[2021] JSMC Civ 46

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 00443

BETWEEN	**MAUREEN DAVIS**	**CLAIMANT**
AND	**YVONNE WILKS**	**DEFENDANT**

IN OPEN COURT

Miss Christine Mae Hudson and Miss Aisha Robinson instructed by K. Churchill Neita & Company for the Claimant.

Mr. John Graham QC and Miss Petagaye Manderson instructed by John G. Graham & Company for the Defendant.

Heard: 29th and 30th June, 2020 & 5th March, 2021

Negligence – Occupiers liability – Occupiers Liability Act S. – Contributory Negligence – Amendment of Claim at close of trial – Personal injuries – Damages

WILTSHIRE J.

Background

[1] It is the Claimant's case that on or about the 7th August, 2012, during the course of her employment, she was standing on a plastic chair cleaning kitchen cupboards as part of her duties as a house keeper employed to the Defendant. Whilst pursuing said duties, the said plastic chair, which it is claimed was given to her by the Defendant for the duties, gave way causing the Claimant to lose her balance. As a result, it is claimed that she fell to the ground and sustained injuries.

[2] The particulars of the Defendant's negligence was that she:

(i) Allowed and/or permitted the use of the plastic chair when she knew or ought to have known it was unsafe thereby exposing the Claimant to a risk of injury and damage;

(ii) Failed to take any or any adequate measures whether by way of periodic or other examination, inspection or otherwise to ensure that the said chair was in a reasonably safe condition for the Claimant to use;

(iii) Failed to provide the Claimant with the appropriate equipment in particular a ladder to reduce or avert the risk of falling while cleaning the kitchen cupboards;

(iv) Failed to provide a safe and/or adequate means of cleaning the kitchen cupboard;

(v) Failed to take any or any adequate precautions for the safety of the Claimant while she was engaged upon the work;

(vi) Exposed the Claimant to a risk of damage or injury of which she knew or ought reasonably to have known;

(vii) Failed to have due regard for the safety of her employee and in particular the Claimant;

(viii) Failed to avert the reasonably foreseeable risk of injury to the Claimant.

[3] In her Defence, the Defendant stated that the Claimant was employed to her for approximately one year prior to the incident. It was contended that the Claimant was not authorized to be at her premises at the time of the alleged accident as it was agreed between the parties that the Claimant would be on vacation and was paid in advance for such. The Defendant admitted providing and entrusting the Claimant with a spare key to the residence which was to be used in the case of an emergency as the Defendant would be off the island.

[4] The Defendant denied that the Claimant was to be carrying out household duties including the cleaning of kitchen cupboards on or about the 7th August, 2012. It was further denied that the Defendant provided the Claimant with a plastic chair to stand on in order to reach the said kitchen cupboards. The Defendant denied all allegations of negligence and contended that in the event that the Claimant was injured as alleged, same was caused by the sole negligence of the Claimant.

[5] The negligence of the Claimant was particularised as follows:

(b) Climbing on a chair when she was neither required nor authorised so to do;

(c) Failing to have any proper or adequate regard for her own safety by climbing on a plastic chair;

(d) Failing to ensure that the plastic chair was safe prior to climbing thereon;

(e) Failing to indicate to the Defendant that she would be using the plastic chair to clean, albeit that she was on vacation;

(f) Failing to indicate to the Defendant that the plastic chair was inadequate to carry out cleaning, albeit that those duties were unauthorised at the time;

(g) Failing to advise the Defendant that she would be accessing her premises during her vacation time at a time when she was not authorised to work;

(h) Failing to avert the reasonably foreseeable risk of injury to herself by using a plastic chair to carry out duties that she was not authorised to do at the time.

[6] In reply to the Defence, the Claimant denied negligence and stated that she received $14,000.00 from the Defendant for the week she worked before her departure and the first week she was off the island. Further that the Defendant indicated that arrangements would be made for her to be paid for the weeks worked while she was off the island. The Claimant also replied that on leaving the island, the Defendant gave her spare keys to access the premises to do her duties and facilitate the access of the gardener and the pool man to carry out their duties.

The Claimant stated that on the day of the incident, she was standing on the white plastic chair provided by the Defendant, she reached forward when suddenly and without warning the chair slipped, she lost her balance and fell to the floor.

Claimant's Evidence

[7] The Claimant's witness statement was permitted to stand as her evidence in chief. From said evidence the Claimant indicated that she was instructed by the Defendant to carry out duties at her house whilst the Defendant was off the island. She stated that when she started working for the Defendant she had given her a set of keys to enter the house in the mornings. She had said keys in her possession when the Defendant was off the island and she would go to the house and carry out her normal duties. On this occasion the Defendant had wanted her to remain on the premises day and night, but she declined staying in the night, so the Defendant got Jerry to do so instead, while she would come in the day to do her work. The Claimant said that she was instructed by the Defendant to carry out certain duties and whilst she was on the premises she granted access to the gardener, the pool man and the Defendant's co-worker.

[8] The Claimant denied that she had discussions with the Defendant about taking a temporary job while she was away and telling her that she wanted to take the time to rest. She also denied receiving $35,000.00 for five weeks from the Defendant for vacation pay or having any discussion with the Defendant about employing King Alarm while she was away as King Alarm was already there.

[9] It was also the Claimant's evidence that on two previous occasions when the Defendant travelled overseas she remained at the house doing her job. She stated that based on the discussions that she had with the Defendant, she had no doubt that she was required to be at work while the Defendant was away. She denied that the Defendant told her not to come to the house in the period she was away and that she asked her why she was at the house when they had no such

arrangement. The Claimant also denied that she told the Defendant that she stopped by to check on the house and fell while tidying up.

[10] The Claimant stated that because of the height of some of the furniture and the ceilings she could not effectively clean those areas and the Defendant did not have a ladder for her to access those areas. The Defendant gave her a plastic chair to stand on to clean those areas. One of the instructions given by the Defendant before she left for overseas was that the Claimant was to work and keep the place clean and tidy. On the 7th August, 2012, the Claimant reported to work and decided to clean the cupboards. She stood on the plastic chair in order to reach the cupboards and while doing so the chair gave way and she fell and hit her knee on the floor. The plastic chair had been given to her by the Defendant from she started working for her and she used it every time she cleaned the cupboards.

[11] Under cross-examination the Claimant indicated that before she began working for the Defendant she had a medical issue with her leg. She revealed that she had liquid in the leg and arthritis in her knee but denied that it affected her. She maintained that she did not have any discussion with the Defendant about taking vacation and she would arrive at work her usual 8:00am every day, including the day of the incident.

[12] The Claimant also denied that there were three ladders at the Defendant's house and stated that when she told the Defendant that she needed a ladder, the Defendant told her that she did not have one and she was to use the chair. She related that on the day in question the chair lost its balance and she dropped off same. She could not get up and remained on the floor until Jerry came some 15 minutes later. He assisted her up and to the car.

[13] The Claimant denied that the Defendant paid her $35,000.00 before going overseas and stated that she did not go on leave while the Defendant was away because the Defendant insisted that the things the Claimant was unable to do

before, could now be done while she was overseas. She insisted that it was she that let the gardener and the pool man onto the premises, not Jerry.

[14] The Claimant relied on medical records from Kingston Public Hospital and medical reports from Dr. Melton Douglas. Dr. Douglas was also called upon to give viva voce evidence. At the close of the Claimant's case, permission was sought to amend the Particulars of Claim, specifically, to amend the cost of future surgery stated therein from $1.2m to $2.5m which Dr. Douglas estimated the cost to be.

Defendant's Case

[15] The Defendant's evidence was that she informed the Claimant that she would be off the island for a period of six weeks between July 6th and August 20th 2012 and that she would not be required to work during that period. She stated that she assured the Claimant that she would still be employed to her during said period and she could take a temporary job during the period. The Claimant however indicated that she wanted to take the time to rest as she was tired.

[16] The Defendant stated that she paid the Claimant five weeks salary, in the sum of $35,000.00, up front and the period was therefore deemed as vacation leave. The agreement was that the Claimant would take the time to rest. After discussion with the Claimant, the Defendant said that she decided the best way to secure the house was to have her nephew Norman Cockburn aka Jerry stay at the house as a caretaker. She indicated that she had given the Claimant a set of keys some months after employing her so that she could let herself in if she came to work and nobody was home. The Defendant stated that she checked up on the house by speaking to Jerry.

[17] She further stated that while away she received a call from the Claimant stating that she had fallen off a chair in the kitchen while doing some housework. The Defendant said that she had asked why she was at the house when they had made no such arrangement. The Claimant responded that she had stopped by to check on the house and fell while tidying up. The Defendant said that she refused the

Claimant's request for money as she had already paid her $35,000.00 in advance and told her not to come to her house during the period that she was away.

[18] The Defendant further stated that she was aware that the Claimant had arthritis and walked with a limp which resulted in her having to sit most of the time while at work. Therefore, she never asked her to stand on a chair or any other object to access any furniture. She stated that a Dawn King would come to her house every three months and deep clean her house.

[19] Under cross examination the Defendant maintained her position that the Claimant was not authorised to be at her house. She stated that Jerry who was staying at the house was aware that the Claimant was not to enter the premises and she had increased the arrangement with King Alarm to a 24hour surveillance. She was, however, not notified by either Jerry or King Alarm that the Claimant was at the house.

[20] The Defendant also maintained that she did not give a plastic chair to the Claimant to stand on to clean certain areas. She insisted that she did have ladders but she never had any discussion with the Claimant about using a chair or a ladder. She further expressed amazement that the Claimant would go outside and get a chair when there were ladders and a mahogany chair. While she conceded that there were areas of the cupboards that the Claimant could not reach because of her height, the Defendant reiterated that she had no discussion with the Claimant about her need for something to stand on to clean the kitchen cupboards.

Issues

[21] The court must determine the following:

(i) Whether the Defendant owed a duty of care to the Claimant at common law or under section 3 of the Occupiers Liability Act.

(ii) If there was a duty, whether the Defendant breached that duty.

(iii) Whether contributory negligence is to be considered.

(iv) Whether the Claimant should be granted leave to amend her Particulars of Claim at the close of her case.

(v) Whether the Claimant is entitled to damages and the quantum thereof.

Law and Analysis

Negligence and Occupiers Liability

[22] In a claim for negligence the claimant must show that the defendant owed a duty of care, breached that duty of care, the breach of duty caused the claimant to suffer the damage/loss alleged and there was foreseeability of the particular type of damage caused.

[23] Section 3(1) and (2) of the Occupiers Liability Act states as follows:

> *"An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*
>
> *The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."*

Duty/Obligation of visitor who was an employee

[24] This duty extends to an employee who enters the employer's premises under a contract of employment. Section 3(3)(b) of the Act also makes provisions for the care to be taken by such visitors and states that:

> *"The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing-*

…

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so."

[1] Section 3(7) goes further to provide that:

> *"The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."*

There is no dispute that the Claimant was employed to the Defendant at all material times. As a result of this employment, the Claimant would need to gain access to the premises in order to carry out her duties as housekeeper.

[25] The Defendant asserts that the Claimant was on vacation leave and was not required to be on the premises at the time of the incident, however, there is no evidence from the Defendant to suggest that the Claimant would not have been allowed unto the premises in the event that she was to show up during this period. The Defendant also admitted that the Claimant had keys to the premises and that those keys remained with the Claimant during the period of the Defendant's trip.

[26] The Claimant's evidence is that she had no discussion with the Defendant about taking vacation leave during the period the Defendant was due to be off the island. The Claimant maintained, throughout the case, that she attended the premises while the Defendant was away to carry out her duties as a housekeeper. The Claimant also stated that she even granted access to the property to the gardener, the pool man and the Defendant's co-worker prior to the date of her accident.

[27] On assessment of the evidence, the court finds the Claimant's version of the events to be more believable. This is based on the fact that the Claimant referred to instances in the past where the Defendant left the island for several weeks and the Claimant was still required to attend the premises and carry out her duties.

Further there is no evidence of any alarm raised when the Claimant was discovered to have been on the premises. From this the court infers that she was permitted to be there.

[28] An employee showing up to their place of work during their vacation would still be considered a visitor, so even if the Claimant was on vacation she would not have been on the premises unlawfully. Especially in the present case where the Claimant was provided with means to enter the premises legally. The Claimant would on any interpretation of the facts be considered a lawful visitor within the meaning of the Occupier's Liability Act and as such the Defendant owed her a duty of care.

[29] Consideration must now be had regarding the Defendant's duties as an employer. Employers have a duty to take reasonable care of their employees' safety. This includes providing adequate plant and equipment and provision of a safe place and safe system of work as well as adequate supervision. The essence of the duty owed by an employer to employee is that the operations are not carried out in a way which would subject the employee to unnecessary risks.

[30] In **Donna Watson v Couples Ocho Rios Limited t/a Couples Tower Isle** [2020] JMSC Civ. 75, Lindo J at paragraph 40 explains that:

> *"A safe system of work includes the way in which it is intended that the work is to be carried out, the giving of adequate instructions and the taking of precautions for the safety of the workers. A Defendant will be said to have breached his duty of care if his conduct falls below the standard required by law and this standard is said to be that of a reasonable prudent man. (See Blythe v Birmingham Waterworks Ltd. (1856) 11 Ex. Ch. 151)*

An employer must take the necessary steps to provide adequate plant and equipment for his workers, and he will be liable to any workman who is injured through the absence of any equipment which is obviously necessary or which a

reasonable employer would recognise as being necessary for the safety of the workman… He must also take reasonable steps to maintain plant and equipment, an he will be liable for harm resulting from any break-down or defect which he ought to have discovered by reasonable diligence. (see Commonwealth Caribbean Tort text, Cases & Materials, Gilbert Kodilinye at pg. 159-160).

[31] On the Claimant's evidence, she maintained that the plastic chair was provided to her by the Defendant because there were no ladders for her to use to access some areas of the house. The Claimant gave evidence that there had been occasions prior to the date of the accident, when the Defendant saw her standing on the plastic chair and gave her instructions to rearrange figurines above the fridge while she was still atop the said chair.

[32] Conversely, Counsel for the Defendant suggested to the Claimant that the Defendant had ladders and sturdier wooden chairs that could have been used. Counsel also maintained that the Defendant had no part in the Claimant's use of the plastic chair. In fact, the Defendant admitted on cross-examination that she and the Claimant "never had a discussion about that" when asked whether she provided anything proper for the Claimant to stand on. Further, and to the detriment of the Defendant, the assertion that the plastic chair was used regularly when carrying out similar tasks and that the Defendant had knowledge of this use, was never challenged by Counsel. This has led the court to regard the assertions as true. It is also noted that although the Defendant argues the availability of ladders, at no point did she say that the Claimant was provided with the ladder. Finally, the Claimant's assertion under cross examination that she told the Defendant she needed a ladder and was told she had none, was never challenged.

[33] The duty that arises out of the employer/employee relationship does not require the employee to request necessary equipment. The duty is on the employer to ensure that the systems are up to standard and safe for workers. A plastic chair, in the mind of any reasonable employer would not be considered suitable for standing on while performing any task especially if there are ladders available. The

Defendant, therefore, failed to take the necessary precautions to ensure that the Claimant was not at risk when performing the assigned tasks.

[34] It is therefore settled that the Defendant owed a duty of care to the Claimant as a visitor under the Occupiers' Liability Act and as an employee in light of their undisputed employer/employee relationship. I find that the Defendant has breached her duty to the Claimant by not providing her with adequate equipment and a safe system of work and that this negligence resulted in the Claimant falling and sustaining injuries.

Seeking a finding of contributory negligence

[35] It is trite in law that a defence of contributory negligence must be specifically pleaded and this principle is explored in the case of **Ainsworth Blackwood, Snr. (Administrator of Estate; Ainsworth Blackwood Jnr. Deceased) v Naudia Crosskill and Glenmore Waul** [2014] JMSC Civ. 28. In that case Fraser J. at paragraph 39 states:

> *"The court is not able to make a finding of contributory negligence when that defence has not been pleaded by the defendants. The Law Reform (Contributory Negligence) Act permits the court to apportion liability between claimants and defendants. However, case law has made it clear that the defence needs to be pleaded before defendants can reap its benefit."*

[36] In support of this point Fraser J. relied on the case of **Fookes v Slator [1978]** 1 W.L.R. 1293 a case which on appeal, the court held that contributory negligence had to be specifically pleaded by way of defence to a plaintiff's claim of negligence; and that, since there had been no such plea, the judge in that matter had erred in law in finding that the plaintiff's negligence had contributed to the accident.

[37] In the case at bar the Defendant in her Defence stated that in the event that the Claimant was injured as alleged, same was caused by the sole negligence of the

Claimant. The alleged negligence of the Claimant was then particularised. In **Davies v Swan Motor Company Ltd** [1949] 1 All ER 620 Denning LJ (as he then was), while distilling the essence of contributory negligence based on a definition of 'fault' in the United Kingdom's Law Reform (Contributory Negligence) Act, identical to its definition in the Law Reform (Contributory Negligence) Act, stated at page 631 that, "[t]he real question is not whether the plaintiff was neglecting some legal duty, but whether he was acting as a reasonable man and with reasonable care".

[38] In **Nance v British Columbia Electric Rly** [1951 AC 601, at page 611, Lord Simon said

> *'…When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove…. that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.'"*

This reasoning has been applied in a number of local authorities including **Wayne Ann Holdings Limited (T/A Superplus Food Stores) v Sandra Morgan** [2011] JMCA Civ. 44.

[39] In support of his submissions for the defence of contributory negligence, Counsel for the Defendant argued that the Claimant did not request or use any of the ladders at the premises nor did she use any of the sturdier wooden chairs. He further argued that the Claimant had a duty to inform the Defendant of her pre-existing arthritis condition as she knew this would affect her ascending or

descending ladders or chairs. Counsel went even further, to submit that the Claimant had been up and down the chair for a whole year without incident.

[40] There is, however, no evidence to suggest that the Claimant's arthritis was the cause of her fall. Her evidence is that while she was standing on the chair (not ascending or descending) the chair gave way/ lost its balance and she fell. The issue of the Claimant's arthritis is only relevant for considering damages. The real issue is whether there was a want of care on the part of the Claimant while she was carrying out the task.

[41] The Claimant's version is believable in that it is not unusual for the legs of a plastic chair to bend as a result of heavy weight being applied to it. Notwithstanding the foregoing, it is the Defendant's duty as employer to take all reasonable precaution to provide the Claimant with necessary equipment and a safe system of work. The Claimant is not required to request any specific equipment especially if the reasonable and prudent employer can determine that the system being used subjects the employee to a foreseeable risk.

[42] The Claimant's duty to herself is predicated on the Claimant not taking reasonable care of herself and contributing to the Defendant's negligence by a want of care on her part. As indicated, the fact that the Claimant suffered from arthritis did not contribute towards her fall, therefore, it is inconsequential that her pre-existing condition was not brought to the Defendant's attention. The Claimant would have had to be using the plastic chair in such a way that would place her at a greater risk and contribute towards her fall. But the evidence is that she was just carrying out her duty in the usual way and the chair which was used for the purpose of carrying out tasks of this nature, gave way causing her to fall. There is no evidence before the court to support the Defendant's position and, in light of this lack of supporting evidence, the court is constrained and must find that the Claimant was not contributorily negligent.

Amendment to Particulars of Claim during the trial and after the limitation period has passed

[43] At the close of the Claimant's case, Counsel for the Claimant sought the Court's permission to amend the Particulars of Claim and in particular the cost of future medical care to read as $2.5M. Counsel for the Defendant objected to this application on the basis that the Claimant had three (3) weeks prior to the trial to inform the Defendant of the proposed amendments which would have provided them with an opportunity to seek a second opinion on the costs associated with the surgery. It was submitted that if the court was to find in favour of the Claimant the amendment would seek to almost double the amount being claimed and this would be prejudicial to the Defendant's interest.

[44] The issue, therefore, is whether an amendment should be allowed in respect of the cost of future medical care claimed by the Claimant. There are two sub issues which arise out of the facts, firstly whether an amendment sought at the close of the Claimant's case would result in injustice to the Defendant and secondly whether the proposed amendment should be allowed after the limitation period had elapsed.

[45] In assessing whether to grant leave to amend a statement of case the court must first turn to the Civil Procedure Rules (CPR) for guidance. Rule 20 of the CPR provides for the amendment to statements of case, but the focus in the instant case would rest on Rule 20.4(2) and Rule 20.6.

Rule 20.4(2) states:

> *"Statements of case may only be amended after a case management conference with the permission of the court."*

Prior to the amendment of the CPR in 2006, Rule 20.4(2) was more restrictive as it provided that the court could not give permission to amend a statement of case unless the applicant could show some change in circumstances since the date of

the Case Management Conference. The amended rule as set out above, gives the court more latitude as there is no guidance provided in the rule with respect to the principles governing the grant or refusal of the permission to amend the statement of case.

[46] In the case of **National Housing Development Corporation (NHDC) v. Danwill Construction Limited, Warren Sibbles and Donovan Hill** 2004 HCV 361 & 362 (May 4, 2007), Brooks J. (as he then was), provided guiding principles for the court to consider when determining whether to grant leave to amend. His Lordship in his dicta observed that our rule 20.4(2) is similar to its UK equivalent rule 17.1(2). He further noted that Stuart Sime in his book *A Practical Approach to Civil Procedure, 7th Ed. at pg. 145* points out that the UK rule does not state how the court's discretion to amend will be exercised. Sime in the text states:

> *"A court asked to grant permission to amend will therefore base its decision on the overriding objective. Generally dealing with a case justly will mean that amendments should be allowed to enable the real matters in controversy between the parties to be determined."*

His Lordship concluded, therefore, that this court was also to seek to achieve the overriding objective. He went on to say that the factors the court was to consider in exercising its discretion as to whether to grant permission to amend would be the stage at which the case had reached, the effect on the opposing party and the extent to which costs would be an adequate remedy.

[47] His Lordship then referred to the case of **Charlesworth v Relay Roads Ltd and Others** [2000] 1 WLR 230 where Neuberger J. quoted the case of **Clarapede & Co. v Commercial Union Association** (1883) 32 W.R. 262 at page 263 where Brett, M.R. said:

> *"however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other*

side. There is no injustice if the other side can be compensated by costs…"

[48] The learned judge found that there need not be an arguable legal basis for the proposed amendment to be granted by the court, that is to say that the amendments do not need to present a new cause of action or ground for defence. His Lordship found that there must an arguable factual basis for the proposed amendment in that the amendment must be relevant in the context of the case and would assist the court in determining the real questions in controversy between the parties. Further where a plausible explanation had been given for failure to initially plead the details, the amendment would not embarrass the defence and costs would be a suitable remedy, the application to amend may be granted.

Expiry of the limitation period

[49] The Claimant has claimed that the incident occurred on or about the 7th day of August 2012. The trial in this matter was heard in June 2020, which would mean that 8 years would have passed since her incident occurred. It is trite law that the limitation period for initiating civil proceedings is 6 years and as such any amendments to statements of case are generally required to be made before the end of this period. The limitation period in this matter would have lapsed 2 years prior to the making of the application to amend the statement of claim.

[50] There are provisions in the CPR for instances where amendments are sought after the limitation period has lapsed. These provisions can be found in Rule 20.6 of the CPR, however there are restrictions on what types of amendments are allowed. Rule 20.6 reads:

"(1) This rule applies to an amendment in a statement of case after the end of a relevant limitation period.

(2) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was –

(a) genuine; and

> *(b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question."*

[51] Whereas the rules allow for amendments which concern the name of a party, it cannot be said that amendments are restricted to those circumstances alone. There is case law which suggests that other amendments may validly be made, despite the expiry of the limitation period. In the case of **Sandals Resorts International Ltd v Neville L Daley & Co. Ltd** [2016] JMCA Civ. 35 Brooks JA (as he then was) assists once more in providing guidance on the principles to be considered when determining whether to grant an amendment after the limitation period has elapsed.

[52] One of the key authorities his Lordship relied upon was the case of **The Jamaica Railway Corporation v Mark Azan** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2005, judgment delivered on 16 February 2006. In that case K Harrison JA stated at paragraphs 27 and 28 of the judgment:

> *"There is provision in CPR, r. 20.6, for a party who wishes to amend a statement of case in respect of a change of name after a period of limitation has expired. There is no provision however, in our Rules for the substitution or addition of a new cause of action after the expiration of the limitation period.*
>
> *. Our Rules do not presently state any specific matters that the court will take into consideration in assessing whether a proposed amendment in fact amounts to a new cause of action (as opposed to a new party). In the final analysis, the decision whether or not to grant such an application, one ought to apply the overriding objective and the general principles of case management."*

[53] Brooks JA went further in his judgement to say:

> *"The learned judge of appeal accepted that the addition of a new cause of action would, in some cases, result in injustice to the defendant against whom the proposed amendment was aimed. He*

stated, however, that in cases where the issues, which are the subject of the proposed amendment, are not new or would have to be the subject of the litigation in any event, the amendment would not necessarily result in a new cause of action, or even where it did, the defendant would not be embarrassed in his defence. Two principles provided overarching guidance for Harrison JA's approach. The first was that "an amendment should be allowed if it can be made without injustice to the other side" (paragraph 25). The second was that of the overriding objective contained in rule 1.1 of the CPR.

At paragraph [25] of the judgement he reasoned thus:

Harrison JA …had properly exercised his discretion in allowing an amendment to a statement of claim to add a claim for money had and received to a claim for specific performance, or alternatively, breach of a contract for the sale of land. The proposed amendment was in respect of the deposit that had been paid on the signing of the agreement. Harrison JA found that the proposed amendment was not a new cause of action, as it arose on the same facts as the original claim. In the second of two paragraphs numbered 29, the learned judge of appeal said, in part:

> *"…In my view no new facts are being introduced by the Respondent. He merely wishes to say that if the Appellant succeeds in establishing that in law, there was no valid contract between the parties, he should be able to recover his deposit…."*

[54] Counsel for the Claimant relied on the case of **Judith Godmar v Ciboney Group Limited** SCCA No. 144/2001 judgement delivered July 2003 which is instructive on the matter of the expiration of the limitation period and amendments to special damages. Smith JA, in his judgment upheld the trial judge's decision to allow an

amendment with respect to special damages and stated that “the application for leave to further amend with a view to adding these expenses as special damages need not be made within the six-year limitation period. The defendant/respondent would have had no accrued defence to these claims for additional special damages since they are merely additional expenses in respect of injuries already pleaded in the Statement of Claim…”.

[55] In the present case the proposed amendment being sought by the Claimant is for the quantum being claimed for special damages, and in particular, future medical care, to be changed from $1.2M to $2.5M. No new facts or causes of action are being introduced by the proposed amendment, as these expenses arise out of the same set of facts already set out in her Particulars of Claim. I find that there would be no injustice caused to the Defendant upon the proposed amendment being granted as it would only seek to help the court to determine the real question in controversy with respect to the quantum of damages. The inconvenience caused by the timing of the application can be remedied with costs for the application to the Defendant. Courts exist for the purpose of determining matters in controversy and exercise discretion to grant amendments to facilitate same as long as it will not cause injustice to the other side. The Defendant would not have been taken by surprise by this claim for future medical costs and although Counsel for the Defendant expressed the inability to obtain advice/ a second opinion as being prejudicial, the onus remains on the Claimant to prove her special damages. Therefore, I am of the view that no injustice will be suffered by the Defendant if this amendment is permitted. The Claimant is granted leave to amend her Particulars of Claim.

Damages

[56] The Claimant was diagnosed with a split/depression fracture of the lateral tibial plateau of the right tibia and a fracture of the head of the fibula. She was treated at the Kingston Public Hospital by way of the immobilisation of the fracture in an above knee cast. She underwent surgery which entailed open reduction and

internal fixation and a bone graft was taken from the iliac crest to graft and support the fractured knee. A brace was fitted following surgery.

[57] The Claimant was subsequently seen by Dr. Melton Douglas on the 20th May, 2013. Dr. Douglas in his report dated 17th July, 2013, indicated the following from his observations:

(a) Walking with a limp,

(b) 16 cm midline vertical surgical scar in the front of the right knee,

(c) Left calf muscle had lost some of its bulk compared to the right as a result of disuse,

(d) Crepitus in the knee on extension and flexion,

(e) The range of motion in the right knee were from full extension to 110 degrees flexion

[58] Dr. Douglas gave a diagnosis of fracture of the right tibial plateau and combined post-traumatic/degenerative osteoarthritis right knee. The Claimant was assessed as having a 26% lower extremity impairment. The doctor confirmed the Claimant's pre-existing arthritis in the right knee and opined that the arthritis of the knee as well as the fracture have contributed to her permanent impairment. He stated that the degree of impairment from each condition differed and could be very difficult to separate but further opined that the impairment was shared equally between both conditions.

[59] The doctor also reported that the fracture had accelerated the onset of the pain of the arthritis and over the long term the pain would worsen and the arthritis would be accelerated. There was therefore the very likely possibility of the need for further knee surgery, preferably a total knee replacement.

Special Damages

[60] The sum of $50,000.00 was agreed between the parties being the cost of the medical report from Dr. Douglas and the court therefore allows same for medical expenses.

[61] Regarding the cost for transportation as pleaded, we note that it differs significantly from what was given in evidence by the Claimant. There is no dispute that the Claimant returned to the Kingston Public Hospital to attend the outpatient clinic and to do physiotherapy. The court is also aware that operators of public transportation rarely, if ever, furnish their passengers with receipts or tickets as proof of travel. Given the nature of the injury, travel by taxi to the hospital was not unreasonable and the court will therefore make an award of $10,000.00.

[62] On the claim for loss of earnings, the Claimant is seeking same for a period of 66 weeks. Counsel for the Defendant has submitted that the claim should be refused or discounted by at least 60% as the Claimant has given no evidence of her attempts to work or to seek alternate employment and further the medical evidence does not support her claim that she is not able to work.

[63] From the evidence of Dr. Douglas the Claimant was admitted into hospital, underwent major surgery on the 4th September, 2012 and was discharged on 8th September, 2012 after she had commenced ambulation aided with a walker. Dr. Douglas saw her in the outpatient clinic in May 2013 at which time she was still complaining of pain to the right knee and was dependent on the use of a cane to walk around. Radiographs done on the 20th May, 2013 revealed that the fractured tibial plateau had healed.

[64] The court has not been furnished with any medical evidence of the time it would have taken for the fracture to heal. It is noted however from the Claimant's evidence that on discharge from the Kingston Public Hospital she attended the outpatient clinic for two months and was then sent to do physiotherapy. She said that she commenced physiotherapy in February 2013 and on completion the pain

was less than before. The Claimant has stated that she has not been able to work since her fall and that she has not fully recovered from her injuries. There is however no medical evidence to support that allegation. It is evident that the Claimants continued issues with pain in her right knee are not solely attributable to the injury she received.

[65] The court is of the view that the claimant's period of healing from the fracture received spanned the period between August 2012 and March 2013. Loss of earnings is therefore awarded for a period of 28 weeks @ $7000.00 per week.

[66] Counsel for the Claimant has included in her submissions a claim for handicap on the labour market. The question to be asked is whether there is a real or substantial risk that the Claimant will lose her job in the future and face a difficulty getting another because of her injury. There is no medical evidence that the injury suffered has or will impact her employment prospects and the Claimant herself has given no evidence of seeking employment. She has made no effort to re-join the labour market. This claim therefore fails.

General Damages

[67] Counsel for the Claimant has relied on two cases:

(vi) **Huclen Carter v Paulette Barnett-Edwards & Clifton Edwards**, unreported Judgment delivered July 2006 entered in Judgment Binder 738 Folio 419. And

(vii) **Marcia Golding v Jamaica Urban Transit Company Limited**, unreported Judgment delivered October 2007, entered in Judgment Binder 742 Folio 309.

[68] The claimant in Carter's case sustained a fracture of the patella. He was treated surgically and placed in a hinged knee brace. He was treated surgically and healed without any impairment. An award of $1,000,000.00 was made for general damages in July 2006 which updates to approximately $2,800,000.00 today.

[69] The claimant in the Golding case sustained a chondral injury and was diagnosed with meniscal injury, advanced chondromalacia and anterior cruciate ligament injury to the right knee. She underwent surgery and physiotherapy and developed osteoarthritis. She was assessed as having a 17% lower extremity impairment equivalent to a 7% whole person impairment and was a candidate for a total knee replacement. An award of $3,500,000.00 was made for pain and suffering and loss of amenities in October 2007 which updates to approximately $8,500,000.00 today.

[70] Counsel submitted that an appropriate award of $10,000,000.00 would be appropriate to take into consideration the increased impairment rating in the case at bar.

[71] Counsel for the Defendant has cited the following cases of Patrice Brown v Kingston Wharves Limited & the A.G. 2014 JMSC Civ 231, Stewart v Robinson, and John Thomas v Marcella Francis and George Fagan Khan Personal Injury Awards Volume 5 pages 54-55.

[72] The Claimant in Patrice Brown's case sustained a knee injury resulting in a posterior cruciate ligament tear along with posterolateral corner injury to right knee. She underwent surgery and physiotherapy and was assessed with a 37% permanent impairment of the left lower extremity which amounted to 15% whole person partial permanent disability. An award of $3,000,000.00 for general damages was made in March 2014 which updates to $3,987,804.87 using the December 2020 CPI of 109.

[73] In Stewart v Robinson the claimant suffered a fractured left knee. She underwent surgery and was left with a 1cm shortening of the left lower extremity. There was a 28% whole person disability assessment and further surgery was recommended for the knee. The sum of $3,000,000.00 was awarded in July 2010 which updates to $5,291,262.13 using the December 2020 CPI of 109.

[74] The claimant in John Thomas case was diagnosed with an avulsion fracture of the anterior tibial plateau. He underwent surgery and physiotherapy. His permanent partial disability was assessed at 15% of the function of the left lower limb. General damages were awarded in the sum of $450,000.00 in September 1999. Same updates to $2,489,847.71 using the December 2020 CPI of 109.

[75] I have found the cases cited by Counsel for the Defendant to be most helpful. The range within which the court finds the award should fall is $3,500,000.00 - $4,500,000.00. An appropriate award would be $4,000,000.00. Taking into consideration that the impairment of 26% has been attributed equally to her pre-existing condition and the fracture, this award is discounted by 50% to the sum of $2,000,000.00.

[76] The court orders as follows:

Judgment for the Claimant.

Special Damages in the sum of $256,000.00 with interest thereon at a rate of 3% per annum from 7th August, 2012 to the date of judgment.

Cost of future surgery $1,200,000.00

General damages in the sum of $2,000,000.00 with interest thereon at 3% per annum from the date of service of the claim form to the date of judgment.

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

[77] The court is of the view that