IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1990/C429

BETWEEN	ANNETTE CHRISTIE	PLAINTIFF
AND	NUTRITION PRODUCTS LTD.	1ST DEFENDANT
AND	THE ATTORNEY GENERAL	2ND DEFENDANT

Mr. N.O Samuels for the Plaintiff.

Mr. K. West instructed by Grant, Stewart, Phillips and Co. for First Defendant.

Heard: December 4, 6, 7, 8 2000; March 30, 2001.

HARRISON J.

The facts

The plaintiff has brought this action against the defendants and is seeking to recover damages from the first defendant for personal injuries she sustained as a result of her fall at the defendant's factory on the 21st day of November 1989. Prior to the commencement of this trial she had discontinued the action against the second defendant.

She is a married woman, 36 years of age, and was employed as a packer in the bakery section of the first defendant, Nutrition Products Ltd. She testified that at the material time she was in the process of collecting a package of drinks in the dairy section when she slipped on flooring that was wet. She became unconscious and found herself later in Annotto Bay Hospital. She sustained a fracture of the left wrist and was treated for her injury.

The plaintiff resumed her job as a packer but due to constant pain and discomfort in the left wrist she was referred to Mr. Grantel Dundas, an Orthopaedic Surgeon, by Dr. Sloley. She underwent operation on the wrist at St. Joseph's Hospital and thereafter resumed work after several sessions of physiotherapy. She could not cope as a result of difficulties she was still experiencing with the left hand, hence she requested of her supervisor lighter work. This request was denied and according to her there was no alternative but to go home. Since then, she has not worked except for selling small packages of food items to children at a nearby school in her community.

The Pleadings

The plaintiff has alleged the following particulars of negligence in her Statement of Claim:

PARTICULARS OF NEGLIGENCE

"The first defendant was negligent in that they failed to provide a safe system of work in that:

(a) They failed to provide a safe means of access and egress to the place where the plaintiff was required to work.
(b) They created a dangerous condition in which the plaintiff was required to work in that water was continually collecting on the floor where the Plaintiff and other workers had to work thereby causing the said area to become slippery.
(c) They caused or allowed the plaintiff to walk with load in an area which they knew was wet and slippery.
(d) The first defendant failed to provide a clean area for the Plaintiff to work and thereby caused her to slip and fall on the wet and slippery concrete floor.
(e) It failed to provide the plaintiff with suitable gear particularly rubber foot wear to avoid falling on the slippery floor."

PARTICULARS OF NUISANCE

(f) The first defendant created a dangerous state of things in the area where they knew that the plaintiff was required to work by allowing the said area to become wet and slippery.
(g) The first defendant rendered the said area permanently wet and slippery be(sic) means of the poor method adopted in filling and washing containers in the said area.
(h) The plaintiff well (sic) rely on particulars of negligence as Breaches of Nuisance.

BREACH OF THE OCCUPIERS LIABILITY ACT.

The first defendant failed in its duty of care to the Plaintiff to see that the said factory premises were reasonably safe for the purposes for which the plaintiff was required to be there.

BREACHES OF THE FACTORIES ACT

1. They failed to send(sic), clean, or otherwise to remedy the slippery condition of the floor contrary to Regulation 25 of the said Regulations.
2. They failed to maintain suitable and sufficient safe access to and egress from the said area where the plaintiff was required to work from time to time.
3. They failed to appoint a Supervisor to see that at all times the place where the Plaintiff was required to work was reasonably safe for that purpose.

The first defendant denied that the plaintiff was injured during the course of her employment and has alleged inter alia, as follows:

> "4.....The first defendant says that in accordance with the regulations of the first defendant company, employees are to remain in their work areas and not to trespass in other work areas. As such, the plaintiff as a worker in the bakery section was specifically instructed not to go to the dairy area and further it was not part of the Plaintiff's duties to collect or otherwise deal with packaged drinks."
>
> 5...The first defendant says that the plaintiff was not required to work or to go and was not instructed to go to the dairy area and as such was not issued with footwear appropriate for workers in the area. Further, the first defendant says that the said incident was caused or contributed to by the negligence of the Plaintiff.

PARTICULARS OF NEGLIGENCE

(A) Entering the dairy area when she was instructed to remain in her own work area and not to trespass in other work areas.

(B) Failing to wear footwear appropriate for persons entering the dairy area.
(C) Failing to take any or any proper precautions before entering the dairy area from the bakery area.
(D) Failing to keep any or any proper look out before stepping into the dairy area."

The first defendant further alleged that the plaintiff was a trespasser in the dairy area since she had been instructed not to go beyond her own work area. No admission was made with respect to the premises being a factory and that there were breaches under the Factory Act.

The Reply to the Defence alleges inter alia:

1. Paragraph 4 of the defence is denied. The plaintiff says, if which is not admitted there were at the material time regulations restricting the movement of workers within the factory maintained by the defendant such restrictions were never communicated to the plaintiff by its servants, agents or by any means whatsoever. Further the plaintiff says she had specific instructions from one Miss Dawn Robinson the then Manager of the factory and as such a servant or agent of the defendant to go to the dairy area where she received her injuries as aforesaid. The plaintiff repeats that she was sent to collect packaged drinks from the dairy area as aforesaid.
2. Paragraph 5 of the defence is denied and each and every particular of negligence therein pleaded against the plaintiff. In particular the plaintiff says that the defendant issued a leather-soled pair of shoes to the Plaintiff to perform her duties in the factory as aforesaid.

An application was made by Counsel for the plaintiff, during his address to amend paragraph 2 of the Reply to delete the words "leather-soled" and to substitute the words "rubber-soled" therefor. No objections were raised and the amendment was granted as prayed.

Assessment of the evidence and the issue of liability

There is no dispute that the plaintiff fell and received her injuries whilst she was in the dairy section of the first defendant's factory. The issue for consideration therefore, is whether or not she was lawfully in the dairy section at the material time.

The plaintiff testified that once the workers had achieved their target production for the week, each worker was entitled to and was given a package of drinks and a bag of buns on a Thursday afternoon before they left for home. She further testified that the packers who were assigned to the bakery section were permitted to go and collect the drinks in the dairy section. She had done this on the 21st September 1989, and it was whilst she was "coming out" that she slipped and fell. She denied under cross-examination that she was told to collect the drinks at the door for the dairy section. She also said that she was wearing the company's rubber sole shoes at the material time. This was not challenged at all, under cross-examination. On the other hand, persons who were employed in the dairy section were provided with water boots. The difference in footwear lies therefore in their height and possibly grip.

The defendant maintained on the pleadings that the plaintiff was not authorized or required to work in or to go in the dairy area and as such she was not issued with footwear appropriate for workers in that section. Junior Morris who is a plant manager at the first defendant company, and a witness called by the defence testified however, that

the bakery workers were allowed to enter the dairy section on a Thursday afternoon in order to pick up their packaged drinks.

The evidence further reveals that the drinks are packaged in plastic bags, and that they are usually placed in crates that are kept on the flooring in the dairy area. Running water is emptied in a gutter in the said room hence the concrete flooring is always wet and slippery due to water and spillage of the substance used to make the drinks. Junior Morris, agrees that water is always emitted on the flooring due to the cooling system in the machines and that the spilt liquid would cause the floor to become "sticky" and "slippery when water mixes with the spilt substance. Mr. Morris said however, that persons employed in the dairy area would use a cleaning device called a "schreechy" to push the water into the drains. He admitted that there could be a large amount of water on the floor at times if there was an overflow. However, he maintained that the water is cleared "as often as possible".

Neville Moodie, a Director at the Ministry of Labour had produced the official records and they revealed that the first defendant was registered as a factory on the 28th August 1989. This evidence was not challenged.

Findings

I have had the opportunity of seeing and hearing the witnesses and I must say that the plaintiff has impressed me as a truthful and honest witness. It is regretted however, that I cannot say the same of the witness called on behalf of the defence.

I have also considered the submissions made by both Counsels and it is my considered view that the defence raised cannot succeed. I find the following facts:

1. The plaintiff had gone to the dairy section during the course of her employment in order to pick up her packaged drinks that were kept in crates on the flooring.
2. She picked up the drinks and was about to leave when she slipped and fell injuring her left wrist.
3. Water and other spillage had caused the flooring in the dairy area to become slippery.
4. Management had given permission to the plaintiff and other workers assigned to the bakery section to enter the dairy section in order to retrieve the drinks.
5. Workers assigned to the dairy section were provided with water boots to work in this area whereas the plaintiff was allowed to enter the dairy wearing the company's rubber sole shoes.
6. The premises occupied by the company was registered as a factory on the 28th August 1989.

I find therefore, on a balance of probabilities:

1. That the first defendant was negligent in failing to provide a safe area for its employees to make proper access and egress.

2. That the first defendant had created a dangerous state of affairs in an area where supervisors had known that the plaintiff would be required to enter and exit.
3. That the plaintiff was not a trespasser.

4. That the first defendant had failed in its duty to see that the premises were reasonably safe for the purposes for which the plaintiff was required to be there.

5. That the plaintiff had not contributed to the injury that she sustained.

DAMAGES

I now turn to the issue of damages. Let me begin by considering the head of General Damages.

General Damages

Dr. Grantel Dundas who is a consultant orthopaedic surgeon saw and examined the plaintiff on the 19th March 1990. He testified that Dr. M. Sloley had referred her to him with a history of pain in the left hand. Examination of the left upper extremity revealed that she had a classical dinner fork deformity of the left wrist with marked restriction in the range of rotation. X-Rays indicated that she had a misaligned fracture of the distal one fourth of the left radius with backward angulation. The joint between the radius and wrist was dislocated.

Surgical intervention was recommended for correction of the angular deformity and also for the removal of the dislocated segmental bone at the head of the ulna. He did not see her for almost three (3) months until she returned to his surgery on the 11th June 1990. He saw her again on the 20th June 1990 and her left hand was a bit swollen. She was referred for physiotherapy. He reviewed her on the 4th July 1990, and discovered that she had only three (3) sessions of physical therapy. Despite this, there was marked improvement in the state of her hand. She was seen again on the 8th July 1990, and had indicated to him that she had missed the therapy sessions due to financial problems.

Anti-inflamatory medication was prescribed for her and she was further advised about the exercises for her hand. Her next appointment was set for the 15th August 1990, but she turned up a month later.

Dr. Dundas said he further prescribed medication for her in order to build up her calcium levels. She was given another appointment but had turned up three months later. When she was seen in March 1991 she complained of pain in the wrist and forearm and informed him that she was unable to return to work due to pain. X-Rays were done in March 1991 and they indicated that the fractures had healed well with the plate in its normal position. Dr. Dundas also diagnosed that she had developed a carpal tunnel syndrome. This meant that there was a combination of fractures indicating that there was pressure on the median nerve as it crosses the wrist. He recommended that she should have the plates removed and at the same time the carpal tunnel pressure relieved surgically. The plaintiff was not seen again until the 17th October 1996. When seen she

had the same symptoms and he made the same recommendations to her. He next saw her on the 23rd October 2000 when she attended on him for a final assessment.

The operation has not been done to date. On October 23rd Dr. Dundas said he noted that she had restriction in her range of flexion at the wrist, restriction in moving the hand towards the side of the little finger as well as towards the side of the thumb. Her grip strength measured 21 kgm compared to 22 kgm on the unaffected side. Up to date X-Rays were done and no abnormal fractures were shown in terms of her plate. However, because of continuing discomfort as well as problems of the carpal tunnel syndrome, he had recommended to her again that the plate should be removed and the pressure on her nerve decompressed. No further surgery had been done in order to put the recommendations into effect.

With regards to her disability, Dr. Dundas testified that as regards her grip strength and range of motion she has a 15% disability of the affected extremity or 9% of the whole person. With respect to the carpal tunnel syndrome her disability amounted to 20% of the affected extremity or 12% of the whole person. Her combined disabilities therefore amounted to20% of the whole person. He was of the view that had she done surgery in 1991 her residual disability could have been reduced to about 6% of the affected extremity and her whole person disability could have been reduced to 4%. He further testified that at this point she would not be able to carry out manual work due to her injury. Under cross-examination Dr. Dundas said that it was quite possible that physiotherapy could have assisted the plaintiff in terms of her disability if she had been doing this 4-6 months. He also told the Court that if she had removed the plate in 1991 there would be a good chance of eliminating the carpal tunnel completely and she would have increased her grip strength. He further opined that as the years passed, the injury to the nerves tend to become less responsive to therapy and that sometimes the damage could be permanent. In his view, surgery was the only chance of any improvement. He estimated the cost of removing the plate and for carrying out the carpal tunnel decompression to be $51,950.00. The cost of surgery in 1991 would have been approximately $5,000.00

Mr. Samuels for the plaintiff, submitted that the impecunious position of the plaintiff was sufficient to reject any allegation that she had failed to mitigate her damages particularly where those damages would impose financial constraints upon her. He referred to and relied upon text in McGregor on Damages 14th Edn. Paragraph 241 where the learned author states inter alia:

> " A plaintiff will not be prejudiced by his financial inability to take steps in mitigation. As Lord Collins said in **Clippens Oil Co v Edinburgh and District Water Trustees** [1907] AC 291, 303 : "In my opinion the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortuous act."

Mr. West submitted on the other hand, that the plaintiff had failed to mitigate her losses.

Let me deal firstly with the submissions regarding the plaintiff's impecunious position. It was her Doctor who testified that she had missed the physical therapy sessions due to financial problems. The plaintiff herself gave no evidence of her financial difficulties or any reason why she had failed to carry out the Doctor's recommendation for further surgery. Her failure to do additional surgery leads therefore to the vexed question of whether there was any onus falling upon the plaintiff in regard to mitigation of damages.

The learned authors of Kemp & Kemp: The Law of Damages for Personal Injuries (4th Edition) state at page 12003:

> "The general rule is that the onus of proving that a plaintiff failed to mitigate his damage lies upon the defendant. The law is, in our view, correctly stated in McGregor on Damages (14th Edn.) paragraph 216, in the following passage: 'The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure will apply. This has long been settled, ever since the decision in Roper v Johnson (1873) LR 8 CP 167 at page 181, per Brett J and is now confirmed by Garnac Grain Co. v Faure & Fairclough [1968] AC 1130 at page 1140."

There is authority however, which states that a plaintiff was under a duty to mitigate his damage, where he decided not to accept medical advice to undergo surgery and the burden lay on him to satisfy the Court that in all the circumstances, including particularly the medical advice, he had acted reasonably in refusing surgery. This principle of law was laid down in the Privy Council decision of **Ponnampalam Selvanayagam v University of the West Indies** (1983) 34 WIR 267, a case on appeal from the Court of Appeal of Trinidad and Tobago. The Court of Appeal of Bermuda strongly criticized the Ponnampalam case in **Russell v Van Galen** (1985) 36 WIR 144, but were constrained to follow the decision since that court was bound by the decisions of the Privy Council. Several authors on damages for personal injuries have voiced their dissent also with the decision. Sir Alastair Blair-Kerr P in delivering the judgment of the Court of Appeal In Russell (supra) stated inter alaia:

> "...Contrary to the general rule regarding damages, the burden of proof is on the defendant". They also cite this passage in Gahan: The Law of Damages, page 140: "The burden of proving breach of the duty to mitigate damages is on the defendant who alleges such failure". The editors go on to voice some very outspoken criticism of the **Ponnampalam Selvanayagam** decision. On page 12008, there appears this:
>
> > 'Decisions of the Judicial Committee are only of persuasive authority in English Courts, which should, we submit, ignore the ruling as to onus of proof in **Ponnampalam Selvanayagam's** case. But Courts from which appeals lie to the Privy Council are bound by this ruling, unless it can be regarded as unnecessary to the ultimate decision and therefore given

obiter, or possibly per incuriam. It is therefore to be hoped that the Judicial Committee will have an early opportunity to reconsider this ruling'

I have not been able to unearth any later decision which overrules the **Ponnampalam Selvanayagam's** case. I may be wrong, but unless and until there is authority to the contrary, I am constrained to follow this decision as I am bound by it. The ratio decidendi of the **Ponnampalam Selvanayagam's** case is therefore this: 1) a plaintiff is under a duty to act reasonably to mitigate his damage; and 2) where a plaintiff rejects a medical recommendation in favour of surgery the onus is on him to show that he acted reasonably.

It is my considered view therefore, that the plaintiff in the instant case has failed to establish that she had acted reasonably in rejecting the recommendation of her Doctor in doing further surgery on her wrist. Had she done surgery in 1991, both her residual disability and whole person disability could have been reduced. This factor will have to be taken into consideration in deciding what ought to be a reasonable figure under the head of general damages.

Mr. Samuels submitted that the Court should make an award between $750,000.00 and $1,000,000.00 for pain and suffering and loss of amenities having regards to the length of time the plaintiff has been suffering from pain. He referred to and relied upon the cases of **Leroy Mills v Roland Lawson and Another**, **Durrant v United Estates Ltd** at page 290 and 259 respectively of Harrisons' "Assessment of Damages for Personal Injuries".

Mr. West submitted on the other hand, that the Court could be guided from the awards made in the cases of **Gardener v Clarke** and **Syblies v Lyn** reported at page 267 of Harrisons' "Assessment of Damages for Personal Injuries"; **Watson v Frazer** and **Robinson v Bonfield and Young** reported at pages 101 and 99 respectively in Vol. 4 of "Khan's Award for Personal Injuries". He suggested therefore, that an award between $350,000.00 and $450,000.00 would be reasonable in all the circumstances.

What would be a reasonable award in respect of this plaintiff's pain and suffering? I bear in mind what Lord Reid said in **H West and Son Ltd v Shepherd** (1964) A.C 326 that a man has to be compensated, so far as money can do it. I also bear in mind that there ought to be consistency in these awards.

The plaintiff in the instant case has said that she became unconscious after she fell and that she subsequently found herself in hospital. She was treated and sent home and she received further treatment as an outpatient. She experienced severe pain in the left arm and had to take pain killers in order to relieve the pain. The left hand was placed in a plaster of parris cast which she wore for about six(6) weeks. Pain was constantly felt during this period. According to Dr. Dundas, she had a "classical dinner fork" deformity of the left wrist. The X-rays had revealed a misaligned fracture of the distal one fourth of the left radius with backward angulation. After Dr. Dundas performed the operation on her wrist, she had to remain in hospital for five (5) days. She experienced further pain and had to continue taking painkillers and sapping the left hand with hot water. She has some

difficulty using the left hand. When she resumed work at the defendant's factory, she was unable to use the left hand to make buns for baking. Fortunately, she is right handed. She is unable to lift any weight with the left hand. Dr. Dundas had said that she would have been unable to use the left hand to do any manual work. Her grip strength and range of movement with the left hand has been affected. The carpal tunnel syndrome which she has to live with until hopefully surgery is done, is largely responsible for her disability.

Let me now examine some of the cases that have been relied upon. In Durrant's case the plaintiff was a 52 year old labourer who had sustained injury to both wrists. He became unconscious after he fell and was taken to hospital where he was treated and sent home. His wrists were placed in plaster of paris for three (3) months. He suffered from intermittent pain in the wrist and sometimes had to be off the job. Whenever he used a cutlass he had pain in the wrist and this had forced him to reduce his farming activities. He was also unable to make a fist. He had a disability of 20% in movement of the wrists. He was awarded the sum of $45,000.00 in June 1991 for pain and suffering but on appeal that sum was increased to $80,000.00. When converted, this award now values $257,000.00.

In Mill's case his injuries resulted in a permanent partial disability amounting to 20% of the right upper limb. He was a mechanic and the injury caused a reduction in the power of his right hand. He had difficulty using his tools. He was awarded $50,000.00 in January 1989 in respect of pain and suffering and loss of amenities. Today that award values approximately $528,000.00.

In Syblies case, the plaintiff had sustained injury which caused an anterior dislocated wrist that was deformed and swollen with restricted movement. Surgical decompression of the wrist and reduction of the nerves were done and after one year there was gradual improvement of the wrist. He had a permanent partial disability of 14% of the whole person. He was awarded $65,000.00 for pain and suffering and loss of amenities in February 1992. I am of the view however, that this award was on the low side. It now values approximately $259,000.00.

It is my considered view that when all the factors are taken into consideration which includes her failure to do further surgery which would enhance her chances of recovery, an award of Four Hundred and Fifty Thousand Dollars ($450,000.00) would be reasonable.

I do believe that this is a proper case to make an award for handicap on the labour market. At the time of trial, the plaintiff was self employed. I accept her evidence on this and further accept that she was earning roughly $500 daily from her sales. This evidence was never challenged. I also bear in mind what the Doctor said about the difficult she would have in doing manual work. In the circumstances, a sum of Seventy Thousand Dollars ($70,000,00) would be an appropriate award.

I disagree with the submissions made by Mr. Samuels with respect to an award for loss of future earnings. I therefore make no award under this head.

Special Damages

By consent the following items of special damages were agreed:

1. Medical expenses	$4,500.00
2. X-rays	$2,200.00
	Total $6,700.00

Mr. Samuels had submitted that an overall figure of $290,400.00 should be awarded for loss of earnings. It was pleaded that this loss was a continuing one and as such the plaintiff would be entitled to an award up to the time of trial. I respectfully disagree with this submission and will therefore not make any award under this head. Here are my reasons for not making the award. The plaintiff was employed as a packer of buns at the defendant's factory. This job involved the packing of buns in plastic bags and thereafter placing them on a counter. She would also make the buns but there was no need for her to mix the dough since this job was done by men who work in the bakery . She is only required to make the buns and place them in tin sheets for baking. She is right handed and she has told this court that she had an option of either using her right hand or both hands to make the buns. She had complained to her supervisor however, that she needed to do lighter work and when this request was denied, she said she had no alternative but to go home. In my view, since she has voluntarily removed herself from the payroll she cannot seek to claim this now, as loss of earning. Furthermore, she has testified that she was still on the payroll from the time of the accident up to and including a portion of 1991. There is certainly no sincerity therefore, in her claim when she pleaded that she had lost earning from September 1990.

With respect to the expenses incurred for her operation and hospital bills the plaintiff had testified that the defendant had taken care of them. I would not allow these sums which were pleaded in the Statement of Claim.

I would allow a partial recovery of her expenses with respect to the domestic helper however. The sum pleaded in the Statement of Claim was $120 weekly as of the 21st September 1989 and continuing. Evidence was given by the plaintiff however, that this sum was increased to $300 and $500 weekly respectively but no amendment was sought. For three (3) years at $120 per week, this amounts to $18,720.00. The use of a helper for 12 months would be reasonable in the circumstances so I award her $6,240.00.

The plaintiff's transportation costs have not been proved so she is not entitled to any award for this item.

I would allow a sum for cost of future surgery. Dr. Dundas had testified that it would cost $51,950.00 for removing the plate in her wrist and for carrying out the carpal tunnel decompression. This item of special damages was pleaded but no amendment of the figure of $3,200.00 was sought. He had also testified that the cost of this surgery in 1991 would have been approximately $5,000.00. I therefore make an award of $51,950.00 in respect of the cost of future surgery. The pleading ought to be amended to bring it in line with the evidence.

Conclusion

There shall be judgment for the plaintiff as set out hereunder:

General Damages

1. A sum of $450,000.00 for pain and suffering and loss of amenities with interest thereon at the rate of 3% p:a from the date of service of the writ of summons up to today.
2. A sum of $70,000.00 for handicap on the labour market.

Special Damages

1. A sum of $12,940.00 with interest thereon at the rate of 3% p:a from the 21st September 1989 up to today.
2. A sum of $51,950.00 for cost of future surgery.

There shall be costs to the plaintiff to be taxed if not agreed.