

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. 2003/HCV1517

BETWEEN	VANURA LEE	CLAIMANT
A N D	PETROLEUM CO. OF JA. LTD.	1 ST DEFENDANT
A N D	JUICI BEEF LIMITED	2 ND DEFENDANT

Mr. Reitzin for Claimant instructed by Reitzin & Hernandez.

Miss Christine Hudson instructed by Churchill, Neita and Company for
1st Defendant.

Heard: 1st December, 3rd December, and 16th December, 2004

Straw, J. (Ag.)

The Claimant, Vanura Lee is twenty four years old. She left high school at age seventeen with two Secondary School Certificate (S.S.C) subjects, Maths and English. She did a course in cosmetology at Success School of Beauty after leaving school and worked for a period of eleven months at M and M Beauty Salon. She then commenced working at Juici Beef Limited. On the 13th May, 2002, while at her place of employment, she was badly burnt by the explosion of a gas cylinder caused by the negligence of the 1st defendant's employees.

Injuries of the Claimant

She was admitted to the University Hospital of the West Indies on the same day. The reports of Dr. Mitchell, Exhibits 1 & 2 revealed that she was suffering from injuries described as partial thickness burns to the face, neck, left upper and both lower limbs which affected an estimated (twenty seven percent) 27% of her body surface area.

Her treatment included the following:

- Tetanus prophylaxis and analgesia administered.
- Standard fluid resuscitation and burn wound care instituted. This comprised twice daily water jet debridement and topical flammazine ointment to the wounds except the face where topical tetracycline cream was used.
- Daily physiotherapy.

Ms. Lee described her experience in the hospital in the following words.

“They took me to bathroom. Put me in shower and scrubbed my skin ----. Feeling a whole heap of pain --. I was screaming. My skin was falling off and bleeding.”

This procedure was repeated in the following days. After the shower she would be wrapped with a cloth and flammazine ointment applied. She would then be wrapped in plastic.

In relation to the physiotherapy, she stated that it commenced after one week, that it was daily. She explained that she experienced pain while doing these exercises.

Dr. Mitchell's report indicated that she made excellent progress and her wounds healed well. She was discharged on the 3rd June, 2002 for outpatient review on a weekly basis.

She remained in hospital for a period of three weeks.

Emotional and Psychological Issues.

Ms. Lee has a son, Nicolay Barrett, who is now three years and eleven months old. When the child visited her in hospital, he did not want to come to her because of her physical appearance. This reaction continued for some time even after she went home and caused her to cry. The child's father is Alphanso Barrett. They got along well together. She had known him for five years, she loved him and they had an exciting sexual life.

After the fire, she reported that the relationship was on edge. He would visit her three times per week previously. After she came out of hospital, he came only once. He has since migrated. She feels sad that he is no longer part of her and Nicolay's life. This also caused her to cry a lot but her mother has been a source of great comfort.

She feels emotionally low because she could not do all the things she used to do. These activities included wearing revealing clothes. She no longer does so because of the scars on her hands.

The court notes burnt scars and raised formation on both arms, especially the left. Also scars on the left thigh and in the area of both ankles.

In Dr. Mitchell's report, dated 12th June, 2003 (Exhibit 2) he notes that there is hypo pigmentation over both Achilles tendons and the dorsum of the left hand and wrist. He also states that there is some hypotrophy noted on the left forearm. In his opinion, there will be no further improvement in her physical appearance.

Her self-image has been affected by the scars. She no longer feels attractive or sexy. She said that before the fire, a lot of guys would call to her without calling her names. She used to attend parties, dances **and the beach**. She still goes sometimes with her mother and sometimes with her friends although she does not really like to go to these places now.

I must remark that her mother has apparently been a source of tremendous support for her.

People make comments about her appearance. Some call her 'bun up gal', some scorn her. She reports that this happens quite often. She experienced nightmares after the fire, maybe up to four times per week.

This, however, has decreased to about once per week. She still cries when she looks in the mirror and sees her skin. She used to have suicidal thoughts but this is of the past. She reports that she does not feel bright about her future and she no longer makes decisions very well.

It is quite clear that the incident has had a great psychological impact on Ms. Lee. Dr. Ruth Doorbar, a consultant psychiatrist, examined her on the 3rd July, 2003 and the 4th December, 2003. She reports that Ms. Lee suffers from depression with associated memory impairment, recurrent nightmares of the fire, anxiety state and very severe social and personal disruption. She recommended referral to Dr. Arscot, a plastic surgeon, who might be able to improve her physical appearance, also six months of psychotherapy to overcome her depression.

Up to the date of trial, Miss Lee had not visited Dr. Arscot's office so the court has no medical evidence concerning the possibility of improvement in her physical appearance. Dr. Mitchell did however suggest that there would be no further improvement.

Ms. Lee was seen by Dr. Abel, a consultant psychiatrist on the 25th and 26th May, 2004. He assessed her (Exhibit 4) as suffering from Post Traumatic Stress Disorder and Major Depressive Disorder as a result of the accident. He states that the accident has impacted significantly on her

personal and professional life and is a source of considerable emotional anguish. He also recommended psychotherapy to reduce the symptoms of Post Traumatic Stress Disorder and Major Depressive Disorder, and also to improve her level of functioning and to enhance her self-esteem.

Ms. Lee however has made no claim for further medical care.

Loss of Amenities

Ms. Lee loved cooking. She cooked about three times per week before the incident. She now experiences fear when using a gas stove, but she is in fact cooking once per day now.

She used to play netball with her sisters. This is a sport which she loves. She has not played since the fire as she is afraid it will cause injury to her skin.

Mr. Reitzen indicated to the court that he would be filing a notice of discontinuance against the 2nd Defendant.

General Damages

He referred the court to four cases in relation to pain and suffering and loss of amenities.

Alfred Thomas v. Pastry Specialist, Harrison, pg 227.

Shernett Williams v. Oscar Mills, Khan 5, pg 212.

Pamella Gabbidan v. Oscar Mills, Khan 5, pg 210.

Pansy McDermot v. Garnett Lewis et al, Khan 5, pg 287.

He recommended the case of Alfred Thomas as the one closest in comparison to the present case but suggested an increase of 30% on the updated award as Mr. Thomas suffered superficial burns compared to Ms. Lee's partial thickness burns; That there was no evidence of any functional disability; that Mr. Thomas was a male and physical scars were more traumatic for a woman in our society where external beauty is highly regarded; that there was no evidence of psychological impairment; that the doctor opined that there would be some benefit from corrective surgery. The updated award using the October CPI would be \$1,356,905.18. The addition of 30% would be \$1,763,976.73.

The Claimant in **Alfred Thomas**, (supra) suffered superficial burns to the face and upper limbs which were assessed to be 35% of his total body surface area. He was in intensive care for three weeks. There was permanent disfigurement by scarring involving the face and upper limbs.

There was no functional disability. The plastic surgeon found that the disfigurement due to scars and pigmentary changes would be permanent but corrective surgery would provide partial improvement in some areas.

In the **Shernette Williams** case, (supra) the Claimant suffered extensive flame burns to head, neck, chest, both upper limbs and both lower

limbs. The burns totaled thirty five to forty percent (35% - 40%), of her body surface area and were of mixed partial and deep partial thickness.

She was in hospital from the 11th December, 1989 to 11th January, 1990. There was scarring of her entire face including the ears. Most of the scars were superficial and the doctor reported it should improve with time. An area on the right forehead was thicker and required surgery. There was also scarring of the complete surface area of both upper limbs.

The burns on the right hand were deep and affected the entire dorsum of the hand and fingers. Reconstructive surgery was recommended to improve her appearance but it was the doctor's opinion that despite this, there would be tell tale signs of her accident. The Claimant was seven years old at the time. The updated award for Pain and Suffering and Loss Amenities is \$1,596,999.14.

The injuries in **Williams** (supra) were clearly more serious than the present. However, counsel for the Claimant has submitted that there was no evidence of any psychological impairment.

In the case of **Pamella Gabbidan** (supra) the claimant suffered second degree burns to both lower limbs, to forearms and face which affected twenty percent (20%) of her skin. She was thirty one years old. She remained in hospital from 11th December, 1989 to 1st March, 1990.

When she was examined on 4th March, 1990, she was found to have an area of hypo and hyper pigmentation of the right upper arm in the elbow region. Both lower limbs below the knee were covered with patches of hypo pigmentation and hyper pigmentation. Improvement was expected in the hyper pigmented area; that after maximum recovery it was unlikely that surgical intervention would be of any benefit. She would suffer permanent scarring. The updated award is \$756,469.49.

The court found the case of Alfred Thomas to be the most useful.

Although, the body surface affected was (thirty five percent) 35% in Thomas compared to (twenty seven percent) 27% for the present case, the court does consider the impact of physical scars upon a woman compared to a man, although it does affect both genders. The court also considers an additional sum for the psychological impairment suffered by the Claimant.

Counsel for the Defendant referred the court to the case of **Marva Protz – Marcocchio vs. Ernest Smart**, Khan 5, pg 284. In that case, Dr. Irons gave evidence that the Claimant suffered from severe phobia anxiety (she was bitten by dogs) with vivid recall, withdrawn action and avoidance specifically related to dogs.

She was awarded the sum of \$100,000.00 on 22nd April, 2002 for post traumatic stress disorder.

Mr. Reitzen asks that the court consider that an updated award would be in the region of \$133,626.94 cents.

I am of the view that Ms. Lee's psychological impairment is directly due to the trauma that she experienced because of the incident. In relation to General Damages, I make the following award.

Pain and suffering and loss of amenities	\$1,450,000.00
Post traumatic stress disorder and Major Stress Disorder	<u>\$ 300,000.00</u>
Total	<u>\$1,750,000.00</u>

Interest at 6% from 29th August, 2003 to 16th December, 2004 is awarded on this sum.

Aggravated Damages

Counsel for the Claimant has submitted that the court should grant an award for aggravated damages based on the hurt feelings of the Claimant. He referred the court to the case of **Pansy McDermot** (supra) where an award of \$750,000.00 was made for Aggravated Damages. In that case the Claimant was shot deliberately in the left thigh by a police officer who had requested that she attend the station. This award however, was later reduced to \$250,000.00 by the Court of Appeal in SCCA no 67/2002 on the 5th February, 2003.

I am of the view that the facts in the present case should not attract an award for aggravated damages. The injuries suffered by Ms. Lee were due to an explosion caused by the negligence of the first defendant's servants. There is no basis for an award to reflect punishment for the conduct of the defendants which resulted in wounded feelings.

Loss of Earning Capacity

The Claimant is requesting an award for loss of earning capacity on the basis that, if she loses her job with Juici Patties for any reason at all, a substantial risk exists that she may not find alternative employment due to her disability.

Mr. Reitzen has asked the court to take the following factors into consideration.

- How Ms. Lee is viewed by certain members of the public.
- During the period of time that she was fired from Juici Beef, she attempted to find alternative employment without any success.
- The difficulty she experiences with her foot while doing her job as a cashier as well as the back pains she experiences while doing the lobby.

- She is unable to pursue cosmetology for which she was previously trained due to her sensitivity to chemicals as a result of the condition of her skin.

The court relies on the principles as set out in **MOELIKER v. Reynolle and Company Ltd**, 1977, 1 AER, page 10 in considering an award under this head.

(a) Does a real risk exist?

The first issue is whether there is a substantial or real, and not merely fanciful risk that the **claimant** will lose her present employment at some time before the end of her working life.

Ms. Lee is twenty four years old and works in the fast food industry. There is no security of tenure. She had been released from her present employment since her return to work after the incident for reasons that are not connected with her injuries. She was fortunate to be rehired.

The court is of the view that there is a substantial or real risk that the **claimant** will lose her present employment or be thrown on the labour market at sometime before the estimated end of her working life.

(b) Assessment of award

If such a substantial risk exists, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the

financial damage the **claimant** will suffer if the risk materializes, having regard to the degree of the risk, the time when it may materialize, and the factors, both favourable and unfavourable, which, in a particular case, will or may affect the **claimant's** chances of getting a job at all or an equally well paid job if the risk should materialize (per Lord Brown in *Moeliker* (supra) page 17).

Ms. Lee's major disability is cosmetic, that is, the scar on her hands. This may affect her desirability in the eyes of some employees for certain positions and it does expose her to the risk that she may not be considered as a first choice if there are other applicants.

The court also considers that Ms. Lee states that her left ankle swells when she puts her foot down and while doing her job as a cashier, she rests the foot on the register box. The doctor's report indicates that Ms. Lee reported pain in the achilles tendon after prolonged standing. However, she has no difficulty walking.

There is no medical evidence however that suggests that the back pains she experiences is connected to the injuries she received.

The court also considers that, due to the condition of her skin, she apparently is unable to pursue her alternative training as a cosmetologist. She could however pursue training in another field.

I assess her risk of being thrown on the labour market as periodic. There is no evidence to support that she will not be able to work at all. She has been going to her place of employment on a daily basis since December 2003. She continues to work as a cashier and deals with the pain in her foot by resting it on the register box. The nature of a job as a cashier allows one to sit.

Taking into consideration all the above factors, I am of the view that an award of a global figure without any reference to the multiplier/multiplicand will suit the interests of justice in this particular case. The award however will be a discounted figure to take into account, immediate receipt, taxation and the usual variables of life.

The Claimant is therefore awarded the sum of \$200,000.00 under this head.

Special Damages

Special Damages are awarded as follows:

Traveling expenses	\$ 1,040.00
Medical reports	47,500.00
Medical expenses	\$412,274.43

The Claimant has pleaded loss of earnings between 29th July, 2003 to 16th December 2003 at \$13,100 per month. She returned to work at Juici

Beef in October 2002. She was fired on 29th July, 2003 and later rehired on 16th December, 2003. Apparently, her dismissal was a result of an incident involving a cellular phone belonging to a customer who was a friend of her co-worker. They were both dismissed.

There is no nexus between her dismissal and the injuries she received. I decline in making any award for loss of earnings during that period.

When she was rehired on 16th December, 2003 her salary was reduced by \$600 per month. There is also no evidence to suggest that the reduction was caused directly or indirectly by her injuries. I also decline to make an award for the difference in her salary between 16th December, 2003 and the 3rd December, 2004.

The total special damages are therefore \$460,814.43 with interest of 6% from 13th May, 2002 to 16th December 2004.

Costs pursuant to schedule awarded to Claimant.