[2025] JMSC Civ 80

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV00565

BETWEEN	**TAMARA MASON**	**CLAIMANT**
AND	**DAVIAN HOLLAND**	**DEFENDANT**

IN OPEN COURT

Christine Mae Hudson and Judaska Shaw instructed by K. Churchill Neita & Co., Attorneys-at-law for the Claimant

Andrea Walters-Isaacs, Attorney-at-law for the Defendant

Heard: 29th April and 27th June 2025

Negligence - Liability for motor vehicle collision - Assessment of Damages

C. BARNABY, J

BACKGROUND

[1] This claim arises out of a collision on 4th March 2017 along the Spanish Town Road between a motorcycle ridden by Yovan Panton on which the Claimant, Tamara Mason was a pillion, and a motor vehicle owned and driven by Davian Holland, the Defendant.

[2] It is the Claimant's contention that the vehicle being operated by the Defendant, negligently collided into the rear of the motorcycle while the said motorcycle was

traveling in the extreme right lane in the vicinity of Spectrum Systems Limited, and that the collision pushed the motorcycle causing its rider to lose control. As a result she fell to the ground, suffered injuries, loss, damage and incurred expenses. She approaches the court to recover special damages, general damages, interest and costs.

[3] The Claimant particularises the negligence of the Defendant as driving too close behind the motor cycle; driving without any due care or attention; failing to drive within breaking distance so as to avoid colliding in the rear of the said motorcycle; failing to keep any or any proper look-out; failing to have any or any sufficient regard for her safety; driving at an excessive speed, and dangerously and recklessly in the circumstances; failing to blow his horn or otherwise alert the rider of the motor cycle to his presence; failing to heed or observe the presence of the motor cycle in sufficient time so as to avoid colliding into its rear; colliding into the rear of the motor cycle; failing to stop, slow down, swerve or in any other way manage or control the motor vehicle so as to avoid the collision.

[4] The Defendant admits that there was an accident in the vicinity of Spectrum Systems Limited but denies that it was due to his negligence as alleged or at all. He contends that the collision was caused wholly or was substantially contributed to by the negligence of the motorcyclist, who he accuses of riding at a manifestly excessive speed in the circumstances; riding without due care and attention and without any or sufficient regard for other users of the road and for his own safety; failing to keep any or any proper look-out; failing to maintain any or sufficient control over the motorcycle; failing to heed or observe in sufficient time or at all the presence or approach of his motor vehicle; failing to operate the motorcycle in such a way as to avoid the collision; suddenly and without prior warning or indication swerving from the middle lane of the roadway into the right lane and into the path of the Defendant's motor vehicle which was lawfully positioned and proceeding along the roadway; and failing to stop, slow down, swerve or otherwise manoeuvre the motorcycle so as to avoid the collision. The motorcyclist was not joined as a

party to the proceedings. The allegations of injury, loss and damage are neither admitted nor denied and the Claimant is accordingly put to proof thereof.

[5] On 29th April 2025 the matter came on for trial. On conclusion of evidence and at the request of Counsel, the parties were permitted to prepare, file and serve closing submissions and any authorities not previously filed and served; and thereafter, to file and serve responses to authorities not already contained in closing submissions. Judgment was reserved to today's date.

[6] Although filed late, the additional submissions were duly considered in disposing of the claim.

LIABILITY FOR THE COLLISION

[7] The principles which govern liability in negligence are well established. A party alleging negligence must prove the existence of a duty situation, breach of duty and consequent damage.

[8] There is no dispute that the Defendant and the rider of the motorcycle owed a duty of care to each other and to the Claimant, pillion. The fact of a collision or that the Claimant suffered some damage as a result are also not in dispute. Issue is joined however on whether they were the result of the failure of the Defendant, the motorcyclist or both, to exercise due care in the operation of their respective motor vehicles and in their use of the road roadway, thereby breaching the duty of care owed to the Claimant.

[9] To borrow the language of Counsel for the Defendant, the parties have presented *"diametrically opposed accounts"* of the accident. Credibility is therefore a material issue for the court.

[10] In her claim for negligence, the Claimant bears the burden of proving, on a balance of probabilities that the Defendant was negligent.

[11] In urging the court to reject the account of the collision given by the Claimant and to prefer the account of the Defendant, a number of arguments were advanced by Counsel for the latter.

[12] It is submitted that the Claimant faltered during cross-examination and was forced to concede several points, particularly in relation to her evidence as to distance and speed, on which she was successfully challenged. Counsel does not particularise the aspects of the Claimant's cross-examination on which she relies for her conclusions but on a review of the evidence, they appear to have their genesis in the following exchange.

> *Q The accident happened in the vicinity of Spectrum?*
>
> *A Yes*
>
> *Q About how far is Spectrum from Berger?*
>
> *A To be honest, I am not sure*
>
> *Q Would you agree or not agree that from Berger to Spectrum is 200 meter?*
>
> *A I say, I am not sure. I can't say if it is 200*
>
> *Q At paragraph 9 of your Witness Statement you said that the vehicle came to a stop 20 to 30 meters from where you fell. So you have given a distance?*
>
> *A In regards to distances for what was indicated. For me, you would have to know all the companies going down between Berger and Spectrum. If I give you a distance from spectrum to Berger I would be lying. The sign was a landmark*
>
> *Q Do you know what the speed limit was on Spanish Town Road?*
>
> *A No*
>
> *Q So when you say at paragraph 7 of your witness statement that the motor vehicle was going at a moderate speed within speed limit*
>
> *A Yes*
>
> *Q You cannot say he was within the speed limit because you did not know the speed limit.*
>
> *A You have a point, but we were not going fast. We were going at a moderate speed*

[13] The Claimant has never given evidence as to the distance between Spectrum and Berger. The fact that she gave a distance for the point between where she fell after the collision and where the Defendant's vehicle came to a stop would not automatically imbue her with knowledge of the distance between the named entities. I can see nothing wrong with the witness saying she was unsure of the distance or that she was unable to say if it was 200m as suggested by Counsel.

[14] As to the speed at which the motorcycle was travelling, while the Claimant conceded in cross examination that she does not know the speed limit on Spanish Town Road, it has always been her evidence that the motorcycle proceeded at a moderate speed on the roadway. The only evidence of the speed limit in the proceedings is that given by the Defendant, which is 50km per hour. The Defendant admitted in cross-examination that he was driving at a greater speed than the motorcyclist who he said was travelling at 20km. Accepting the Defendant's unchallenged evidence in these regards, the Claimant's evidence that the motorcycle was going within the limit of the roadway and at a moderate speed was not impugned.

[15] Counsel also submits that it is the clear suggestion on the Claimant's pleadings and on cross-examination, that there was a flush impact to the back of the motorcycle, but that the Claimant in her witness statement does not suggest this in any way. She goes further to submit that this is a critical inconsistency on the Claimant's case which goes to what is described in written submissions as "*the singular issue in the case" - "whether the collision was to the back or to the right of the [motorcycle]"*. It is argued that the Claimant's inability to commit to one version is not only troubling, but fatal to her case. I find the submissions of defence Counsel in these regards unmeritorious.

[16] The Claimant has never used the word *"flush"* to describe the impact to the back of the motorcycle. Her pleaded case is that the Defendant collided *into "the rear of the motorcycle, pushing it"*. In her witness statement she said she *"felt an impact*

*to the **rear right side** of the motorcycle which caused [it] to propel forward".* [Emphasis added]

[17] I think judicial notice could safely be taken of the fact that motorcycle mufflers are typically located on the right side, often near the rear of motorcycles. They are a part of the exhaust system of a motorcycle, which in addition to optimizing performance, is positioned to direct exhaust fumes away from rider and pillion. The court is also assisted by the opportunity presented to the Claimant in cross examination to more pointedly state where on the rear of the motorcycle the impact was felt. This is seen on this extract from her cross examination by Counsel.

> Q *Where on the bike are you saying was impacted by the motor vehicle?*
>
> *A The lower right part of the muffler of the bike*
>
> *Q Where on the bike is the muffler, back, front, side, right side?*
>
> *A Stretched to the back. Like how you would have a car, and the muffler come round to the back*
>
> *Q You sure the muffler was not on the side?*
>
> *A Side to the back*
>
> *Q So muffler got hit on right rear side of the bike?*
>
> *A That's where I felt the impact on the right side, the lower part*

[18] It appeared to me and is confirmed by the above exchange that reference to *"right side"* which immediately follows *"rear"* in the Claimant's Witness Statement is a relative term used to indicate her perspective of the impact. It demonstrates that she felt the impact to the "*rear right side"* as distinct from the *"rear left side"* of the motorcycle on which she travelled as a pillion.

[19] The Claimant's evidence in chief and on cross-examination, which is consistent with her pleadings, is that the impact was to the rear of the motorcycle. The muffler is to the rear and is located on the right side. There is no material or other inconsistency in my judgment which would cause me to regard the Claimant's evidence on this or any other material matter as incredible.

[20] While it was the Defendant's evidence on cross examination that he swerved, tooted his horn and stepped on his brake ahead of the collision, those material facts formed no part of the Defendant's pleaded case, which was entirely silent as to any steps being taken by him to avoid the collision. No effort was made by Counsel for the Claimant to impeach the witness by omission however, so no opportunity was provided to the Defendant to explain the omissions if it was possible to do so. Accordingly, the court has not been placed in a position to draw an adverse conclusion as to the credibility of the witness in respect of this particular matter or his other evidence because of the omissions.

[21] The Defendant's evidence, consistent with his pleadings of negligence and or contributory negligence on the part of the motorcyclist Yovan Paton, is that the motorcyclist swerved *"suddenly"* from the middle lane into the extreme right lane, into the path of his motor car. The evidence of the Defendant, elicited during cross examination, is that when he first saw the motorcycle swerve, it was about 25 feet diagonally from him. This was relied upon by Counsel for the Claimant in submitting that there is a material inconsistency in the Defendant's evidence in these regards. I find myself unable to agree. In its ordinary meaning, *"suddenly"* may mean either quickly or unexpectedly. What exactly was meant by the use of the word by the Defendant was not explored. Further and in any event, if the two statements are inconsistent, the procedure for proving an inconsistency was not engaged. The court has not been properly placed in a position to conclude that the Defendant's evidence in this or other regards incredible.

[22] That being said, the Claimant who bears the burden of proving her case has not been shown to be an incredible witness. In fact, I found her to be a forthright witness who offered a consistent and credible account of the incident. I accordingly accept her evidence that the motorcycle was traveling in the extreme right lane in the vicinity of Spectrum Systems Limited. Having accepted this evidence, and it being the Defendant's evidence that he was also travelling in the extreme right lane, I find it to be more probable than not that the motor vehicle driven by the

Defendant was travelling behind the motorcycle and collided into its rear right side, in the region of the muffler where the Claimant said she felt the impact.

[23] Having so concluded and considering the Defendant's own unchallenged evidence that he was travelling at 50km per hour compared to the 20km per hour at which the motorcyclist travelled, I find it to be more probable than not that the Defendant was, at minimum, traveling at an excessive speed behind the motorcycle in the circumstances which then existed in the extreme right lane; and driving too close behind the motorcycle. In so doing, the Defendant failed to have sufficient regard for the safety of the Claimant in breach of his duty towards her as a fellow road user.

[24] I also find it to be more probable than not, and as a matter of fact, that the Defendant had indicated to the Claimant that he "*was running late for [his] usual Saturday class sessions as he is a teacher"*; and had said *"Thank God, thank God that [she] was not killed in the accident."* The Claimant gave consistent evidence on cross examination in insisting that the words were said after the Defendant stopped his car and came over to assist her and the motorcyclist to the Kingston Public Hospital. The Claimant denied the suggestion that the conversation which she recounts took place in the car. It is her evidence that at that time she was on the phone with her spouse, making him aware of what happened.

[25] The Defendant was permitted an opportunity to comment on the words attributed to him in the Claimant's witness statement and admitted to saying some of them. When asked which of them he did not say, he responded:

> *I did not say anything about thank God that she wasn't killed in the accident. Also, the conversation did not take place at the scene of the accident because while at the scene of the accident my only intention was to take them safely to the hospital. I mentioned that taking them to the hospital would make me late for my class not that being late for my class caused the accident. The accident would cause me to be late for my class.*

[26] It was not put to the Claimant that the Defendant did not say anything about thanking God that she was not killed, or that the Defendant had said or mentioned that taking them to the hospital would make him late for class and not that being late for class had caused the accident. The Claimant got no opportunity in the circumstances to deny or accept these aspects of the Defendant's case. I do not disbelieve the Claimant, and I accept her evidence as to the conversation between herself and the Defendant about being late for his Saturday class. In consequence, I find to be more probable than not that the Defendant's failings which led to the collision are attributable to his running late for class.

[27] I am not persuaded to conclusions otherwise by the submissions advanced by Counsel for the Defendant in submitting that the Defendant's account of the collision should be preferred.

[28] Among those submissions is that the fracture to the mid 1/3 of the Claimant's right tibia is fully consistent with impact to the right side of the motorcycle as it swerved from the middle lane across the path of the Defendant's vehicle travelling in the right lane. The location of the fracture is at best equivocal evidence as to the point of impact on the motorcycle. The common evidence of the parties is that the Claimant fell from the motorcycle onto the roadway following the collision, thereby bringing her person into contact with the road surface. The fracture would be equally consistent with the Claimant's account of the collision in the circumstances.

[29] The Defendant denied in cross-examination that upon impact the motorcycle was pushed forward, and that upon being pushed forward the Claimant and the rider fell from the motorcycle. He contends that he would have run over them if that was the case. This argument was repeated in submissions by Counsel for the Defendant in contenting that a hit to the rear of the motorcycle would not have caused the Claimant to feel the impact to the right rear side of the muffler, but that the impact would be felt directly to the back of the motorcycle and the Claimant's back.

[30] I do not believe the fact that the Claimant and the motorcyclist were not run over by the Defendant invalidates the Claimant's account of the point of impact and her evidence which I accept, that the impact caused the motorcycle to be pushed forward.

[31] Further, there is no dispute that the extreme right lane abuts a median which separates the dual carriage way on the Spanish Town Main Road. According to the Defendant, the motorcycle ended up between the middle lane and the right lane after the impact. His motor vehicle - the right front and rear wheel to be exact - ended up on the median which separates the dual carriageway. It seems to me that after the impact, the Defendant would have gone further right, away from the direction of the motorcycle, its rider and the Claimant therefore avoiding running over them.

[32] When the Defendant was asked in cross-examination, how far into the middle lane the motorcyclist would have swerved, he responded, *"he swerved into my lane, so he actually collided with my left front fender."* Counsel for the Defendant says this evidence was unchallenged and relied upon it as being supportive of the Defendant's version of how the accident occurred, that is, the motorcycle swerved from the middle lane into the path of his motor vehicle. I would not say that the narrative was unchallenged, for although the Defendant denied it, the Claimant's diametric account of the collision was put to the Defendant.

[33] It was suggested to him that *"[he] was travelling too close behind the motorcycle that morning",* that *"at all material times the motorcycle was in the right lane…"*, and *"that [t]he collision was to the rear of the motorcycle."* To the latter suggestion he responded that *"the photographs would show otherwise".* On the same suggestion being put to him a second time, he responded, *"the side of the bike collided with the side of my car".* There were no photographs in these proceedings.

[34] Further, among the allegations of negligence levelled against the motorcyclist by the Defendant is that the former was riding at an excessive speed. The Defendant stated on cross-examination that he was travelling at 50km per hour - the maxim

of the speed limit - and the motorcyclist was travelling at 20km per hour. There is no evidence of any peculiar circumstances on the roadway way at the material time which would warrant the latter's speed being regarded as excessive. On the Defendant's own evidence, the allegation that the motorcyclist was travelling at an excessive speed so as to cause or contribute to the collision has proved untrue.

[35] In all these premises and having seen and heard the witnesses, and considered the evidence as a whole, I find that the question as to liability for the collision is to be determined in favour of the Claimant.

[36] Before moving on to assessing the damages recoverable by the Claimant, Counsel for the Defendant submitted that the Defendant's estimated stopping distance of 45 feet shows that he was not going as fast as 50km per hour or that he desperately tried to the avoid the collision by braking sharply and quickly, so that he was able to bring his motor vehicle to a stop well under the typical braking distance of 35 meters. The submission was grounded on an extract from a website which gives typical braking distances for vehicles travelling at a speed of 50 km per hour. The calculation of braking distance, reaction time and total stopping distance which were reproduced in the submissions are technical in nature and are likely to be outside of the expertise of judicial officers. Where such evidence is sought to be introduced, it is appropriately done through engagement of the process for admission of expert evidence. Having failed to engage that process, and the matters being outside of this court's expertise, no weight was given to the calculations of braking distance, reaction time and total stopping distance in determining the issues in dispute.

DAMAGES

Special Damages

[37] While it is well settled that special damages are to be specifically pleaded and proved, equally settled, is that unlike the intractable obligation to specifically plead

special damages, the requirement for specific proof is not inflexible. It is recognized that *"… there may be situations, depending on the circumstances of the case, which accommodate the relaxation of the principle. In some cases, the incurring of some expenditure may not be readily capable of strict proof. As a consequence, the court may assign to itself the task of determining whether strict proof is an absolute prerequisite in the making of an award".* In these regards, see **Julius Roy v Audrey Jolly** [2012] JMCA Civ 53 at para. [38] and **Trudy-Anne Silent-Hyatt v Rohan Marley and Anor** [2023] JMCA Civ 24 at para. [25].

Medical Expenses

[38] The sums claimed for medical expenses in the cumulative amount of One Hundred and Fifty-Six Thousand Eight Hundred and Thirteen Dollars and Six Cents ($156,813.06) was agreed at trial. Transportation costs in the sum of Fifty Thousand Dollars ($50,000.00) was conceded in written submissions filed on behalf of the Defendant. In the result the Claimant is only required to prove the sums claimed for loss of income as a customer service representative and for household help for a period of six (6) months.

[39] It is submitted by Counsel for the Claimant that evidence provided in respect of the items of special damages which require proof were not sufficiently discredited by the Defendant. Accordingly, it was argued that the sum of Four Hundred and Thirty-Two Thousand Dollars ($432,000.00) should be awarded to the Claimant in these regards. For reasons set out below, I am unable to agree with the submission.

Loss of income

[40] The Claimant claims the sum of Four Hundred and Thirty-Two Thousand Dollars ($432,000.00) for loss of earnings as a customer service representative for six (6)

months from 7th April 2017 to 6th October 2017, at Seventy-Two Thousand Dollars ($72,000.00) per month.

[41] The collision took place on Saturday 4th March 2017. The court is advised by correspondence from the Claimant's previous employer, which was admitted in evidence, that the Claimant was employed as a Customer Service Representative within its warehouse department at the time of the accident. It is also indicated that she was *"absent from work on sick leave from March 6, 2017, to August 4, 2017".* It was elicited on cross-examination that the Claimant was paid for the period of her sick leave. When the Claimant's evidence in these regards is taken together, I am unable to find that there was any loss of income between 7th April 2017 and 4th August 2017.

[42] It is the Claimant's evidence that she went back to work in August 2017 but that due to the extreme pain which she was experiencing, she was unable to perform her duties, which involved standing for long periods of time. She goes further to say that because of the that she had to resign from her job on 23rd August 2017.

[43] I observe from the letter provided by the Claimant's previous employer that immediately after the indication that the Claimant was "*absent from work on sick leave from March 6, 2017, to August 4, 2017"*, it goes on to say that *"she later resigned from [the said employer] effective August 23, 2017."* There is no reference to the Claimant being absent from work from 5th August 2017 when she would have returned from sick leave to the date of her effective resignation. Although the Claimant was asked on cross-examination about the time which passed between her going back to work and her resignation, she failed to indicate a time and merely stated that she *"went back in August but based on the nature of [her] job [she] couldn't perform [her] duties, and [she] had to resign."* On her own evidence, the Claimant has failed to satisfy the court that there was income loss from the period 5th to 22nd August 2017.

[44] The Claimant claims loss of earnings up to 6th October 2017. While she testifies that she resigned from her employment effective 23rd August 2017 on account that

she could not perform her duties, there is no indication on the letter from her then employer that at the end of her sick leave, that the Claimant was unable to perform her duties as a customer service representative or other duties, to require her departure. There is also no medical evidence before this court which demonstrates that the Claimant was unable to work up to 6th October 2017 because of injuries suffered in the accident. In fact, the latter date appears quite arbitrary as there is no evidence of the Claimant having returned to a position of earning as a customer service representative or other employment as at that date.

[45] In these circumstances a departure from the well-established principle that special damages are to be specifically proved is unwarranted. The Claimant has failed to strictly prove that she was unable to work and lost income as a result of the accident. In the result, no award is made under this head.

Household help

[46] The Claimant pleads and claims the sum of Eighty-Four Thousand Dollars ($84,000.00) for household help for six (6) months. Her evidence is that she could not do a lot of the things after the accident, and she accordingly hired someone to assist around the house and do household chores for the period claimed at a cost of Three Thousand Five Hundred Dollars ($3,500.00) per week. There are no receipts or other evidence in proof of the expenditure, although it was disclosed during cross-examination that the Claimant was assisted by someone known to her. It is my view that in these circumstances, the expenses said to be incurred for household help would be capable of strict proof with some effort being made to obtain proof. There is no evidence of any effort however and no explanation for the failure to strictly prove the expenditure. The sum claimed for household help is accordingly refused.

General Damages

[47] There is no dispute in relation to the medial evidence. The Medical Data sheet dated 28th June 2018 under the hand of Dr. R. Webber of the Kingston Public Hospital; and the Medical Report of Dr. G.G. Dundas, Consultant Orthopaedic Surgeon and certified expert witness in these proceedings, were admitted in evidence by agreement.

[48] Dr. Webber's report shows that on presentation the Claimant was examined on the date of collision and found to have swelling to the right lower limb, ecchymosis (bruise) to the right leg, swelling to the right ankle and limited range of motion due to pain. X-rays revealed significant soft tissue swelling, slightly displaced and comminuted fracture of the middle 1/3 of the right tibia which extended down in a spiral fashion towards the distal metaphysis. The Claimant was diagnosed with a closed right comminuted distal tibia fracture. The report shows that the Claimant was treated with an above knee back slab which was converted to full cast, analgesics and leg elevation. Surgical and non-surgical options were discussed with the Claimant, and she was disposed to the Orthopaedic Outpatient Department and physiotherapy. The Claimant was also readmitted on 18th March 2017 and assessed as having compartment syndrome. The cast was removed and the Claimant observed.

[49] Dr. Dundas saw the Claimant on 8th February 2023, over five (5) years after the accident for the purpose of preparing his medical report. The Claimant complained of chronic swelling of the right leg, intermittent pain in the right leg, and a lump in the right buttock for five (5) years. The Claimant had also indicated that her right leg swells repeatedly everyday but is relieved by elevation, and that she was unable to sustain a standing position for more than half an hour as the swelling and pain became intolerable.

[50] On examination, Dr. Dundas observed:

i. Areas of superficial hyper-pigmentation along the extensor (ulnar) borders of the forearms.

ii. Right forearm scar measuring 12cm and extended along the proximal half of the forearm.

iii. Ovoid 4x3 cm area of hyper-pigmentation in the vicinity of the olecranon, on the left side of the right forearm.

iv. Mobile, non-tender and firm area measuring 7x6 cm posterior to the greater trochanter of the right femur in the buttock region, in the right thigh.

v. Right lower limb 1 cm shorter than the left.

vi. Right calf circumference 2 cm larger than the left.

vii. Mild to moderate tenderness in the distal third of the right leg, in the fracture zone, with minimal pitting leg oedema.

[51] He diagnosed the Claimant has having delayed union fracture distal right tibia and post traumatic fibrosis in the region of the right buttock. He indicated that the residues suffered by the Claimant are limitation of ankle motion with a 7% lower extremity impairment and a 3% whole person impairment.

[52] Counsel for the Claimant relies on the cases of **Jermaine McPherson v Desmond Bryan** unreported judgment delivered 3rd March 2015, entered in Binder No. 763, Folio No. 404**; Maureen Golding v Conroy Miller and Duane Parson** Claim No. 2005 HCV 00478, Khans Volume 6 page 62; and **Cecil Gentles v Artwell's Transport Co. Ltd and Josyln Chambers,** Khans Volume 5 page 60 in submitting that the sum of Five Million Dollars ($5,000,000.00) to Five Million Five Hundred Thousand Dollars ($5,500,000.00) is an appropriate award for general damages in this case.

[53] In the **Jermaine McPherson** case, on presentation on the day of the accident the claimant was observed as having a swollen and tender right leg and abrasion. He was diagnosed with right comminuted tibia fracture. He was treated at hospital with analgesia and plaster immobilization with follow up in the orthopaedic outpatient department. Seven (7) months later he was seen by a consultant orthopaedic surgeon when he complained of mild pain with ankle movements. On examination he was non-tender over the fracture site but had mild pain with extremes of ankle motion and some callus palpated. By way of prognosis, Mr. McPherson was stated as having a partially united fracture of the distal tibia for which he had not yet achieved maximum medical recovery as he was still a patient at the hospital's orthopaedic clinic. One (1) year and three (3) months post-accident he attended the consultant for review when he complained of leg pain during cold weather. On examination, he was found to have mild tenderness to the region of the fracture site. Radiographs showed a healed fracture of the distal tibia, and he was diagnosed accordingly. He was not expected to have any residual defects and had no permanent partial disability. He was awarded the sum of $1,500,000.00 as general damages in March 2015. This sum updates to $2,495,310.67 using the most current CPR of 141.9 for May 2025.

[54] The second case relied on by the Claimant is that of **Maureen Golding** in which the claimant had an undisplaced fracture of left fibula at the ankle and pain in the left leg. She was treated with a plaster cast and made non-weight bearing. She attended outpatient clinic on four (4) occasions and had her plaster removed approximately two (2) months post-accident. While she continued to have pain in the left leg, she was treated with analgesics and an ankle support. Partial weight bearing also commenced and she was referred to physiotherapy. Within months of the accident, she was fully ambulant with no significant complaints and discharged from the clinic. She was temporarily incapacitated for six (6) months, but she was not expected to have any permanent partial disability. Ms. Golding was awarded the sum of $580,00.00 in July 2006. This updates to $2,171,556.73.

[55] In the **Cecil Gentles** case the Claimant suffered from a bimalleolar fracture of the left ankle and was treated with below knee plaster of paris cast that was applied for seven (7) weeks. He was not allowed to weight bear. He was discharged from hospital within two (2) weeks of the accident giving rise to his claim with regular follow up at clinic. Within four (4) months of the accident he could walk without aid and there was no pain at the fracture site. The broken bone had healed well and although it was likely to have arthritis in his left ankle, there was no evidence of it on his last visit to clinic. General damages was awarded in the sum of $300,000.00 in February 2000. This updates to $2,097,044.34.

[56] To the extent that **Jermaine McPherson case** is concerned with a fractured tibia, it is an appropriate comparator. Although the fractures and other injuries in the **Maureen Golding**, and **Cecil Gentles** cases are not the same as those suffered by the Claimant here, they too are sufficiently similar and capable of offering some assistance to the court, subject to upward adjustments.

[57] Counsel for the Defendant relied on **James Cowan v New Era Homes Jamaica Ltd. and Anor.,** Khans Volume 6 at page 72 and **Barrington Mckenzie v Christopher Fletcher and Anor.**, Khans Volume 5 at page 72.

[58] In the **James Cowan case,** the Claimant suffered from abrasions to the right leg just behind knee, contusions of tissues of right leg, undisplaced fracture of articular surface of tibia, comminuted fracture distal parts of both tibia and fibula and marked swelling of the right leg. A cast was applied but was removed due to persistent pain, which required the claimant to be readmitted to hospital due to the *"risk"* of compartment syndrome. Further treatment included the application of a below knee plaster of paris back slab and analgesia. Thereafter the claimant was discharged for follow up in the outpatient clinic. He ambulated on crutches for two (2) months.

[59] Almost two years after the accident Mr. Cowan saw an orthopaedic surgeon. On examination it was revealed that the claimant had a short leg gait, multiple scars on the right leg, a 20cm reversed check-shaped hyper-pigmented area extending

from the 7th rib at anterior axillary line to the level of the umbilicus, a 1.5cm shortening in the right lower limb, limited motion of the right knee, 10 degrees loss of plantar flexion in right ankle and palpable irregularity in the tibial shaft 15cm proximal to medi malleolus. He was diagnosed as having mal-united fracture of the right tibia with overlap. Approximately six (6) years after the accident the Claimant saw another orthopaedic surgeon complaining of swelling in the right leg after standing and walking, and of his need to take frequent breaks because of pain and lower back pains. Examination revealed mild tenderness on palpation of midline over L1, L5 and S1 vertebrae, mild tenderness on palpation of right iliac crest, mild restriction in ranges of motion of the lumbo-sacral spine, varus angulation and bony prominence at the site of the malunion of the tibia. The claimant was diagnosed with mild mechanical lower back pains, mild malunion of the right tibia, limb length discrepancy of 1.8 cm and mild ankle stiffness. Mr. Cowan was assessed with a permanent partial disability of 3% of the whole person in respect of the lower back pains, 7% of the foot because of a mild restriction in inversion of the subtalar joint which was equivalent to a 2% whole person impairment and was assigned a 5% whole person disability rating. Mr. Cowan was awarded the sum of $550,000.00 for general damages in November 2004, which updates to $2,438,906.25.

[60] The Claimant's Attorneys-at-law conceded in submissions that the injuries suffered by Mr. Cowan were more severe than those of the Claimant in the instant case but went on to contend that it does not follow that a considerably lower award should be made. They go on to submit that the **James Cowan case**, though not appealed or overruled was anomalous, a standalone and on the low side when consideration is given to the awards for uncomplicated fractures of the tibia or fibula which were treated conservatively with a short period of rehabilitation and without permanent impairment. Cautious reliance on the decision was accordingly urged. I find merit in these submissions.

[61] The cases cited for the Claimant precede the **James Cowan case** in one instance and postdates it in two others. The referenced anomaly is evident on a comparison with these cases.

[62] The anomaly is also confirmed by the **Barrington Mckenzie case** on which the Defendant relies. In that case, an award which exceeds that made in **James Cowan case** was made in circumstances where the claimant suffered significantly less. Mr. Mckenzie had pain, swelling, and tenderness of the right leg, a comminuted fracture of middle third of tibia, and a transverse fracture of middle of right fibula. He was treated with tetanus prophylaxis and above knee back slab and above knee plaster of paris splint. He was advised to use crutches and not weight bear for three (3) weeks. The splint was later removed and the leg placed in a Sarmiento plaster for a further six (6) weeks and the claimant advised to continue the use of crutches. Although there were fractures in two places of the leg, they were uncomplicated. The claimant only received treatment for some two (2) months and six (6) weeks and was not expected to have any impairment. General damages was awarded in the sum of $420,000.00 in March 1998 which updates to $3,348,202.25. In the face of other authorities which concern uncomplicated fractures of the tibia or fibula with conservative treatment, short rehabilitation periods and without residual impairment, the award here also appears to be on the higher end.

[63] Considering the anomaly presented by the **James Cowan case** and the view I have taken of the award in the **Barrington Mckenzie case,** it is my judgment that decisions relied on by the Claimant provide the most useful guidance in terms of a starting point in arriving at an appropriate award for general damages in this case. When these authorities are considered, together with the rationale for general damages awards for pain and suffering and loss amenities, I am unable to agree with the submission of Counsel for the Defendant that the Claimant's injuries should not attract an award in excess of Two Million Five Hundred Thousand Dollars ($2,500,000.00).

[64] As opined by Sykes, J (as he then was), which was approved by the Court of Appeal in **Courts Jamaica Limited** v **Kenroy Biggs** [2012] JMCA Civ 50, in dismissing an appeal against the decision of the court at first instance:

> *It is well established that the assessment of damages has two components. There is the objective part and the subjective part (see* H.W. West & Sons v Shephard *[1964] A.C. 326).* ***The objective component deals with the actual injury and the subjective part takes account [the effect] of the injury on the claimant.*** *Additionally, there is a distinction between pain and suffering on the one hand and loss of amenities on the other (see Lord Scarman in* Lim Poh Choo v Camden and Islington Health Authority *[1980] A.C. 174 189G, reaffirming what was said in* H. West & Son Ltd v Shephard *[1964] A.C. 326).* ***Lord Scarman made the very important point often overlooked, that pain and suffering depends on the claimant's awareness of and capacity for suffering.*** *Thus it is entirely possible for there to be a low award in a personal injury case for fairly serious injuries if the evidence shows that the claimant is unable to appreciate the suffering or has no capacity for awareness of the pain. On the other hand, the lack of awareness of pain and the lack of capacity for suffering does not necessarily mean that the award for personal injury will be low. It can be quite high if the injuries in and of themselves are so serious that the claimant has, on an objective view, suffered a significant loss. This was indeed the case in* Lim Poh Choo *were [sic] the claimant was unable to appreciate her suffering and pain but suffered a substantial loss.* [Emphasis added]

[65] While the injuries (the objective element) in the cases cited for the Claimant are comparable to the injuries here, when the impact of the injuries (the subjective element) is considered, it seems clear to me that the Claimant has experienced greater suffering.

[66] It is the Claimant's evidence at trial that prior to the accident she was fairly active and healthy and was able to go about her business without experiencing pain and discomfort but that this has not been the case since the accident. While she admits to feeling improvements over time, she continues to experience pain and suffer in

her daily life. She has been unable to stand or walk for long periods of time as this causes pain, tenderness and stiffness to her right ankle. As a result, she tries not to stand for more than thirty (30) minutes and if she does, she takes the pressure off her right leg. On occasions, the symptoms observed on standing and walking for long periods also present during periods of inactivity. It is also the Claimant's evidence that she feels the most pain and numbness in the ankle when the time is cold. Since the accident she has been unable to wear certain shoes, including high heels. Further, she has difficulty carrying out regular household chores such as sweeping the yard, cleaning the house and washing. She also experiences difficulty driving as she uses her right foot to control the brakes and gas pedals, which causes her pain. The Claimant's evidence in these regards was unchallenged.

[67] Although there is no evidence of the Claimant being seen by a medical practioner after her visit to Dr. Dundas on 8th February 2023, I am prepared to accept her evidence as to continued pain, suffering and dysfunction as consistent with the residual suffering of which the orthopaedic specialist opined. The Claimant went to see the said specialist on account that she was experiencing swelling and discoloration of her right foot, in addition to pain. It was his expert opinion, which I accept, that the residues suffered by the Claimant are limitation of ankle motion which lead him to assign a 7% lower extremity impairment and a 3% whole person impairment.

[68] In these circumstances I find that the Claimant has been impacted by the injuries she sustained in the accident for a period of eight (8) years. This period far exceeds the period of suffering in the **Jermaine McPherson**, **Maureen Golding**, and **Cecil Gentles cases.** Further, in addition to negatively impacting aspects of daily life, the Claimant, a young woman also suffers from posttraumatic fibrosis in the region of the right buttock, scarring, skin hyperpigmentation, shortening of the limb and reduced circumference of the calf of the impacted leg. Unlike the other claimants, she also has a lower extremity impairment of 7% and a whole person disability rating of 3%. It is accordingly my judgment that the awards in those case require

upward adjustments, and that **Four Million Five Hundred Thousand Dollars ($4,500,000.00)** for general damages fairly compensates the Claimant for pain and suffering.

ORDERS

1. Special damages is awarded to the Claimant in the sum of **Two Hundred and Six Thousand Eight Hundred and Thirteen Dollars and Six Cents ($206,813.06)**.

2. Interest on special damages at the rate of 3% per annum from 4th March 2017 to 27th June 2025.

3. General damages is awarded to the Claimant in the sum of **Four Million Five Hundred Thousand Dollars ($4,500,000.00).**

4. Interest on general damages at the rate of 3% per annum from 21st April 2023 to 27th June 2025.

5. Costs are awarded to the Claimant, to be taxed if not sooner agreed.

6. The Claimant's Attorneys-at-law are to prepare, file and serve this order.

Carole S. Barnaby
Puisne Judge