IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2007 HCV 00802

BETWEEN	BARBARA ROWE-ANDERSON	CLAIMANT
AND	MOHINI ENTERPRISES LTD.	FIRST DEFENDANT
AND	RAJU LACHMANDAS	SECOND DEFENDANT

Mr. Jeffery Mordecai for the Claimant.

Mrs. Ursula Khan instructed by Khan and Khan Defendants.

Negligence – Occupier's Liability – Customer of store slipping and falling – Store on different levels – Levels joined by small ramp – Whether ramp the cause of the fall – Whether ramp dangerous

Damages – Quantum - Personal Injury – Claimant falling with legs in a 'split' – Severe lower back pain - Chronic myofascial pain resulting from trauma – 10% whole person disability

11th, 12th and 29th January 2010

BROOKS, J.

On September 29 2004, Mrs. Barbara Rowe-Anderson visited "Jamaica Jewellers", a jewellery store at East Queen Street in Kingston. Having looked at the contents of a showcase in the store, she started to leave the store but slipped and fell. According to her the slip and fall was as a result of her stepping on a sloped area of the floor which was shiny. The defendants, Mohini Enterprises Ltd. and its managing director Mr. Raju Lachmandas, contest her account. They assert that she slipped and fell in water which she had brought into the store on her clothes and umbrella. They say the water dripped unto the floor causing the hazard.

The court has to determine which version is true on a balance of probabilities. If Mrs. Anderson-Rowe is believed then the quantum of damages needs to be assessed. It is also to be decided if Mrs. Anderson-Rowe was correct in joining Mr. Lachmandas as a

defendant. Mr. Lachmandas asserts that "Jamaican Jewellers" is the trade name of Mohini Enterprises and that he does not use that trade name. It is noted that the name is variously given as "Jamaica Jewellers" and "Jamaican Jewellers" but the difference is not significant for these purposes. I shall, henceforth, use the officially recognized name of "Jamaican Jewellers".

Liability

Mrs. Anderson-Rowe testified on her own behalf and Miss Marvine Bonner was the witness as to fact for Mohini Enterprises. Miss Bonner said that she was the counter-clerk at the store on the time of the incident. Neither was really discredited in cross-examination on the matter of the incident. In deciding the issue of liability the evidence of the physical layout of the store has to be closely considered.

Mr. Lachmandas, who was not present at the time of the fall, gave evidence of the layout of the store. His evidence is that it is 20-25 feet wide and is on two levels. The front section toward the entrance is lower than the rear. The rear section is about 10-12 inches higher than the front. The two sections are joined by a ramp which traverses the entire width of the store. From the entrance to the ramp is a distance of about 15-20 feet. The ramp itself is about 8-10 inches wide and has an angle of about 15-20 degrees from bottom to top. The showcase is toward the rear and is about 5 feet from the ramp.

As far as the floor is concerned Mr. Lachmandas testified that he did not consider placing a mat on the ramp because the floor was rough concrete. Miss Bonner testified that there was no tiled area in the store; the flooring was rough concrete. The concrete was painted green and the "paint had a little sheen to it". She agreed that the slope was "shiny". Mr. Lachmandas testified that there were two paper signs put on the floor about 15-18 feet apart warning customers about the ramp. The signs were white with red

writing. None was in the centre of the path leading from the store entrance to the showcase. Neither was there any sign at the front of the store or on the showcase, warning of the ramp. There was no railing by the ramp.

That was the situation that faced Mrs. Rowe-Anderson at about noon on the day in question. She says there was no water on the floor. She insists that she slipped as she stepped on the slope. She says that one leg went forward the other went behind her and she fell into what could be termed a 'dance split'; her groin area to the floor. She says that she was helped up by a man in the store and taken to the front part of the store where she sat on a chair. She said that it only began to rain after she had been sitting there.

Miss Bonner's account was that Mrs. Rowe-Anderson came into the store while it was raining. She noticed that Mrs. Rowe-Anderson had been sheltering from the rain under the awning in front of the store, but afterward entered the store and walked toward the rear. According to Miss Bonner, she was behind the showcase and watched Mrs. Rowe-Anderson approach. She noticed that Mrs. Rowe-Anderson was carrying an umbrella and that the umbrella was dripping water. At the time the umbrella was closed but not strapped. She also noticed that Mrs. Rowe-Anderson's shoe heels were "rocky", that is, unstable, as she walked in.

On Miss Bonner's account, Mrs. Rowe-Anderson walked up to the showcase and was looking at the merchandise. Water dripped from the umbrella as she surveyed the baubles. Miss Bonner says that she enquired whether she could help and Mrs. Rowe-Anderson said, no and that she would come back. Mrs. Rowe-Anderson then turned to leave and as she turned she fell. That was just by the showcase. Miss Bonner testified that the ramp was not involved in the fall.

I preferred the evidence of Mrs. Rowe-Anderson. I formed the impression that Miss Bonner was less than objective in her testimony. She testified that there were three or four signs on the slope at 3-4 foot intervals. As mentioned before, Mr. Lachmandas said there were only two signs. He seemed more objective than did Miss Bonner and I accept his testimony on this point instead of hers.

I also find that Miss Bonner is not credible when she speaks of Mrs. Rowe-Anderson's shoes. She says that she saw Mrs. Rowe-Anderson return to the store later in the day with a photographer and noticed that she had on the same shoes. She did not, however, notice anything about the heels at that time.

I reject the testimony that Mrs. Rowe-Anderson's umbrella was dripping water sufficient to cause a hazard. According to Miss Bonner, Mrs. Rowe-Anderson was standing outside the store with the umbrella closed but she "didn't wrap it". Although she did not say how long Mrs. Rowe-Anderson stood under the front awning for, it is unlikely that she could have brought in sufficient water after sheltering there, to have caused the hazard Miss Murray describes.

Finally, I am inclined to believe Mrs. Rowe-Anderson instead of Miss Bonner that there was no employee behind the showcase. Miss Bonner says she did not speak to Mrs. Rowe-Anderson after the fall and there was no mention of water on the floor in Mrs. Rowe-Anderson's presence after she had fallen.

It is my view that Mrs. Rowe-Anderson's fall is more likely to have been caused by slipping on the sloped floor while walking, as she describes, rather than while turning at one spot, as Miss Bonner says. I also find that the slope was in fact dangerous. The store operators clearly recognized the danger prior to the day of the incident. I find that they did place signs on the slope. The signs, being far apart and not being in the direct

path of a visitor who is walking straight to the rear of the store, would not have caught the attention of such a visitor and so did not serve as a warning to the visitor.

I find that there is no basis for ascribing any liability to Mrs. Rowe-Anderson. There was, in my view, nothing to alert her to any danger in using the floor and the relatively narrow area of the slope would not have made it obvious to her that this was an area which required special care.

In the circumstances I find that the store operator, the occupier of the building, is liable for Mrs. Rowe-Anderson's fall. It must, therefore, compensate her for her pain and suffering and loss of amenities arising from her injury resulting from the fall.

Who is the Occupier?

The next question to be decided is, "who is the occupier of the building". There is no dispute that it is the party or parties trading under the trade name "Jamaican Jewellers". The issue lies in whether Mr. Lachmandas was one of those parties. Mrs. Rowe-Anderson supports her assertion to the affirmative by producing a Certificate of Registration under the Registration of Business Names Act. Mr. Lachmandas contends that the certificate does not indicate that which Mrs. Rowe-Anderson asserts.

The certificate is for the registration of a branch called "Touch Of Gold". The relevant part of the certificate, issued by the Registrar of Companies states as follows:

> "I HEREBY CERTIFY that a Statement...furnished by RAJU LACHMANDAS & MOHINI ENTERPRISES LIMITED, with Business Name "JAMAICAN JEWELLERS' (jewellery store) of 56, King Street, Central Sorting Office, Kingston (Principal place of the business), Showing that...a branch (jewellery store) was opened at ...with business name "TOUCH OF GOLD" pursuant to section 8 of [The Registration of Business Names Act] was registered on...."

The simple question to be decided is whether the clause "with Business Name "Jamaican Jewellers" refers to both parties providing the statement or only to the latter.

Section 8 of the Registration of Business Names Act requires the trader who, among other things, opens a branch, to deliver a statement to the Registrar, furnishing the relevant details. If Mr. Lachmandas is not the trader why would he provide a statement? He says that he is the Managing Director of Mohini Enterprises. His testimony is that his name appears on this certificate in error.

Although only one address appears for both parties making the 'statement', I am of the view that the business name "Jamaican Jewellers" is a reference to the name proximate to the clause containing the business name, that is, Mohini Enterprises Ltd. In any event, this is not a certificate of the registration of the business name "Jamaican Jewellers". The party or parties registered as using that name would be a matter of record, it should not be a matter for implication by reference to some other record.

The certificate which Mrs. Rowe-Anderson has submitted only confirms that Mr. Lachmandas and Mohini both made a statement that the business using the name "Jamaican Jewellers" has opened a branch called "Touch of Gold". Mr. Lachmandas, I find is not the occupier of the store and is not liable to Mrs. Rowe-Anderson. No proper basis for making him a party to this action has been shown. He is therefore entitled to his costs from Mrs. Rowe-Anderson.

I now turn to the matter of assessing the damages to be paid to Mrs. Rowe-Anderson.

Special Damages

Certain aspects of the special damages were agreed. These were the medical reports and the medical expenses at $24,000.00 and $311,865.10 respectively. Contested were the matters of loss of earnings and the cost of transportation and housekeeping assistance.

Loss of Earnings

In respect of loss of earnings, Mrs. Rowe-Anderson pleaded that although she worked as a telephone operator, she made pastry and cakes during her spare time, as a business venture. She claimed that she was unable to do this business because of her disability and could not have hired anyone to do the work for her because of the late hours in which the tasks involved had to be undertaken. She pleaded that, as a result, she lost $17,500.00 per month.

Her evidence showed an annual breakdown of her total claim. No documents were provided. She kept no accounts. She made no tax returns. She was unable to say what the profit that she made on a cake was; she could tell the sale price but could not estimate the cost of the ingredients. In my view she has not met the standard of proving special damages, which is that they must not only be specifically pleaded but that they must be **strictly** proved. This principle is outlined in *Robinson and Company Ltd. and Another v Lawrence* (1969) 11 J.L.R. 450 at p. 453 and in *Hepburn Harris v Carlton Walker* SCCA 40/90 (delivered 10/12/90). No award is made under this head.

Transportation costs

On the issue of transportation costs Mrs. Rowe-Anderson pleaded in her particulars of claim that she incurred transportation costs of $39,575.00. In her witness statement she stated that she had to travel by car and taxi to access medical care. She said that she "had kept written records of these travelling expenses related to the accident which total $39,575...". She then gave a year by year break down of the composition of that figure but no other details. She provided no documentary support for this evidence.

In cross-examination Mrs. Rowe-Anderson said that she had been accustomed to driving before the time of the fall. She said that she had to stop driving for over a year, if

not two years after the fall. There were, however, times when, even after resuming driving, she had to take temporary breaks from driving. She did, after she had resumed driving, drive to see Dr. Neville Ballin and the other doctors who had treated her.

Mr. Mordecai, on her behalf, submitted that the court considers that Mrs. Rowe-Anderson would have made trips, using her car, to Dr. Ballin and that that I should award what is reasonable. I cannot accept that submission. I agree with Mrs. Khan, for Mohini, that in proving special damages Mrs. Rowe-Anderson has to do more than she has. I have no evidence as to what a trip by taxi or otherwise would have cost Mrs. Rowe-Anderson to attend any of the Doctors to have medical treatment.

Special Damages have to be strictly proved and even though there is some flexibility given to the courts where it would be unrealistic to expect documentary evidence, the court cannot supply figures of its own design. In the circumstances I shall only award Mrs. Rowe-Anderson the sums claimed for the years 2004 and 2005 as being reasonable for the number of trips she would have taken to seek medical treatment. These are $3,825.00 and $3,850.00 respectively.

Household Assistance

Thirdly there is the matter of the cost of household assistance. Dr. Ballin, who has treated Mrs. Rowe-Anderson since shortly after her fall up to the present time, has testified that, over the period, she has needed assistance to do household chores. Mrs. Rowe-Anderson herself gave evidence incurring expense of having to pay a household helper for services once per week. This was at the rate of $1,000.00 per day for 2004 and 2005, $1,200.00 per day from 2006 to March 2008 and $1,500.00 from April 2008 to the present time. These figures are not unreasonable. The total of $309,200.00, submitted by Mr. Mordecai, as being the figure agreed between counsel, is therefore allowed.

General Damages

Pain and Suffering and Loss of Amenities

Mrs. Rowe-Anderson was 50 years old when she fell. I shall attempt to summarize her condition from the many medical reports which have been submitted on her behalf. The doctors state that she sustained soft tissue injury to her back and bottom when she fell; it was a "twisting injury". She thereafter had pain to the left side of her head and neck, her right wrist, left chest, left buttock and left hip. She developed Chronic Myofascial Pain Syndrome and continues to suffer from it though its intensity has decreased. Dr. Ballin testified that she has reached maximum medical improvement and that her whole-person impairment is 10%, based on the American Medical Association's *Guide to the Evaluation of Permanent Impairment* – 5th Ed. Her pain impairment classification is "moderate to severe", opined Dr. Ballin.

Myofascial Pain Syndrome, testified Dr. Ballin, is "basically a condition...where...trauma causes the patient to have pain in the different muscle groups...the trigger is trauma". He said trigger points would be sensitive areas which set off pain. Dr. Ballin explained that with that condition, chronic pain itself becomes the disease, rather than the result of disease. He said in cross-examination that pain in that situation is composed of social, psychological, physical and emotional factors. He acknowledged the risk of patients over-emphasizing complaints in order to enhance financial recovery. He testified, however, that the patient's credibility is taken into account in making assessments.

Dr. Ballin testified that he has treated Mrs. Rowe-Anderson over the years with pain-killers, topical medication and other drugs and that she has had physiotherapy. He has given her a number of pain restricting injections over the years with varying degrees

of relief being achieved. An MRI, consultations with neurology, orthopaedic and cardiac consultant doctors as well as a consultant physician, were all prescribed in an attempt to determine whether there were any physiological causes of the pain. None was identified.

The effect of this condition on Mrs. Rowe-Anderson is that she is still suffering from pain at the various sites mentioned above, cramps in her fingers, permanent swelling to the left shoulder, numbness in the toes and a "sticking, burning pain from the bottom area around the left side to the groin". She says that she has problems turning around to reverse while driving and a permanent weakness around her waistline. The condition affects her when she stands or sits for long hours and there are times when it affects her walking and she experiences pain during sexual intercourse. She has been and continues to be unable to do household chores such as sweeping and needs domestic assistance for these chores. Her hobby/business of baking cakes and pastries has also been halted because, according to her, some things have to be done by hand and she is unable to manage those tasks.

Considering the calibre and experience of learned counsel appearing in the matter, it is not surprising that a number of cases were cited in respect of general damages and that the submissions were thorough.

In respect of the appropriate award to be made under this head, Mr. Mordecai cited the cases of *Jackson v Charlton* 5 Khan 167, *Clarke v Dawkins and another* 6 Khan 54, *Vernon v Paulnor Sea Port Co. Ltd.* 6 Khan 110, *Naggie v The Ritz Carlton Hotel of Jamaica* 6 Khan 198, *Grant v Dalwood and others* 6 Khan 200, *Robinson-McIsaacs v Lawrence* 6 Khan 126, *Clarke v James-Reid* 6 Khan 229, and *Morgan v Wayne Ann Holdings Ltd.* (Claim 2001/M-130 (delivered 29/5/09).

For her part Mrs. Khan cited *Robinson-McIsaacs v Lawrence, Clarke v James-Reid, Jackson v Charlton* (all referred to above), *Nelson v Cousins* 5 Khan 162 and *Walker v Pink* 6 Khan 114.

All these cases involved impairment of between 8% and 12%. The majority specifically state that this was in respect of the whole person. Of the cases, I find that *Clarke v James-Reid* offers the best assistance by way of similarity to the instant case. Mrs. James-Reid was 60 years old at the time of her injury. Her injuries, symptoms and disabilities were as follows:

a. Pain in right buttock and hip,
b. Abrasions on both legs;
c. Tenderness in right ischial (pelvic) region;
d. Some wasting of right lower limb;
e. Compression of the sciatic nerve;
f. Suffering continuing after 10 years
g. Cramps in the lower back;
h. Inability to sit or drive for any length of time.

She was diagnosed with post-traumatic myo-fascial pain was made and she was treated for pain with physiotherapy and a combination of narcotics and non-steroidal anti-inflammatory pain killers. Her impairment was between 10-12% of the whole person.

Having reduced the first instance award, the Court of Appeal awarded Mrs. James-Reid the sum of $3,000,000.00 under the head of Pain and Suffering and Loss of Amenities. The original award was made on 5th October, 2007. The equivalent value of that award today is just over $4,000,000.00 using the Consumer Price Index for November 2009 (148.7).

Another case which my learned sister Straw, J. has brought to my attention, is that of *Deyannis v Half Moon Bay Ltd.* 2007 HCV 1001 (delivered 12/6/09). In that case, Ms. Deyannis suffered injury when she was hit by a defective cart. There was disc herniation

of her lumbar spine and tearing of the right gluteus medius (buttock) muscle. The medical reports on her condition spanned the years 2004 -2009. She complained of "persistent pain along the right side of her lower back, right hip region and along the lateral aspect of her right thigh." Ms. Deyannis testified as being on a daily regime of pain killers. Her impairment was determined to be 8% of the whole person.

Straw, J. examined the phenomenon of "chronic pain disorder" and determined that the claimant was suffering from, not only discogenic pain from her spinal condition but also from chronic pain disorder. The suggestion from the medical evidence is that this disorder is psychological. In making her award the learned judge awarded $3,000,000, as a base figure, for the discogenic pain and increased that figure by a further $2,000,000.00 to compensate for the "ongoing psychogenic pain". The total award for pain and suffering and loss of amenities was therefore $5,000,000.00.

I regard Mrs. Rowe-Anderson's condition as less serious than that of Ms. Deyannis. The level of pain management that Ms. Deyannis seems to have had to undergo with daily doses of various pain killers, does not, fortunately, seem to be Mrs. Rowe-Anderson's lot. I find that her condition is more in-keeping with the injury and disability of Mrs. Reid-James. I shall not make any adjustment for the age difference between her and Mrs. Reid-James. Nor shall I adjust for the fact that Mrs. Reid-James may have had a slightly higher level of permanent impairment. In the circumstances I would award $4,000,000.00 for pain and suffering and loss of amenities.

Handicap on the labour market

Mr. Mordecai submitted that there should be an award for handicap on the labour market. He based his submission on the fact that she has reached maximum medical improvement and will continue to require medical care. He relied on the judgment of

Harrison, J.A. (as he then was) in *Monex Ltd. v Mitchell and others* 5 Khan 304. The learned judge of appeal said of loss of earning capacity/handicap on the labour market:

> "This head of damages arises where the ...victim:
> (a) resumes his employment without any loss of earnings, or
> (b) resumes his employment, at a higher rate of earnings
> but because of the injury he received, he suffered such a disability that there exists the risk that in the event that his present employment ceases and he was to seek alternative employment on the open labour market, he would be less able to vie because of his disability, with the average worker not so affected: (See *Moeliker vs A. Reyrolle & Co. Ltd.* [1977] 1 All ER 9)." (Pages 12-13 of the judgment)

It must be noted, however, that in *Dawnette Walker v Hensley Pink* SCCA 158/01 (delivered 12/6/03), at p. 11 of the judgment, the same learned judge (then acting as President), reiterated that there must be medical evidence confirming the likelihood of the risk of handicap on the labour market. He made these points after citing *Monex Ltd.* The principle stated in *Moeliker* is that "the court should only make an award of loss of earning capacity if there was substantial or real, and not merely fanciful risk that the plaintiff would lose his present employment at some time before the estimated end of his working life". (Page 9 of *Moeliker*)

The point had not escaped Mr. Mordecai. He submitted that the court should take judicial notice that the government has indicated that it will lay off some public sector workers in the near future. I do not accept that that is evidence that there is a real risk that Mrs. Rowe-Anderson would lose her present employment. She is a telephone operator in a court's office. No evidence has been given about government policy concerning telephone operators. Neither has any been led concerning closing courts' offices.

I also do not accept that there is any medical support for a claim for handicap on the labour market. Dr. Ballin did not give any evidence of Mrs. Rowe-Anderson being

unable to carry out her tasks as a telephone operator. I therefore do not accept that there is "medical evidence confirming the likelihood" of her being "thrown out on the labour market because of his injury", or of her being "at a disadvantage in competing for a job with other injury-free persons". (See page 11 of the judgment of Harrison P. (Ag.) in *Dawnett Walker v Hensley Pink* mentioned above.)

In my view Mrs. Rowe-Anderson should not receive an award under this head.

Conclusion

Having assessed the evidence I find that Mrs. Rowe-Anderson's account of the fall is more probable, bearing in mind the location and size of the slope. I find also that she was more credible than Miss Bonner who was the only other witness as to fact. The occupier of the store is therefore liable to her for failing to discharge its common duty of care to her as required by the Occupiers' Liability Act.

She has not established, however, that Mr. Lachmandas was a person trading as "Jamaican Jewellers" and thus, was the occupier of the store.

As a result of her injuries, she is entitled to damages for pain and suffering and loss of amenities. She is not entitled to damages for loss of earning capacity as she has not satisfied the requirements for such an award.

It is therefore ordered as follows:

1. Judgment is granted to the Claimant against the 1st Defendant with damages assessed as follows:

<u>General Damages</u>

Pain and suffering and Loss of Amenities $4,000,000.00

With interest thereon at 3% *per annum* from 27/2/07 to 29/1/10.

Special Damages:

Transportation	$ 7,675.00
Medical Reports	$ 24,500.00
Medical Expenses	$311,865.10
Housekeeping Assistance	$309,200.00
Total	$653,240.10

With interest thereon at 6% *per annum* from 29/9/04 to 21/6/06, and at 3% *per annum* from 22/6/06 to 29/1/10 or such other date as prescribed below.

2. Judgment is granted for the 2nd Defendant as against the Claimant;

3. Costs to the Claimant as against the 1st Defendant to be taxed if not agreed;

4. Costs to the 2nd Defendant against the Claimant.

5 The First Defendant is entitled to the benefit of the Interim Payment of $800,000 made to the Claimant on January 9, 2008; this benefit to be applied as set out below:

(a) Interest on Special Damages to be calculated up to January 9, 2008 and that sum added to the special damages award of $653,240.10.

(b) The total of Special Damages ($653,240.10) and that calculation of interest to be deducted from the Interim Payment.

(c) Any balance remaining of the Interim Payment is to be deducted from the award of interest on General Damages up to the date of the Interim Payment and, if necessary, any remaining balance to be deducted from the award of General Damages.

6. Stay of Execution of the Judgment granted to the First Defendant for a period of 28 days provided that the First Defendant pays to the Claimant the sum of $1,700,000.00 within fourteen (14) days of the date hereof.