



[2022] JMSC Civ. 189

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2010HCV00179**

<b>BETWEEN</b>	<b>SHELDON McGIBBON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JEROME GOULDBOURNE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>DANI MARIE FENTON</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**CONSOLIDATED WITH**

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

**CLAIM NO. 2010HCV002220**

<b>BETWEEN</b>	<b>KYMORE JEFFERY McGIBBON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JEROME GOULDBOURNE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>DANI MARIE FENTON</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN OPEN COURT**

**Ms. Andrea Lannaman instructed by Marion Rose – Green & Co for the Claimant**

**1<sup>st</sup> Defendant absent and unrepresented**

**2<sup>nd</sup> Defendant absent and unrepresented**

**Heard: 26<sup>th</sup> September, 2022 and 24<sup>th</sup> of October 2022**

**ASSESSMENT OF DAMAGES – Personal Injury – Motor vehicle accident – Fracture of right femur – Fracture of right radius – Ligament damage – Limb length Discrepancy – Loss of income and allowances – Proof of specific damages**

**T. HUTCHINSON SHELLY, J**

**BACKGROUND**

[1] This matter concerns an assessment of damages against the Defendants arising out of a motor vehicle accident which occurred on or about the 6<sup>th</sup> day of January, 2007. The facts in brief are that at about 11 pm that evening, the 1<sup>st</sup> Claimant was driving his private motorcar registered **3935 EN** along the Haughton Grove main road in the parish of Hanover accompanied by his wife, the 2<sup>nd</sup> Claimant. He observed a motorcar registered **9765 EV** being driven at a high rate of speed travelling in the opposite direction. The driver of that car, who was later identified as the 2<sup>nd</sup> Defendant, attempted to overtake a bus around a corner. This resulted in her losing control of her vehicle which ended up colliding head on into the 1<sup>st</sup> Claimant's vehicle. The 1<sup>st</sup> Claimant's motor car was extensively damaged and both he and the 2<sup>nd</sup> Claimant had to be assisted from the wreckage. They were subsequently transported to the Cornwall Regional Hospital for treatment.

[2] Both Claims were later filed and the 1<sup>st</sup> Defendant was sued by virtue of being the owner of the motor vehicle which was being driven by the 2<sup>nd</sup> Defendant, his servant and/or agent. The Claims were served on both Defendants and judgment in default of acknowledgment of service was obtained against the 1<sup>st</sup> Defendant on the 24<sup>th</sup> of July 2013. The Defence of the 2<sup>nd</sup> Defendant was struck out on the 10<sup>th</sup> day of April, 2019. In furtherance of this matter, the Claimants have approached this Court for damages to be assessed. On September 26<sup>th</sup>, 2022, the Claimants gave evidence as to the quantum of damages that they submit should be awarded.

## **ISSUE**

- [3] The sole issue before the Court is the quantum of damages which should be awarded to the respective Claimants for injuries suffered and other related losses as a result of the Defendants' negligence.
- [4] In making an award, the Court is required to consider the nature and extent of the injury and/or loss suffered and thereafter determine the appropriate award taking into account the sums awarded in comparable cases.

## **EVIDENCE**

- [5] At the hearing on September 26<sup>th</sup>, 2022, both Claimants were sworn and their witness statements filed May 19<sup>th</sup>, 2022 were allowed to stand as their evidence in chief. Although the Claims were consolidated, I will commence my assessment by reviewing the evidence of Mr. Sheldon McGibbon whose claim was the first in time.

## **SHELDON MCGIBBON'S CLAIM**

### **Special Damages**

- [6] The 1<sup>st</sup> Claimant requested an award for special damages under a number of headings. One of which related to his employment for which he sought awards for loss of income, over time payments, travelling allowances and meal allowances. He also sought to be compensated for unpaid sick. While he gave evidence of being a Customs Officer at the time of the incident, there was not one scintilla of documentary proof provided on his behalf in order to assist the Court on the question of whether the figures claimed had been proved and ought to be awarded.
- [7] It has long been established that special damages such as these must be proved and while the Courts have exercised some level of flexibility in relation to areas such as transportation expenses and household help, the position in respect of income has remains unchanged. In the absence of proof, I am unable to make an award under this heading.

[8] The 1<sup>st</sup> Claimant also sought an award of **Twenty-Four Thousand Dollars (\$24,000.00)** for transportation expenses to MoBay Hope for follow up visits. The breakdown provided states that there were 6 trips at a round trip cost of **Two Thousand Dollars (\$2000.00)** each. In considering this award, I noted that there was evidence provided of these visits. I accept that given the damage which was done to his vehicle and himself, the 1<sup>st</sup> Claimant would have faced challenges getting around, thereby making it necessary to incur this expense. In keeping with my earlier comments, it is not in dispute that the transportation system in this jurisdiction is not one in which receipts are usually generated and as such a measure of flexibility has been adopted in respect of this claim. I note the decision of **Shaquille Forbes v Ralston Baker** Claim No. HCV 02938 of 2006, in which Fraser J, in holding that the Claimant was entitled to costs for transportation, stated:

*“It is not hard to fathom that at the time of taking the claimant to the doctor for treatment and check-ups, the need to obtain receipts to prove that expenditure would not have been uppermost in the mind of the Claimant.”*

[9] I also considered the decision of **Ezekiel Barclay v Clifford Sewell and Kirk Mitchell**, Suit No. CL.B 241 of 2000, in which Anderson J opined that transportation is one of those situations where it is not the custom for taxi drivers to issue receipts in Jamaica. On a review of the cost and purpose behind it, I find that this expense is justified and **Twenty-Four Thousand Dollars (\$24,000.00)** is a reasonable figure for same. As such, this sum is awarded.

[10] In respect of the claim for medical related expenses which included the costs of doctors' visits, physiotherapy and medication. A number of receipts were provided in support of same and these were admitted into evidence. My review of the documents, which were all served on the defendants, revealed that the sum of **Three Hundred and Four Thousand Nine Hundred and Twenty-Nine Dollars and Fifty-One Cents (\$304,929.51)** was spent by the 1<sup>st</sup> Claimant on these expenses and he ought to be compensated for same.

## General Damages

[11] The 1<sup>st</sup> Claimant was initially seen at the Cornwall Regional Hospital where it was noted that he presented with the following injuries:

- a. Fracture of right femur.
- b. Ligament damage to the right hand
- c. Swollen thigh
- d. Abrasions
- e. Pain

[12] He tendered two Medical Reports into evidence. The first was prepared by Dr. Don Gilbert from the Cornwall Regional Hospital and was dated November 3<sup>rd</sup>, 2009. The second report was prepared by Dr. A Ueker of MoBay Hope Hospital and it is dated February 25<sup>th</sup>, 2009.

[13] In his report Dr. Gilbert made the following observations:

- Physical Examination – The 1<sup>st</sup> Claimant walked with a limp due to a 2 cm limb length discrepancy which resulted from injuries sustained in the motor vehicle accident.
- Prognosis – The 1<sup>st</sup> Claimant will need a shoe lift to compensate for this discrepancy without which the persistent limp will give rise to lower back pains and right knee pain from development of osteoarthritis in the joint.
- Impairment – 7 % lower extremity which is equivalent to 3% whole person.

[14] Dr. Ueker's findings were as follows;

- The right femur fracture and ligament damage were observed and noted.

- A plate had been surgically placed in respect of the fracture which broke and had to be re-plated by a swiss plate.
- He also observed the 2 cm shortening and opined that it would be permanent.
- Last x-ray of 1<sup>st</sup> Claimant on the 19<sup>th</sup> of February 2009 showed complete healing of the fracture and the patient was fully mobile.
- The 1<sup>st</sup> Claimant will have to do surgery in the future to have the hardware removed.

**[15]** The history of the 1<sup>st</sup> Claimant's visits to Cornwall Regional Hospital and MoBay Hope Hospital as well as his present condition and loss of amenities are also essential to the assessment process hearing and in this regard a chronology is laid out as follows;

- The 1<sup>st</sup> Claimant was admitted to the Cornwall Regional Hospital for about 2-3 days. He was later transferred to the MoBay Hope Hospital, where a surgery was done on his right foot. He was admitted for 4 days and a traction was subsequently placed on this foot. A follow up surgery to replace the metal plate was done 8 months later at MoBay Hope.
- The 1<sup>st</sup> Claimant made six (6) follow-up visits for treatment as well as several physiotherapy sessions for the injuries he sustained in the accident.
- He was placed on sick leave from 9<sup>th</sup> of January 2007 to the 2<sup>nd</sup> of July 2007. Then from the end of July 7<sup>th</sup> 2007 to the 18<sup>th</sup> of February 2008. He suffered from mobility issues and was required to purchase a knee brace to assist with same. Since the accident, he has had difficulty walking and walks with a limp. He also has difficulty negotiating stairs.

- He was unable to drive for 4 ½ months and had to hire a driver. He stated that he still experiences cramps in the foot during cold temperatures as well as pain for which he has to take medication. He is no longer able to do weight lifting, jogging or swimming as they cause pain to his foot.

## SUBMISSIONS/ANALYSIS

- [16] It is settled law that the sum of money that should be awarded as General Damages for personal injury suffered by a Claimant ought to be a sum which as “**nearly as possible**” puts the Claimant in the same position she would have been in if she had not sustained the wrong” (per Lord Blackburn in *Livingstone v Rawyards Coal Co. (1880) 5.A.C. 25 at 39*).
- [17] A number of authorities were cited by Counsel for the Claimants and have been reviewed accordingly. The first case cited was *Barrington McKenzie v Christopher Fletcher and Joseph Taylor, Suit No.CL. 1996*, in that matter, the Court made an award in March 1998, in the sum of **Four Hundred and Twenty Thousand Dollars (\$420,000.00)** for pain, swelling, tenderness of right leg, communitated fracture of middle third tibia and transverse fracture of middle of right fibula. This sum updates to **Two Million Nine Hundred and Fifteen Thousand Six Hundred and Ninety-Six Dollars and Sixty-Three Cents (\$2,915,696.63)**. The injuries in this matter are comparable to those which had been sustained by Mr. McGibbon. The current Claimant however suffered a 3% whole person impairment rating.
- [18] In the decision of *Gary Reid v Kern Paul Anthony Braham, Claim No. 2011 HCV 04669*, delivered December 2012, the Court awarded **One Million Nine Hundred Thousand Dollars (\$1,900,000.00)** for pain and suffering and loss of amenities. The relevant injuries were injuries to his lower back, excruciating pain to his right ankle and knee. Whiplash injury and lumbago with no PPD. This award when updated would be **Three Million One Hundred and Eighty-Five Thousand Six**

**Hundred and Fifty-Eight Dollars (\$3,185,658.00).** I did not find that this authority was as relevant as the nature of the injuries were not comparable.

- [19] Counsel also made reference to the *Jermaine McPherson*<sup>1</sup> case and that of *Kavin Pryce*<sup>2</sup>. McPherson suffered injuries to his right leg, which was swollen with tenderness and abrasions. He was diagnosed with a right comminuted tibia fracture. The award of **One Million Five Hundred Thousand Dollars (\$1,500,000.00)** in March 2015 updates to **Two Million One Hundred Seventy-Two Thousand Nine Hundred and Seventy-Eight Dollars (\$2,172,978.00)**. Mr. Pryce sustained cervical strain, lower back strain, soft tissue injury to the left thigh and left knee sprain. Unlike the McPherson matter, the Pryce case was not especially useful by way of comparison given the marked differences in the injuries suffered.
- [20] The injuries suffered by the Claimant in the case at bar seem to be more severe than that suffered by *McKenzie* and *McPherson* as Mr. McGibbon suffered injuries to both his left upper extremity and his right lower extremity. The nature and extent of his injuries were so serious that they required surgery and extensive medical treatment in excess of one year. It is indeed noteworthy that today, Mr. McGibbon has a 2cm limb discrepancy and walks with a limp fifteen (15) years post-accident and that in spite of two (2) surgeries, he is unable to negotiate a staircase. He also has a 3% whole person impairment.
- [21] The other authority commended to the Court for consideration was **Pogas Distributors Ltd. Et al v McKitty** (unreported) S.C.C.A 13/94 and 16/95 delivered July 1995 (Volume 4 Khan Recent Personal Injury Award) where the relevant principles guiding an award of damages were outlined. In that case, it noted that careful consideration and weight ought to be placed on the extent of the Claimant's

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<sup>1</sup> *Jermaine McPherson v Desmond Bryan* 2011HCV04949

<sup>2</sup> *Kavin Pryce v Raphael Binns and Michael Jackson* [2015] JMISC Civ 96



injuries, discomfort, length of total incapacity and permanent partial incapacity resulting from the injuries sustained.

- [22] On assessment of these authorities and the evidence before the Court, I am satisfied that **Three Million Seven Hundred Thousand Dollars (\$3,700,000.00)** is a reasonable award for General Damages to the Claimant.

### **KYMORE JEFFERY MCGIBBON'S CLAIM**

#### **Special Damages**

- [23] Mrs. McGibbon also sought to recover special damages under a number of headings in respect of losses/expenses incurred. In respect of loss of income an award in the sum of **Two Hundred and Eighty-Three Thousand One Hundred and Seventeen Dollars (\$283,117.00)** is being claimed. In respect of this loss, it was noted that there was no evidence presented nor explanation provided in order to assist the Court in determining what had been her regular income, overtime payments, travelling allowance and meal allowance. In the absence of this evidence, I was unable to properly assess what loss had in fact occurred, as such I am unable to make an award under this heading.

- [24] In relation to paid assistance, there was cogent evidence presented as to the Claimant's inability to perform domestic duties due to her injuries. It is her evidence that she required household assistance thereby incurring the expenses of **Three Hundred and Forty-Nine Thousand Five Hundred Dollars (\$349,500.00)** for the period January 15, 2007 to December 2010. In explaining the absence of documentary proof, the Claimant indicated that she no longer has the contact numbers for the three individuals who assisted her. I have carefully considered this expenditure and believe that it would reasonably have been incurred. The medical evidence would tend to show that as a result of the injury to her hand, the 2<sup>nd</sup> Claimant would have been incapacitated in this regard for some time. Although there was no documentary proof presented, I am cognizant of the fact that this is another area in which documentary proof of payment is not usually generated. As

such, applying the principles in the *Ezekiel Barclay* decision, I am prepared to award this sum.

- [25] In relation to transportation, I accept that the 2<sup>nd</sup> Claimant would have been unable to drive and would likely have required the services of a driver. Although no receipts have been provided for transportation, *the Ezekiel Barclay v Clifford Sewell and Kirk Mitchell supra*, decision is again applicable in this regard. The claim in respect of this expense is to recover the sum of **Thirty-Six Thousand Dollars (\$36,000.00)** for 4 ½ months transportation expenses at **Two Thousand Dollars (\$2000.00)** per week. This sum is a reasonable one taking into account the time period and the need for this service to be provided. This 2<sup>nd</sup> Claimant is also awarded this sum.
- [26] The penultimate item of special damage is medical expenses, in this regard, Counsel placed into evidence a number of receipts from doctors, hospitals and pharmacies which by my calculation amounted to **Sixty-Five Thousand Five Hundred and Seventy Dollars (\$65,570.00)**. I carefully examined these exhibits and I was satisfied that these sums had been expended by the 2<sup>nd</sup> Claimant in connection with the treatment of her injuries which were sustained in this accident and as such she should be compensated for same.
- [27] The Claimant also sought to recover the sum of **Eighteen Thousand Four Hundred Dollars (\$18,400.00)** which she said was the cost for her engagement ring which had to be cut from her finger by the hospital team in order to treat her. While the 2<sup>nd</sup> Claimant may not have had a receipt for this purchase, she was able to recall its purchase. It would have been useful if a replacement receipt or confirmation in writing had been produced in this regard. In the absence of same, I am unable to make this award.

## **GENERAL DAMAGES**

- [28] The medical reports of Dr. Don Gilbert from the Cornwall Regional Hospital dated February 8, 2010 and Dr. A. Ueker from MoBay Hope Hospital dated March 10,

2009 also formed a part of the evidence in this claim. Both reports particularize the injuries sustained as a result of the accident. The combined observations of the doctors were noted to be as follows;

- (a) Loss of consciousness
- (b) Swollen neck and pain in neck
- (c) Laceration on left knee, right knee and leg
- (d) Severe damage to tongue
- (e) Pain right forearm
- (f) Mid shaft fracture of right radius of right forearm
- (g) Severe pain overall

**[29]** The 2<sup>nd</sup> Claimant stated that she received treatment for her injuries at the Cornwall Regional Hospital. After being discharged on January 9<sup>th</sup>, 2009, she had surgery on her right hand. The medical report of Dr. A. Ueker dated March 10<sup>th</sup>, 2009 refers to the surgery. In April 2007, the same arm was re-fractured and her hand had to be placed in a cast. It subsequently healed uneventfully. Dr. Ueker also commented that the 2<sup>nd</sup> Claimant will be required to undergo surgery to remove the plate from her hand.

**[30]** In his report, Dr. Gilbert stated that on examination of the 2<sup>nd</sup> Claimant he noted a 8.5 cm scar on the dorsum of the forearm with implants. He found that there was full range of motion in the elbow, forearm and wrist and there was also a strong grip in the hand. He diagnosed her as having a healed fracture of the right radius with no limitation in the range of motion in the elbow, forearm and wrist. There was no PPD identified.

**[31]** In outlining her medical challenges and loss of amenities, the 2<sup>nd</sup> Claimant stated that as a result of her injuries, she experienced difficulty tending to household

duties and caring for her family. She had to employ a domestic assistant. She further stated that when she resumed work, she was unable to perform her duties as she did previously before the accident. She postulated that prolonged driving and lifting of weights aggravates the pain and discomfort in her right hand. The Claimant also stated that the injuries to her tongue prevented her from eating properly for two weeks after the accident.

## SUBMISSIONS/ANALYSIS

- [32] A number of cases were cited by Counsel as being of pertinent assistance in the Court's determination. The first is ***Carlton Parsons, Estella Ffolkes and May Smith v Colin Graham and Stanley Grant, Suit No. CL.1984 P078 (consolidated) reported at Khan Volume 4 pages 95-97.*** The Claimant in that case suffered fracture of left fibula, fractures of two left metatarsals, laceration to head and left leg, had plaster cast for two months and walked with crutches for three months. In the case at bar, the Claimant suffered similar injuries but it is clear that that Claimant suffered more injuries than Mrs. McGibbon. Her injuries were also more severe. **Folkes** was awarded the sum of **Two Hundred and Thirty-Eight Thousand Dollars (\$238,000.00)** in February 1995. The award when updated amounts to a sum of **Two Million Six Hundred and Two Thousand Six Hundred and Twenty-Five Dollars (\$2,602,625.00).**
- [33] The other authority commended to the court for consideration was ***Leroy Robinson v James Bonfield and Conrad Young,*** Suit No. CL. 1992 R 116. In that case, Robinson sustained multiple abrasions to left hand, tender swelling to left elbow and abrasions to eyebrows, fracture to right wrist which was placed in a cast. He suffered a slight deformity of wrist but no permanent disability. The Court awarded **Robinson** a sum of **Two Hundred and Sixty-Nine Thousand Four Hundred and Thirty-Eight Dollars (\$269,438.00)** for general damages in September 1996 which equates today to a sum of **Two Million One Hundred and Seven Thousand Two Hundred and Forty-Four Dollars (\$2,107,244.00).** On a

comparison of Mrs. McGibbon's injuries with those of Mr. Robinson, it is evident that hers were more severe.

[34] As such, I am in agreement with Counsel's submissions that Mrs. McGibbon's injuries are far more serious than those suffered by **Robinson**. I was not however able to agree that this was also true in respect of **Ms. Folkes** even though neither **Robinson** nor **Folkes** suffered from any loss of consciousness and injuries to the neck.

[35] Counsel argued that although Mrs. McGibbon's injuries did not result in any permanent partial disability, she sustained significant injuries that affected her quality of life after the accident. In this regard she relied on the case of **Pogas Distributors Ltd. Et al v McKitty supra**. Although the medical report of Dr. Gilbert states that the injury was now completely healed, I accept that it has had a life changing effect of Mrs. McGibbon. It also appears that her medical interventions may not be over, based on the observation of Dr. Ueker and she still has to self-medicate from time to time.

[36] On assessment of damages and the evidence before the Court, I am prepared to award the sum of **Two Million Six Hundred Thousand Dollars (\$2,600,000.00)** as General damages to the 2<sup>nd</sup> Claimant.

## **Conclusion**

[37] The assessment of damages for injury and loss incurred by the Claimants are as follows:

### **Mr. Sheldon McGibbon**

- (a) General Damages for Pain and Suffering and Loss of Amenities awarded in the sum of **Three Million Five Hundred Thousand Dollars (\$3,500,000.00)** with interest at a rate of 3% from 10<sup>th</sup> November 2010 to September 28<sup>th</sup>, 2022.

(b) Special Damages awarded in the sum of **Three Hundred and Twenty-Eight Thousand Nine Hundred and Twenty-Nine Dollars and Fifty-One Cents (\$328,929.51)** with interest at a rate of 3% from 6<sup>th</sup> January 2007 to September 28<sup>th</sup>, 2022.

(c) Costs to the Claimant

**Mrs. Kymore Jeffrey McGibbon**

(a) General Damages for Pain and Suffering and Loss of Amenities awarded in the sum of **Two Million Six Hundred Thousand Dollars (\$2,600,000.00)** with interest at a rate of 3% from 10<sup>th</sup> November 2010 to September 28<sup>th</sup>, 2022.

(b) Special Damages awarded in the sum of **Four Hundred and Fifty-One Thousand and Seventy Dollars (\$451,070.00)** with interest at a rate of 3% from 6<sup>th</sup> January 2007 to September 28<sup>th</sup>, 2022.

(c) Costs to the Claimant.