 8th April 2019 which she exhibited. In this report, Dr. Dagbue notes, additionally, that she complains of back pain, pain in both knees and that the pain in her hips worsens in the morning. The new diagnoses on clinical assessment were, osteoarthritis of the left knee, left sacroiliitis, and lumbar spondylosis. She continued to have osteoarthritis of both hips, visual disturbance and post-traumatic stress syndrome noted in the previous report. She was deemed to be stable, not expected to suffer sudden incapacitation and to have reached maximum medical improvement. Under stability of condition, patellofemoral osteoarthritis is noted to be a degenerative condition of the knees, triggered or aggravated by trauma, and that it has worsened over the past two years. The effect of her conditions on work and leisure remained the same. However, having reached maximum medical improvement she was diagnosed as having a whole person impairment of 3% from the mild osteoarthritis of the hips and knee.

[49] By letter dated 12th July 2019, Mrs. Faisal sought clarification from Dr. Dagbue regarding the contents of his report of 8th April 2019, which she also exhibited. The letter specifically asked about the effects, if any, of the injuries sustained by Ms. Williams, on her job as a cook with a local restaurant. Dr. Dagbue replied by letter dated 19th July 2019 which is also exhibited and states that she would not be able to perform her job as a commercial or career cook to date; though she could manage to do basic activities of daily living at home with difficulty.

[50] Ms. Williams says that at present, she has constant headaches in the area where her head was hit by the vehicle. She also suffers itching all over her body which becomes worse when it is hot. She has been informed by the eye doctor that the itching is caused from nerve damage that she sustained in the accident. He suggested that she do a CT scan or MRI to ascertain the extent of nerve damage. However, she is unable to afford the cost and has been unable to do either.

[51] At the date of the accident Ms. Williams says she was employed as the manager and a cook in a small restaurant. She started working there in September 2015 and worked Mondays to Saturdays every week earning \$40.00 per day. This is confirmed by a letter from her employer exhibited to her witness statement. She says, however, that as a result of the accident and the injuries she sustained, in particular loss of her vision, and her inability to afford the spectacles she needs, she has been prevented her from doing her job and lost her sole income of \$240.00 per week. She says as a result, her mortgage has fallen into arrears and the lender, The Saint Lucia Mortgage and Finance Company, has made full demand for the balance and is now threatening to seize and sell her house. Before the accident she paid her mortgage every month without fail. She says she is presently unemployed and in order to attempt any kind of work, her vision issues must be corrected since vision in the left eye is bad, and both eyes are afflicted by double vision. She seeks an award for loss of earnings from the date of the accident to the date the claim was filed.

[52] Ms. Williams says she does not have all the receipts of payment for various expenses she incurred but has produced those she is able to find. She is unable to find the receipts for:

- 1) Traffic Accident Report in the sum of \$200.00.
- 2) Medical Report of Dr. Dagbue dated 15th June 2016 in the sum of \$500.00
- 3) Medical Report of Dr. Dagbue dated 8th April 2019 in the sum of \$150.00
- 4) 2 medical consultations with Dr. Dagbue at \$150.00 each totalling \$300.00.

She seeks an award for these sums, nonetheless.

[53] She exhibits receipts for the following expenses for which she seeks an award:

- 1) Receipt dated 19th October 2017 in the sum of \$150.00 for consultation with Dr. Dagbue
 - 2) Receipt dated 14th March 2019 in the sum of \$150.00 for consultation with Dr. Dagbue
 - 3) Receipt dated 11th March 2019 in the sum of \$100.00 for dental treatment (panoramic x-ray) by Dr. Glace
 - 4) Receipt dated 14th March 2019 in the sum of \$50.00 for dental treatment by Dr. Glace
- Regarding the document dated 19th October 2017 in respect of a consultation with Dr. Dagbue, I note firstly that the consultation date is stated to be 26th October 2017 which is after the date of the 'receipt' and secondly it does not indicate that any payment was made by Ms. Williams. It appears to be an invoice and not a receipt.

[54] Ms. Williams states that she also seeks an award for her pain and suffering.

Analysis

General Damages

[55] In assessing general damages, the court must take into account the considerations set out in the case of **Cornilliac v St. Louis**¹⁶:

- (a) the nature and extent of the injuries sustained;
- (b) the nature and gravity of the resulting physical disability
- (c) the loss of amenities, if any; and
- (d) the extent to which, consequentially, pecuniary prospects are affected.

[56] In doing so, the Court ought to have regard to recent comparable awards in its own and other jurisdictions with comparable social and economic circumstances to assist in arriving at the quantum of damages that is fair and reasonable. The House of Lords decision of **Wells v Wells**¹⁷ provides guidance:

“The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court’s best estimate of the plaintiff’s general damages.”

¹⁶ (1965) 7 WIR 491.

¹⁷ [1998] 3 All ER 481 at 507.

Pain and Suffering
Nature and Extent of Injuries

Eye Injury

- [57] Ms. Williams admitted in cross examination that no doctor had diagnosed her with near blindness in the left eye as she alleged but she insists that she could only see black. She agreed that the medical reports stated blurred vision and not loss of vision. She also agreed that her vision had improved from the date of the accident. This is clearly stated in the report of 13th July 2017 which diagnoses her vision as 20/25 in both eyes and best corrected vision of 20/20. However, it does indicate that exotropia and diplopia persist, though the effect of these conditions on her have not been provided to assist the Court. I agree with Mrs. Faisal that there is no evidence that she had poor eyesight before the accident and that in any event a defendant must take the victim as he finds her.

Tooth Injury

- [58] Ms. Williams also stated that she has lost one tooth, and another is pushed forward which is visible when she laughs and smiles which makes her self-conscious. The Hospital admission form simply notes a damaged tooth, however there is no medical report in respect of this injury.

Knee Injury

- [59] Ms. Williams complained of pain in the left knee which drags and buckles and causes near falls. She also says she experiences pain when climbing stairs and walking short distances. The Hospital admission form indicated ligament injury and the first report of Dr. Dagbue referring to her assessments on 20th February 2017 and 12th June 2017, indicated post traumatic chondromalacia to left knee. His subsequent report referring to her assessment of 1st April 2019 indicates osteoarthritis of the left knee.

Hip Injury

- [60] She had no complaint of hip injury until 20th February 2017, the date of her first assessment by Dr. Dagbue which was some 15 months after accident. He observed that this condition was known to be degenerative but could be caused from trauma. Whilst this

diagnosis is uncertain in terms of whether it was caused by or the result of the accident, it was challenged by Ms. McDonald only in submissions and not on the evidence.

Back Injury

[61] Back pain and the related diagnoses of left sacroiliitis and lumbar spondylosis surfaced for the first time on Dr. Dagbue's examination of 1st April 2019, some 3 1/5 years after the accident. There was no explanation by Dr. Dagbue as to whether this was related to the accident and injuries suffered as a result or the nature and extent of this injury on her. In the absence of such evidence, they are too remote, especially given the length of time that elapsed before they arose.

[62] Neither Post-Traumatic Stress Syndrome, which was never evaluated, nor nerve damage, which is not contained in any report and is hearsay, were substantiated.

Nature and Gravity of Resulting Physical Disability

[63] Dr. Dagbue indicated that Ms. Williams had partial impairment for 2 years as she would have had some difficulty performing some daily activities such as bathing, cooking, washing and pain climbing stairs and walking short distances. He diagnosed her with permanent whole person impairment of 3% from mild osteoarthritis of the hips and knee.

[64] I have considered the case of **Browne v Israel et al**¹⁸ cited by Mrs. Faisal. In that case, the claimant's legs were pinned under the dashboard resulting in injury to both knees. He suffered damage to the tendons of both knees and developed osteoarthritis which caused him constant pain. The most significant injury was degenerative injury to knees – osteoarthritis. The prognosis was that he still suffered pain in his knees and would need constant physiotherapy and possibly knee replacement surgery in the future given the degenerative nature of his condition. It was held that he was not disabled, although he continued to experience pain and some restriction in his movements. He would have lifelong problems with both knees as his condition would invariably worsen with age despite palliative treatment with medication and physiotherapy. He was awarded \$50,000 for pain and suffering. I note that Ms. Williams' injuries are much less severe than the

¹⁸ SVGHC Claim No 80 of 2006

claimant in **Browne**. She suffered injury only to her left knee while he suffered injury to both. Whilst they both have been diagnosed with osteoarthritis, Ms. Williams' was noted to be mild and there was no evidence that Ms. Williams' would worsen significantly or require constant physiotherapy or knee replacement surgery.

[65] In the case of **Mcnelly v Lotte et al**¹⁹, the claimant's most significant injuries were injury to right knee, torn anterior cruciate ligament, some destruction of the meniscus, arthroscopic ACL reconstruction to stabilize knee, arthrofibrosis. The prognosis was continual difficulty in bending right knee, walking and standing for prolonged periods; small degree of muscle atrophy and affected gait. Risk of developing arthritis in right knee was at least 70%, permanent disability was 20%, and there was intense post-traumatic stress requiring psychological counselling to cope with anxiety and depression. After two operations, the medical evidence was that she had residual limitations and would be unable to return fully to her previous level of function. The claimant was awarded general damages of \$20,000 for pain and suffering and loss of amenities. This claimant's injuries appear more similar to Ms. Williams' with respect to her knee injury.

[66] The case of **McGibbon v Liddie**²⁰ involved eye and hip injury. The claimant's most significant injuries were dislocated right hip, fracture of the right acetabulum, sunken right eye and significant loss of vision in right eye. The prognosis was significant loss of vision in right eye, constant headaches, permanent disability in right eye, visual acuity loss and chronic pain from right hip dislocation. The Court was satisfied with the evidence of continuing pain and discomfort suffered by the claimant from headaches, a deformity of the peri-orbital region, and a hip dislocation coupled with a fracture of the lip of the acetabulum. It concluded that continuing to work in her present condition would have presented difficulties and that in the future she might need a hip replacement. She was awarded \$75,000 for pain and suffering, resulting physical disability and loss of amenities. The eye injury in that case was more severe in that the claimant had significant loss of vision, deformity and continuing pain which is not the case for Ms. Williams. That award

¹⁹ Claim No. BVIHCV2001/0068 (Rawlins, J.)

²⁰ Claim No. AXAHCV/2006/0081 (George-Creque, J.) November 19, 20, 2007; December 4, 2007]

also included the significant hip injury and must be discounted taking into account those factors.

- [67] In **Jaimason Samuel (acting by his next friend Calvert Samuel) v Lincoln Prescott**²¹ cited by Ms. McDonald, the plaintiff was a 15-year-old pupil at the time the defendant accidentally shot him in the eye with a pellet gun. At the date of assessment, he was 19 years old and studying Architectural Design and Building Construction. He had enjoyed technical drawing since his school days. His original ambition had been to become an airline pilot, but his injury precluded that. Architectural Design was a fall-back choice for career. As a result of the loss of sight in his eye, the plaintiff no longer participated in body contact sports such as football, which he used to enjoy. The steady focusing on fine lines in his study of architecture caused his eyes to water and is accompanied by tears and pain. He would have to endure this discomfort all his life. At the time of the accident, he had suffered excruciating pain. This pain was particularly felt when his eye was open. As the left eye tended to open when the right one was opened, he was forced to keep both eyes shut for periods. He obtained a licence to drive but finds that in order to be able to see properly, he has to drive with his head turned to an angle in an attempt to let his right eye see both forwards and towards the left. He had lost bi-focal vision and depth perception would be a difficulty. On the other hand, the injury had healed nicely from an aesthetic point of view. Looking at him, you would hardly know that something was wrong with his left eye. There was no scarring or discolouration visible. It was held that he was put to a certain amount of pain and suffering through the carelessness of the defendant. He would continue for the balance of his life to suffer inconvenience and discomfort as a result of the loss of the effective use of his eye. In all the circumstances, an award of EC\$45,000.00 for pain and suffering and for loss of amenities was appropriate. Again, in this case the claimant suffered effective loss of use of the eye which Ms. Williams has not. This must be a significant consideration and the award would have to be discounted to reflect it.

²¹ [2000] ECSC No. 289

- [68] Based on the cases cited above, I would award Ms. Williams \$18,000 in respect of the injury to her knee and \$12,000 in respect of the injury to her eyes for pain and suffering, bearing in mind that she has provided no evidence of loss of amenities. This would total **\$30,000**.

Future Medical Expenses

Prescription Spectacles

- [69] Ms. Williams claims for the cost of the spectacles prescribed to her on 24th November 2016 in the sum of \$1,466.97 based on the invoice she received from Family Eye Care. However, as mentioned, since then, her vision was noted to have improved. Therefore, that prescription is no longer relevant, and it was incumbent on Ms. Williams to obtain an updated prescription, if spectacles were still needed, and an invoice in respect of the new prescription. Nonetheless, the defendant does not appear to challenge this sum and has indicated an award for medical expenses which appears to include the cost of the spectacles as invoiced. Thus, the sum of **\$1,466.97** is awarded.

Eye Surgery

- [70] The report of 13th July 2017 does not state that Ms. Williams requires corrective surgery as she suggests, but states that it may be a possible solution for the exotropia and diplopia which are noted to persist and that she needed to be evaluated by a specialist in the area of ophthalmology overseas. This was not done and without a report from a specialist, the Court is bereft of information as to whether the procedure is a necessity or likely to be effective to resolve those conditions, or the extent to which it will improve her vision. There was further no explanation provided of these conditions and how they would affect her in her daily life if not corrected. Based on the report, it seems she would have perfect corrected vision with the spectacles. Ms. Williams agreed in cross examination that surgery was not required, that her vision had improved and that the matter of the surgery was in relation to the eyeball. Thus, she cannot recover the sum claimed in respect of the eye surgery.

Tooth Implant

- [71] As noted above, the Hospital admission form noted a damaged tooth and an assessment of the cost of reconstructive work has been provided by Kent Glace & Associates signed by Naomi Glace, Practice Manager. I agree with Ms. McDonald that there is no medical report detailing this injury and this precludes Ms. Williams from recovering damages in respect of it. The admission form and invoice are not sufficient to substantiate the nature and extent of this injury and the need for reconstructive work as a result of the accident. Whilst I accept that Ms. Williams suffered some injury to her tooth, it was incumbent on her to provide the medical evidence in support, which she has failed to do. She cannot therefore recover the amount claimed in this regard.

Special Damages

- [72] In relation to special damages, it is well-established that:-
- “special damages, in the sense of a monetary loss which the plaintiff has sustained up to the date of trial, must be pleaded and particularised... It is plain law — that you can recover in an action only special damage which has been pleaded, and, of course, proved.”²²
- [73] As to the importance of proving special damages, Lord Goddard CJ in **Bonham Carter v Hyde Park Hotel** stated that plaintiffs:-
- “must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court saying ‘this is what I have lost; I ask you to give me these damages’. They have to prove it.”²³

Loss of Earnings

- [74] Whilst Ms. Williams relies on Dr. Dagbue’s letter dated 19th July 2019 wherein he indicates that she could not work as commercial cook, he does not say she could not perform other jobs. In cross examination, she stated that she had performed many other jobs in past, including cashier, babysitter, receptionist, administrative assistant, and restaurant supervisor.

²² Per Diplock J. in *Ilkiw v Samuels* [1963] 1 WLR. 991.

²³ *Bonham Carter v Hyde Park Hotel* [1948] 64 TLR at page 178.

[75] Ms. Williams was required to mitigate her loss by seeking to obtain and accept reasonable alternative employment, which she did not do. Part of her reason for being unable to work is the loss of her vision. However, I note that from 24th November 2016, she was advised that her vision could be corrected 20/20 with prescription glasses which were so prescribed. Further and in any event, her vision was noted to have improved in both eyes 20/25 from 4th July 2017. Certainly, by this date she would have been in a position to look for and obtain alternative employment. Having not done so, she did not fulfil her obligation to mitigate her loss. In fact, she admitted in cross examination that even after she recuperated and could walk and her vision had improved, she did not look for a job that she could do. When pressed, she spoke of difficulty going up stairs, her knee dragging and painful and her body being different. There are, however, jobs she could do even with these symptoms.

[76] Ms. Williams is only entitled to recover loss of earnings for the period she could not work. In the circumstances, this is the period from the date of the accident to the date her vision was noted as having improved – 4th July 2017, which is 497 days (excluding Sundays and public holidays which she did not work prior to the accident). There is no justification for using any other date – neither 20th February 2017 when Dr. Dagbue first assessed Ms. Williams or 19th July 2019 the date of his letter in which he clarified that she would not have been able to work as a commercial cook, as Mrs. Faisal suggests. At her salary of \$40.00 per day, her total loss of income for the period is \$19,880.00. As she has not indicated whether she was liable to pay taxes and other contributions such as NIS, this sum must be taxed by the amount of 20%, reducing the sum to be awarded to **\$15,904.00**.

Expenses Incurred

[77] Special damages must be pleaded and proven, therefore Ms. Williams is only entitled to recover the expenses for which she was able to provide receipts of payments made set out at paragraph 53 above (with the exception of the invoice dated 19th October 2017 from Dr. Dagbue). Additionally, although she cannot find the receipt for the traffic accident report, the Court may take judicial notice that same was adduced into evidence and attracts a fixed cost of \$200.00. Thus, Ms. Williams may recover the total sum of **\$500**.

Order

[78] Based on all the foregoing, damages are assessed and awarded as follows:

- 1) Special damages in the sum of \$500.00 discounted by 40% being **\$200.00** is to be paid by the defendants together with interest thereon at the rate of 3% per annum from the date of the accident, 9th November 2015, to the date of judgment.
- 2) An award for loss of earnings in the sum of \$15,904.00 discounted by 40% being **\$9,542.40** is to be paid by the defendants, together with interest thereon at the rate of 3% per annum from the date of the accident, 9th November 2015 to the date of judgment.
- 3) General damages are awarded for pain and suffering in the sum of \$30,000 to be discounted by 40% being **\$18,000.00** to paid by the defendants, together with interest thereon at the rate of 6% from the date of service of the claim to the date of judgment.
- 4) An award of \$1,466.97 discounted by 40% for future medical expenses (spectacles) being **\$880.18** is to be paid by the defendants.
- 5) Interest at the rate of 6% per annum on the total award of **\$28,622.58** is awarded from the date of judgment to the date of payment.
- 6) Prescribed costs on the total award discounted by 40% is awarded to the claimant pursuant to CPR 65.5 to be paid by the defendants.

Observations

[79] I feel it necessary to make the following observations on the state of the medical evidence in this claim. The evidence in support of the claimant's injuries in this case was woefully inadequate. The hospital admission notes whilst not contested by the defendants is hardly an acceptable way to present the injuries of a claimant to the Court. The Court should not be expected to decipher documents presented for its consideration. The **Evidence Act** is clear as to what is required for the admissibility of medical evidence in civil cases.²⁴ Injuries have to be substantiated by evidence of a qualified medical practitioner or relevant specialist.

Kimberly Cenac-Phulgence

²⁴ Section 152 of the Evidence Act, Cap 4.15 of the Revised Laws of Saint Lucia.

High Court Judge

By the Court

Registrar