

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW

SCFZ  
SUPREME COURT LIBRARY  
KINGSTON  
JAMAICA

Judgment Book

CLAIM NO. C.L. 2002/F002

BETWEEN MAUREEN FEARON CLAIMANT  
AND FITZROY BROWN 1<sup>ST</sup> DEFENDANT  
AND WAYNE MARSHALL 2<sup>ND</sup> DEFENDANT

Mr. Norman-Samuels for and on behalf of the Claimant.

The Defendants not appearing or being represented.

**Heard on 23<sup>rd</sup> and 24<sup>th</sup> September 2004**

**Assessment of Damages**

**Brooks, J.**

Miss Maureen Fearon suffered the unwanted termination of her pregnancy in the year 1999 and seeks compensation for that loss.

Miss Fearon's loss arose from an incident, which occurred on 5<sup>th</sup> October 1999. On that date the motor vehicle in which she was a passenger struck a motor truck that was parked along the roadway at Roses Tree in the parish of Saint Catherine.

The driver of the vehicle that she was in was Wayne Marshall and the owner was Fitzroy Brown. Neither entered an acknowledgement of service

to this claim and a judgment in default, with damages to be assessed, was entered against them.

Miss Fearon now seeks to have the damages assessed.

The first doctor to treat Miss Fearon after the injury was sustained was Doctor Kataiah Katragadda. The doctor provided a report as to Miss Fearon's injuries. He itemized them as follows:

“An extensive laceration on the right frontal scalp:  
c/o pain in the right side of the lower abdomen.”

The “the laceration” healed leaving “two scars in the region of the right forehead”, according to Mr. Leighton G. Logan a consultant plastic surgeon whom Miss Fearon consulted. He detailed the scars as follows:

- “(a) The first of a curved nature 5 cms. long and extending into the right eyebrow and eyelid.
- (b) 1 ½ cms. long in the right eyebrow region.”

Mr. Logan recommended a surgical revision followed by a course of steroid and irradiation treatment. He envisaged that there would be a 60 – 70% improvement in the scars as a result of the result of the treatment.

Mr. Logan provided an estimate for the procedure, which he had recommended. The projected cost is \$90,000.00.

The injury to Miss Fearon's head had two side effects.

She testified that she lost consciousness for some three hours and she regained consciousness in the Linstead Hospital.

Secondly, Miss Fearon testified that she had to consult a Doctor Manjunath. This was because, according to her, "the eye was swell up and I could barely see out of the eye."

She saw that doctor twice, and it seems that that problem has been resolved.

On the matter of the pregnancy Miss Fearon testified that shortly after the accident she felt pain in her "belly bottom and pain in (her) side."

She said that she was not admitted to hospital on the day of the accident but having been sent home she couldn't sleep because her, "whole body was in pain".

She testified that she consulted Dr. Katraggada at his private surgery. He prescribed an ultra sound. This was done and he ordered that she repeat the procedure in six weeks. At the end of the six weeks and after the second ultra sound Dr. Katraggada referred Miss Fearon to Dr. Alexander at the Spanish Town Hospital. She consulted Dr. Alexander on the 12<sup>th</sup> December and he sent her home after prescribing medication for her.

The rest of her testimony in this area is helpful, it is as follows:

“On the 23<sup>rd</sup> December I start to feel pain in my belly. I went to the hospital on the 26<sup>th</sup> December 1999. I didn't see Dr. Alexander, I saw a next doctor. She examined me. She didn't admit me. She sent me home. I was still feeling pain in my belly and I went back to hospital on the 28<sup>th</sup>. I was five months pregnant in October. When I went back to the hospital they admitted me and they removed the baby; it was dead.”

### **General Damages**

In his submissions Mr. Samuels on behalf of Miss Fearon advocated that an award of \$1,083,317.00 would be an appropriate award for pain and suffering and loss of amenities. He arrived at that figure by an award of \$762,272.00 for the facial injury and \$321,045.00 for the loss of pregnancy.

He relied on two authorities to support these submissions.

The first was *Florence Samuels v. Michael Davis* reported at Vol. 4 Khan p. 151. In that case the plaintiff suffered unconsciousness, pain in the head, chest and back, cuts on the right knee and multiple lacerations to the face. She was then five months pregnant but it does not appear that the pregnancy was affected.

The lacerations to the face were detailed as:

“numerous superficial and deep healing and varying from 1 ¼ inches to 2 inches long to forehead and nose. There were also two lacerations each 4 inches long stretching from the forehead to below the left eye and left side of

the nose. The wounds healed with much scarring and keloid formation”.

Miss Fearon’s facial injury is clearly nowhere as serious as Miss Samuel’s.

In comparison Miss Fearon has only two lacerations. These have healed without prominence, though plastic surgery could assist with their appearance according to the doctor.

The other case relied upon by Mr. Samuels was *Carvana v Mrugala* (1967) C.L.Y Para. 1177. It would be helpful to quote the report of the case in full.

“Female, aged 30. At time of accident five months pregnant. Four days later had miscarriage due to accident. Most serious of other injuries were three fractures of the pelvis and three stitches in left knee laceration. Judge awarded £500 for loss of child, and £500 for other injuries. Judge said that if an accident resulted in a serious limitation of a potential family he would “feel it necessary to award a very substantial figure.” This was not such a case. Agreed special damages: £35. General damages £1,000.”

Mr. Samuels arrived at a proposed damages figure of \$321,045.00 by a somewhat convoluted manner viz. he updated the £500.00 awarded in 1967 to a 1995 figure in Pounds Sterling using the United Kingdom Official Retail Prices Index. He then converted that figure to Jamaican dollars in 1995 and then updated the equivalent to 2004 using the Jamaica Consumer

Price Index (CPI). Finally he halved the result to adjust for the differences in the economies of the two countries.

The court has only been able to find one case of this type in this Jurisdiction. It is *Patricia Lyons v Aaron Bagaloo* reported at Vol. 3 Khan p 242. There the claimant suffered:

- “(a) superficial bruises over right elbow and hip.
- (b) (being 2 ½ months pregnant at the time of the motor vehicle accident) an incomplete abortion necessitating a minor operation involving dilation and curettage.
- (c) loss of foetus”

The plaintiff in that case had already had three children and there was no serious limitation of a potential family. The parties agreed to a settlement in the matter in the sum of \$35,000.00 inclusive of costs. Counsel for the plaintiff in that matter is reported as saying that \$30,000.00 of the agreed total would have been for pain and suffering and loss of amenities.

It is accepted that settlement figures are not always the best guides as to appropriate awards but the \$30,000.00 awarded in January 1991 when converted to today's money is equivalent to \$335,500.00 using the CPI of 1878.8 for August 2004. That award is not a long way off from Mr. Samuels' figure.

Miss Fearon's pain and suffering would seem to have been worse than that of Miss Samuels, but it is clear that she has been left with no permanent disability from her injuries. In court the scars were not conspicuous. Miss Fearon herself did not seem to be unduly troubled by them. Her testimony in that regard was, "I went to Dr. Logan because people were bothering me about the scar over my eye so I went to him about my surgery."

The unconsciousness was temporary and there is no evidence that it will have any lasting effect.

She had pain for the first few days after the injury and then suffered severe pain for the period 23<sup>rd</sup> to the 28<sup>th</sup> December when the surgical procedure was carried out. Her eye was swollen for over a month. I consider the facial aspect of the injury minor. There was no mention as to whether she had had any other children nor was there any indication as to her being unable to have any other children. Finally there was no evidence of any mental or psychological injury to Miss Fearon as a result of the loss.

In looking at cases with minor injuries such as these I have reviewed the case of *Gilbert McLeod v Keith Lemard* reported at Vol. 4 Khan p. 205. In that case the plaintiff suffered temporary unconsciousness and lacerations to the face. It is true that that plaintiff was male but I make no distinction

on that basis because Miss Fearon has neither pleaded nor testified as to any negative psychological impact on her as a result of the scar.

The comments of Carey, J.A. in *Gravesandy v Moore* (1986) 23 JLR 17 at p. 20 E are apposite:

“In our opinion in the absence of any pleading relating to cosmetic disability or any application to amend to allow its inclusion, the learned trial judge was not entitled to use his view to supply inadmissible evidence.”

When the award in *McLeod's* case is updated it provides a figure in the region of \$200,000.00. I find Miss Fearon's injury to be less serious than Mr. McLeod's when omitting the gynaecological considerations.

Based on the above I am of the view that an award of \$450,000.00 is an appropriate global award to compensate Miss Fearon for her pain and suffering and loss of amenities arising from the injury.

In addition to that figure should be added the sum of \$90,000.00 quoted by Mr. Logan in respect of the cost of the recommended plastic surgery. Together the total award for General Damages is \$540,000.00.

### Special Damages

Miss Fearon has pleaded and proved the following expenses:



Doctors Fees	\$11,700.00
Hospital Bills	3,690.00
Medication Costs	2,161.22
Ultrasound Costs	4,400.00
Transportation for medical treatment	<u>6,000.00</u>
Total	\$27,951.22

She has also claimed loss of earnings for six months. She testified that she was a higgler. She sold at the gate of a school in Harkers Hall, which is the district where she also lives. She gave details of the items, which she traded in, the quantities which she handled per week and the profit which she made on each item.

She provided no bills or other documentary proof of her loss in this area. I am however prepared to accept that this type of trader may be excused from the requirement of documentary proof for special damages. (See *Walters v Mitchell* (1992) 29 JLR 173.) Miss Fearon testified that her loss was \$8,120.00 per week. In her Statement Of Claim she pleaded \$8,000.00 as her weekly loss and so she is limited to that latter figure. The quantities and levels of profit do not seem unreasonable and I am prepared to accept her evidence on this aspect as credible.

What I am not prepared to accept is that she was not able to work for six months. Her testimony as to her various trips to the doctor do not support this, nor indeed does the testimony quoted in some length above.

She testified as to suffering pain just after the accident and pain in December for approximately a two-week period. There is nothing in any of the medical reports to support her claim of an inability to work.

I am prepared to award her six weeks loss of use being two weeks for the period immediately after the accident and four weeks for the period commencing 23<sup>rd</sup> December 1999. During the latter period the pain resumed, she had the surgical procedure done and undoubtedly would have had to recuperate.

If I have underestimated the level of disability I believe it would be compensated by the fact that for some portion of the latter four weeks the school would have been on holidays and she would not have had that level of income in any event.

The award for loss of earnings is therefore six weeks at \$8,000.00 per week, that is \$48,000.00.

The total figure of special damages being therefore \$75,951.22.

Damages are therefore assessed as follows:

General Damages

Pain and Suffering and Loss of amenities      \$450,000.00

Future Medical Expense      \$ 90,000.00

\$540,000.00

with interest at the rate of 6% per annum on the sum of \$450,000.00 from 4<sup>th</sup> September 2003 (the date of the service of the Writ of Summons) to 24<sup>th</sup> September 2004.

Special Damages      \$75,951.22

with interest thereon at 6% per annum from 5<sup>th</sup> October 1999 to 24<sup>th</sup> September 2004.

Costs to the Claimant in the sum of \$40,000.00.