



[2024] JMSC Civ. 09

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV04083

BETWEEN	ELAINE ALLWOOD-PALMER	CLAIMANT
AND	ROSE HALL ASSOCIATES PARTNERSHIP LIMITED	DEFENDANT

IN OPEN COURT

Mr. Sean Kinghorn instructed by Kinghorn and Kinghorn appearing for the Claimant

Defendant absent and unrepresented

Heard: December 6th, 2023 and January 29th, 2024

ASSESSMENT OF DAMAGES — Personal Injury — Employee fall whilst walking on wet floor — Negligence — Pain and suffering and loss of amenities — Special damages — Post-concussion syndrome.

T. HUTCHINSON SHELLY, J

BACKGROUND

[1] On the 25th day of August 2014, the Claimant, Elaine Allwood-Palmer, filed a Claim Form and Particulars of Claim seeking damages against the Defendant company, Rose Hall Associates Partnership Limited for negligence and or breach of Occupier’s Liability Act. She has also claimed interest pursuant to the Law Reform (Miscellaneous Provisions) Act (‘LRMPA’) and costs.

- [2]** It is Mrs. Elaine Allwood-Palmer's evidence that on or about March 9th, 2013, she was employed to the Defendant as a Cook. She stated that while in the lawful execution of her duties, she slipped and fell whilst walking on the floor of the Defendant's cold room in the kitchen, as there was bloody water on the floor which had drained from the meat freezer. As a result of this fall, she suffered loss and incurred expenses.
- [3]** The Defendant is a limited liability company duly incorporated under the Companies Act of Jamaica with its registered address or place of business at Rosehall in the parish of St. James.
- [4]** In her Particulars of claim filed on August 25th, 2014, the Claimant outlined that her employer was negligent in failing to provide a safe place and system of work and breached its statutory duty under the Act to ensure that she would be reasonably safe when using the premises of the Defendant. Specifically, she claimed that her fall occurred because of the negligent, unsafe and dangerous manner in which the Defendant kept and maintained the floors of the cold storage area. She also highlighted the failure of her employer to give sufficient warning of the dangerous condition of the floor and their failure to provide her with the necessary safety equipment and safety shoes to prevent her slipping on the wet floor. The Claimant further claimed that her employer failed to take any adequate precautions for her safety while she was engaged in her work.
- [5]** The Defendant failed to file an Acknowledgment of Service in response to the claim and consequently, Default Judgment was entered against them on the 18th of September 2015. The matter was listed for Assessment of Damages on the December 6th, 2023. On the day of the hearing, the Claimant gave evidence as to quantum of damages that she believes the Court should award. The Defendant made no appearance and was unrepresented, as such, the assessment proceeded uncontested.

ISSUE

- [6] The Default Judgment having been entered, the sole issue to be determined is the quantum of damages which should be awarded to the Claimant for injuries suffered and other related losses as a result of the Defendant's negligence.

THE CLAIMANT'S EVIDENCE

- [7] The evidence-in-chief of Mrs. Elaine Allwood-Palmer was outlined in her witness statement, which was amplified with permission to a limited extent. It was her evidence that on the 9th of March 2013, she was injured in the cold room area whilst she was preparing grilled chicken for her station. She testified that upon entering the cooler with a metal bowl in her hand, she slid in the bloody water which had drained from the meat onto the cold room floor and fell to the ground. She explained that before falling to the ground, she slid for some distance and eventually landed on her back.
- [8] She stated that she immediately felt the impact of the fall in her vagina and urinated on herself. She lost consciousness and only became aware of her surroundings later at the nurse's station. She was seen by the nurse then sent home. On her journey from Montego Bay to Falmouth, she began to experience pain emanating from her neck down to her lower back and vagina and made the decision to seek medical attention at the Falmouth Hospital. Mrs. Allwood-Palmer also recounted that she had requested a new pair of shoes from her Supervisor a few days before she fell. At the hospital, an x-ray was conducted and she was given a prescription for the pain. Due to her ongoing issues with pain, she was unable to return to work. This resulted in her being home for a period in excess of her sick days and she was made redundant by the Defendant in 2015.
- [9] The Claimant sought medical attention from a number of medical practitioners. She was examined by Dr. Levy at the Edgewater Medical facility who instructed her to do an MRI at Pines Imaging Centre. Dr Levy also recommended that she engage in sessions at the Pain Unit of the Kingston Public Hospital. She was also

referred to Dr. Phillip Waite, a Consultant Orthopaedic Surgeon and Dr. Fleur Minott Nembhard, an Occupational Therapist. The assessment by Dr. Nembhard revealed that the Claimant's current physical abilities would cause her to perform less duties than would be required in her job as a Cook.

[10] The Claimant indicated that she has spent a large sum of money for her medical expenses which were pleaded as follows:

i.	Dr. Phillip Waite	\$61,500.00
ii.	Dr. Minott Nembhard.....	\$85,000.00
iii.	Dr Dane Levy	\$7,500.00
iv.	Kingston Public Hospital.....	\$1,000.00
	Total	\$155,000.00

[11] The sum of **Eight Thousand Dollars (\$8,000.00)** was also claimed for transportation expenses associated with medical visits.

[12] Mrs. Elaine Allwood-Palmer lamented that as a direct result of her injuries, she is unable to work as her particular skill set (cooking) was greatly affected. She informed the Court that she has applied for other jobs but her applications have been unsuccessful and she was turned down by Island Grill after she was frank with them about her condition. She gave evidence of ongoing physical challenges and indicated that she still experiences pain when travelling on a bus. She indicated that she is unable to stand or sit for too long without feeling some kind of pain. She also disclosed that it is now virtually impossible for her to lift heavy objects and she is unable to perform her usual household chores, especially cooking.

[13] The Claimant testified that the injuries sustained from the fall has severely affected her entire life. She is unable to financially provide for her daughter and has had to resort to sleeping on the floor because of the pain. Her sexual relationship has also been significantly impacted as she has been unable to engage in intimacy with her

spouse. As a direct result of these challenges, her spouse has veered away from her to other women and has expressed a desire for a divorce.

ASSESSMENT OF SPECIAL DAMAGES

Medical expenses

[14] The Claimant stated that she expended the sum of **One Hundred and Fifty-Five Thousand Dollars (\$155,000.00)** for medical expenses, including office visits, medication, physiotherapy and medical reports. The documentation in proof of these expenses were admitted into evidence. Exhibits 4a to 4e showed payments to Dr. Waite in the amount of **Twenty-Five Thousand Four Hundred Dollars (\$25,400.00)**. Exhibit 5 showed the cost of consultation with Dr. Levy in the sum of **Seven Thousand Five Hundred Dollars (\$7,500.00)**. The receipt that was admitted as Exhibit 6 was also issued by Dr. Levy and shows proof of payment for the addendum report in the sum of **Ten Thousand Dollars (\$10,000.00)**. The total amount of these receipts was **Forty-Five Thousand Four Hundred Dollars (\$45,400.00)**. I have reviewed these documents and I am satisfied that these sums were expended for the expenses pleaded. Accordingly, the Claimant is awarded the sum of **Forty-Five Thousand Four Hundred Dollars (\$45,400.00)** as special damages under this head.

Transportation

[15] The sum of **Eight Thousand Dollars (\$8,000.00)** is said to have been spent on transportation to and from the doctors, hospital and physiotherapist. Mrs. Allwood-Palmer provided no evidence of the number of trips made, but from the medical reports produced by Dr. Levy, Dr. Waite, Dr. Fleur Minott Nembhard and Dr. Ballin, it is evident that several trips were made by the Claimant for medical purposes. I am satisfied that this expense is justified and the sum is reasonable given the number of trips the Claimant was required to take, the distance she had to travel, and the nature of her injuries, which made it difficult for her to commute other than by a private taxi.

[16] While the general rule requires special damages to be specifically pleaded and proved, this has been relaxed in specific instances such as these, where the Courts have considered what is reasonable in the circumstances and used its experience to arrive at a just award: **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)**, SCCA No. 109/2002; **Desmond Walters v Carlene Mitchell** [1992] 29 JLR 173.

[17] I have 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. Having reviewed these authorities and the evidence on this point, I find that the sum of **Eight Thousand Dollars (\$8,000.00)** should be paid to the Claimant under this head.

ASSESSMENT OF GENERAL DAMAGES

Pain and Suffering and Loss of Amenities

Medical Evidence

[18] The Medical Summary Report from the Kingston Public Hospital indicated that Mrs. Elaine Allwood-Palmer presented with pain in her neck, shoulders, upper and lower back following the accident at her workplace where she slipped and fell while working in a cold room on March 9, 2013. She complained of pain during defecation and pain in her back which is associated with “numbness.” Upon examination, she was found to have tenderness and pain to palpitation in both shoulders and lower back, trigger points and straight leg raising limited by pain in her lower back. Her right leg could only be elevated to 45 degrees whilst her left leg was limited to 60 degrees only. In terms of investigation, an MRI performed on her cervical spine and lumbar spine on April 11, 2013 revealed that she had disc bulges in cervical spine from C3/4 to C6/7 and degenerative changes in the lumbar spine with disc bulges in L4/5 and L5/S1.

[19] She was diagnosed with chronic widespread pain, myofascial pain and neuropathic pain. She was treated with anti-neuropathic medications (**used to reduce or “calm down” nerve activity as well as reduce pain hypersensitivity**), gabapentin (**used to treat nerve pain and epilepsy**), amitriptyline (**an antidepressant medicine used to treat low mood and depression**) and tolperisone (**a muscle relaxant for treatment of muscle spasms**) non-steroidal anti-inflammatory analgesics. She was administered trigger point injections. She was advised to undergo physical therapy and occupational therapy. Thereafter, she was discharged. While the report of Dr Ballin was not entered into evidence as an expert’s report, the Court agrees that its contents were nonetheless worthy of careful consideration as the document was clearly created by a qualified medical practitioner and the findings constituted a medical opinion issued upon first review of the Claimant’s injuries.

Medical Report of Dr Dane Levy

[20] The evidence of Dr Levy is that he first saw the Claimant on March 28, 2013, when her presenting complaints were pain, stiffness and swelling in the neck and pain in the upper and lower back along with headaches which resulted from her hitting the back of her head while walking in a cold room at work. He noted that she was unconscious for half (1/2) hour.

[21] His examination of the Claimant revealed the following findings:

- i. A middle-aged female distressed by pain.
- ii. Her cardiovascular, respiratory system and abdomen were unremarkable.
- iii. In the area of her neck, there were marked tenderness over the cervical vertebrae with reduced range of movement in flexion, extension and rotation.
- iv. In the area of her lower back, there was tenderness over the lumbar vertebrae and reduced range of movement in flexion and extension.

[22] His diagnosis was as follows:

- i. Post-concussion syndrome
- ii. Herniated lumbar
- iii. Cervical intervertebral discs

[23] He noted that the Claimant was referred for Magnetic Resonance Imaging (MRI) at Pines Imaging Centre that showed the following:

- a. Disc bulges from cervical vertebrae three (3) to seven (7)
- b. Degenerative disc disease at lumbar vertebrae four (4) and five (5)
- c. Disc bulges at lumbar vertebrae five (5)
- d. Disc bulges at sacral vertebrae one (1)

[24] Dr Levy reported that the patient was referred to Dr. Phillip Waite for orthopaedic consultation and management of the injuries to the neck and lower back. He stated that he continued to see her every four (4) to six (6) weeks to assess her recovery from the post-concussion syndrome and her other injuries. He also noted that she was referred to Dr Roger Hunter for a neurological assessment of her injuries because her rate of recovery was unsatisfactory. Dr. Hunter's assessment did not show any complications that had not previously been observed and a decision was made to have the Claimant continue treatment with Dr Levy and Dr Waite. She was also referred to the Pain Management Clinic at the Kingston Public Hospital.

[25] In terms of prognosis, Dr Levy stated that the Claimant was still undergoing physiotherapy treatment for her injuries and has not fully recovered. He opined that she has not yet achieved the level of fitness to resume working.

Medical Report of Dr. Philip Waite (Consultant Orthopaedic Surgeon)

[26] The Claimant was seen on the 24th of April 2006, her complaints were:

- i. Severe neck pain
- ii. Constant, moderate lower back pain

[27] In this report, Dr Waite outlined a number of headings. Under the heading, history of impairment, he made a number of observations which included the finding that *'She (the Claimant) sustained injuries to her feeling in her neck and back. There were no neurological symptoms'*.

[28] Under the heading, past orthopaedic history, he stated that there was no previous history of similar pains or injuries. In terms of her past medical history, she is a known diabetic. His assessment of her revealed:

- i. Severe mechanical neck pains
- ii. Severe mechanical upper back pains
- iii. Severe mechanical lower back pains

[29] On examination, the following observations were made:

- Cervical spine – severe tenderness with swelling particularly to the neck
- Thoracic spine – severe tenderness
- Lumbosacral spine – severe tenderness

[30] He noted that the conclusion of the Claimant's radiological evaluation revealed the following findings:

- a. Tiny central bulges from C3/C4 to C6/C7 without significant compressive effects on either the spinal canal or the nerve roots. There was also no evidence of ligamentous strain.
- b. Degenerative disc disease at L4/L5 and L5/S1 without cauda equine or nerve root compression.

[31] In respect of his final medico-legal evaluation, the following observations were made:

1. Recurrent moderate neck pain – which occurs up to four (4) times per week and lasts approximately half an hour.

2. Recurrent severe upper back pain – which is brought on by prolonged sitting and partially relieved by lying down.
3. Constant moderate lower back pain – which is aggravated by prolonged sitting. There were occasional cramps and stinging pains to the upper and lower limbs (outer aspect of legs – L5). There was no faecal or urinary incontinency, however, there was mild urinary urgency.
4. Total whole person impairment of 9%.

[32] In respect of Prognosis, Dr Waite observed as follows:

1. She is experiencing relationship issues because of her inability to have sex.
2. She has difficulty performing house chores. She is forced to seek help.
3. She has been unable to work since the accident.
4. She also experiences challenges travelling due to the aggravation of pain.

SUBMISSIONS

Pain and Suffering and Loss of Amenities

[33] Learned Counsel Mr. Kinghorn submitted that the Claimant has sustained a most serious injury. He highlighted the opinion of the doctors who indicated that Mrs. Elaine Allwood-Palmer will experience pain permanently. Counsel also pointed to the fact that she has been suffering from pains to her back for over nine (9) years. Mr Kinghorn asked the Court to be mindful of the major lifestyle adjustments that this injury has occasioned to the Claimant as well as the lasting impact of the disability suffered. Learned Counsel submitted that in order to address these factors, an award of **Ten Million Dollars (\$10,000,000.00)** is appropriate under this head of damages.

[34] In his submissions under this head of damages, Counsel placed reliance on the following cases:

- i. **Marie Jackson v Glenroy Charlton and George Stewart** – Khan Vol. 5, pg. 167. The Claimant was injured in a motor vehicle accident and subsequently began experiencing pain in the neck, back, rib cage and left elbow. She also developed a low persistent back discomfort and was advised by her therapist and doctors to wear a spinal back support and use her cervical collar for long journeys only. She was diagnosed with lumbar disc prolapse and developed dysaesthesia in the lower left extremity causing her to limp. Her Permanent Partial Disability was assessed at 8% whole person. As a result of her injuries, she was unable to function normally in her daily routines and required analgesics. The award in May 2001 was **One Million Eight Hundred Thousand Dollars (\$1,800,000.00)** when the CPI was 22. This figure now updates to **Eleven Million One Hundred and Eighty-Four Thousand Five Hundred and Forty-Five Dollars and Forty-Five Cents (\$11,184,545.45)** based on the current CPI of 136.7 for December 2023.
- ii. **Schaasa Grant v Salva Dalwood and JUTC**, Claim No. 2005HCV03081 – Khan Vol. 6, pg. 200. The Claimant who had been employed as a conductress on a JUTC bus was injured when she was flung from her seat when the driver made a sudden stop. She suffered serious pains in the back as well as marked swellings, spasms and tenderness to the paravertebral muscles bilaterally. She was eventually diagnosed with chronic cervicothoracic pain with subjective cervical radiculopathy and chronic mechanical low back pains with subjective lumbar radiculopathy. She was left with a Permanent Partial Disability rating of 10%. The award at the time was **Three Million Dollars (\$3,000,000.00)** based on the CPI of 49.9 for June 2008. After indexation, this award amounts to **Eight Million**

Two Hundred and Eighteen Thousand Four Hundred and Thirty-Six Dollars and Eighty-Seven Cents (\$8,218,436.87) based on the present CPI of 136.7 for December 2023.

DISCUSSION/ANALYSIS

[35] On a detailed examination of the evidence and authorities provided on this point, the Court agrees that the injuries of the Claimant are closely comparable to those sustained by the respective Claimants. The main point of distinction being that the disability suffered by **Schaasa Grant** was slightly greater while that of **Marie Jackson** was lower. In terms of similarities, it is noted that all three (3) Claimants suffered from back pain with varying degrees of severity. They were also left to cope with permanent challenges that required them to adopt life-changing modifications in order to function. It was also observed that the number of injuries suffered by the Claimant in **Schaasa Grant** were slightly higher.

[36] In determining the appropriate quantum of damages, it was interesting to note that the award which was given for injuries in the **Schaasa Grant** case, which is of more recent vintage and marginally more severe than those of **Marie Jackson**, is actually lower when updated. Given the foregoing observations, it does appear that the **Schaasa Grant** award was more conservative in nature. Having carefully assessed the circumstances of this Claimant, I find that the level of disability suffered and her ongoing challenges are sufficient to move the Court to make an award more in keeping with that which was given in the **Marie Jackson** case. Accordingly, the Court makes an award in the sum of **Ten Million Dollars (\$10,000,000.00)** for pain and suffering and loss of amenities.

Handicap on the Labour Market

[37] The Claimant also seeks an award under this head of damages. In support of this claim, heavy reliance is placed on the medical reports which outline her physical challenges as well as the Claimant's evidence as to her unsuccessful efforts at gaining employment.

Submission

- [38] Under this Head of Damages, Learned Counsel submitted that the medical evidence of the doctors speaks to the serious level of disability suffered by the Claimant. He submitted further that the Claimant's ability to perform her functions has been greatly impaired. He also argued that the Claimant's injuries are such that she has a distinct disadvantage on the labour market. Mr Kinghorn highlighted the Claimant's witness statement, specifically her evidence that the injuries have affected her future.
- [39] Counsel made reference to the authority of **Icilda Osbourne v George Barnes and others**, Claim No. 2005HCV00294 where the Court elected to use the conventional approach and awarded a global sum of **Five Hundred Thousand Dollars (\$500,000.00)** to a Claimant who had 5% of the whole person permanent disability.
- [40] Mr Kinghorn also placed reliance on the authority of **Carline Daley v Management Control Systems**, Claim No. 2008HCV00291 delivered on the 4th May 2012. The Learned Judge made an award of **One Million Two Hundred Thousand Dollars (\$1,200,000.00)** for Handicap on the Labour Market. He also commended the authority of **Robert Minott v South East Regional Authorities** [2017] JMSC Civ. 218 delivered on the 20th October 2017 in which the Court awarded **Two Million Dollars (\$2,000,000.00)** to the Claimant for Handicap on the Labour Market. Learned Counsel submitted that in light of the circumstances of the case at bar and the trend of the authorities, the sum of **Three Million Dollars (\$3,000,000.00)** is a reasonable sum under this head.
- [41] In considering this head of damages, the Court is acutely aware that although the evidence of handicap is disclosed in the Claimant's witness statement, it was never pleaded by the Claimant in her Particulars of Claim, neither was there an Amended Particulars of claim filed in this regard. The effect of this failing is that the Claimant would not have fully particularised her claim in order to place the Defendant on notice of the relevant heads of damages under which awards were being sought.

This failure would place the Claimant at odds with the requirements of Rule **8.9**. The fact that this was an undefended assessment, did not relieve the Claimant of the need to comply with this requirement. Regrettably, although the Claimant has suffered a loss, for the foregoing reasons the Court is unable to make an award under this head.

ORDER

[42] Accordingly, damages are assessed as follows:

1. Special Damages are awarded in the sum of **Fifty-Three Thousand Four Hundred Dollars (\$53,400.00)** with interest at the rate of 3% from March 9th, 2013 to January 29th, 2024.
2. General Damages are awarded for pain and suffering in the sum of **Ten Million Dollars (\$10,000,000.00)** with interest at the rate of 3% from November 20th, 2014 to January 29th, 2024.
3. Costs to the Claimant to be agreed or taxed.
4. Claimant's Attorney to prepare, file and serve the Judgment herein.