



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV03629

BETWEEN	PATRICE BROWN	CLAIMANT
AND	KINGSTON WHARVES LIMITED	1ST DEFENDANT
	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

G. Gibson Henlin, Taniesha Rowe for Claimant (instructed by Henlin Gibson Henlin)

Manley Nicholson for 1st Defendant (instructed by Nicholson Phillips)

Harrington McDermott for 2nd Defendant (instructed by the Director of State Proceedings).

Heard: 17th & 19th February and 7th March, 2014

Assessment of Damages – Heavy object falling, injury to knee - Whether loss of earning capacity payable although Claimant in the Public Service – General Damages

BATTS J.

[1] This judgment was orally delivered on the 7th day of March 2014. On the morning of trial, at the request of the parties, judgement was entered by Consent as follows:

- a) Judgment for the Claimant against the 2nd Defendant on the claim

- b) On the Ancillary Claim, liability is apportioned 65% to 1st Defendant and 35% to the 2nd Defendant.
- c) Assessment of Damages on the Claim or announcement of a settlement is adjourned to the 19th February, 2014 at 10:00 a.m.

[2] On the 19th February 2014, there being no announcement of settlement the Assessment of damages proceeded. A bundle of documents was filed and admitted as exhibit 1. Exhibit 2 was the Jamaica Gazette dated 28th March 2014 re the Executive Agencies Act. Both exhibits were admitted by and with the consent of the Parties.

[3] The Claimant gave evidence and her witness statement dated 30th September 2013 stood as her evidence in chief. This reveals that she was injured when a heavy object fell on top of her and knocked her to the ground. There being no objection from the Crown the Claimant was allowed to amplify her evidence. At this juncture it should be noted that the 1st Defendant's attorney indicated that he did not expect to be heard on the assessment having regard to his understanding of the rules and a decision of the Court of Appeal in that regard.

[4] By way of amplification the Claimant indicated that she was no longer assigned to berth 6. She is now at the Norman Manley International Airport (NMIA) passenger terminal. This assignment was in accord with the doctor's recommendation that she avoid staircases. She indicated that it was also possible for her to work at Customs House, Valuation and Research. The witness indicated further that at the time of injury her employer was the Ministry of Finance under which Jamaica Customs was located. She said they were now undergoing transformation to an Executive Agency.

[5] When cross-examined the Claimant indicated she was now 39 years old. Prior to the incident she had been a customs officer for 5 years, 2003 – 2008. Her duties at NMIA now entailed processing, interviewing passengers, assessing duty, overall protection of the country's borders. The job was now less rigorous

on her knee. She said that she had not requested the transfer although it had been recommended by her doctors. She denied acting as a supervisor at the time of the incident. In answer to the court, she stated she was not now acting as a supervisor.

[6] Her attorney asked in questions arising, whether she had ever acted as a supervisor. The Claimant's response was in the affirmative. She had done so on two occasions prior to the accident. She has not acted as a supervisor since the incident. In answer to the 2nd Defendant's attorney she was unable to give the dates on which she had acted as a supervisor.

[7] By consent the witness statement of Delrose Morris dated 31 October 2013 was allowed to stand as the evidence of that witness. The Claimant then closed the case.

[8] The Defence called no evidence and the parties then proceeded to make oral submissions supporting their written submissions on damages. The Claimant's attorney advocated for

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| a. | Pain Suffering and Loss of Amenities | \$3.5 million |
| b. | Lost earning capacity
(In this regard it was submitted that in an Executive Agency her security of tenure would be reduced.) | \$2.6 million |
| c. | Future Care | \$480,000 |
| d. | Special Damages | |
| | Domestic Help | \$84,000 |
| | Medical Expenses & Transportation | \$701,572.16 |

[9] The 2nd Defendant submitted for:

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| a. | Pain suffering and loss of amenities | \$3 million |
| b. | Handicap on the Labour Market
No award should be made but if one was to be made then \$500.000 | |

Future Care
No award should be made but if so \$260,000.

c. Special Damages
Agreed at \$785,572.00

[10] At the end of the day therefore, the real dispute between the parties had to do with the question of Handicap on the Labour Market or as it is sometimes called Lost Earning Capacity. Before resolving that however I will state my mind with respect to Pain Suffering and Loss of Amenities as well as Future Care. The parties are to rest assured that I have carefully considered their well-formulated submissions, both written and oral but will not repeat them in the interest of brevity.

[11] The medical reports are contained in Exhibit 1. In his report of the 5th November 2009 Dr. Akshai Mansingh of the UHWI Orthopaedic Division, who first saw the Claimant on the 13th May, 2009, stated that she had been a patient of the UHWI since 19th December, 2008. He described her complaint as “Instability of right knee since December 2008.” On the 19th December 2008 she presented with a pain in her head and right knee. An MRI Scan confirmed the diagnosis of posterior cruciate ligament tear along with posterolateral corner injury to right knee. She was advised that surgery was required. On 14th May 2008 an arthroscopic assisted posterior cruciate ligament reconstruction was done. She continued with out-patient treatment and on the 3rd August 2009 her knee was stable and the use of the brace and crutches was discontinued. Physiotherapy continued. On the 3rd November 2009 she complained of instability and had resumed use of the brace. The doctor found the ligament stable. She had not yet reached maximum medical improvement and he recommended removal of the screw.

[12] In his report dated the 28th September 2009 Dr. Dundas stated that he first saw the complainant on the 24th September 2009. His examination revealed

a. 10 cm anterior pre-patellar scar which was hypertrophic

- b. 8 cm posterior medial scar vertically along medial hamstring muscle
- c. Synovitis in right knee and could flex 102° compared to 160° on the left.
- d. Lateral and posterior rotator instability and positive Lachman's and positive anterior and posterior drawer signs.
- e. Tenderness along medial femoral condyle close to jointline
- f. The superior tibio-fibular joint was unstable
- g. Blunting of sensation lateral to the anterior pre-patellar scar

[13] His diagnosis was:

- a. Posterior cruciate ligament repair with residual insufficiency
- b. Anterior cruciate ligament insufficiency
- c. Lateral collateral ligament insufficiency

The doctor recommended a new MRI scan to determine the status of the graft and whether the locking screw had shifted position.

[14] By his report of the 17th January 2010 Dr. Dundas reported that the fixation screw was removed on the 17th November 2009. Stress x-rays confirmed she had posterior lateral corner insufficiency of the knee, which required surgical intervention. The Claimant had anterior cruciate ligament instability of the knee. The doctor opined that in the post operation period the patient would require a further 3 to four months off her job. He recommended her reassignment to more sedentary duties.

[15] In his report of the 20th May 2010 Dr. Dundas stated that the patient came to see him, "for re-evaluation with a view to determining her suitability to return to work." He determined that she still had a significant anterior cruciate ligament insufficiency. The surgery for her posterior lateral corner improved her status "quite considerably." The knee was stable in that direction. The doctor however

advised that her assignments “eliminate as far as possible, climbing stairs, lifting weights, stooping and prolonged bending.” She was still doing physiotherapy. He recommended a return to work on 1st June 2010.

[16] In his final report of the 14th February 2011, Dr. Dundas found the patient’s ligaments quite stable and encouraged her to gradually resume a fairly normal lifestyle. In his prognosis, however the doctor stated that many patients who underwent cruciate ligament reconstruction go on to develop osteoarthritis in the knees. The risk of osteoarthritis/osteoarthrosis was elevated because the Claimant had had multiple interventions and arthrofibrosis. Such development would occur in 10 to 15 years. The doctor assumed her Permanent Impairment at 37% of the left lower extremity. This amounted to 15% of the whole person.

[17] I have found the cases of **Noel Robinson v. AG (1977)** Khan 4d page 50 and **McDonald v Williams (1981)** Khan 2d page 51 of great assistance. In my judgment, \$3 million is an appropriate award for the Claimant with respect to her Pain Suffering and Loss of Amenities.

[18] With reference to the claim for Future Care, I agree with Counsel for the 2nd Defendant that, any award on this head of damages should not be on the basis submitted by the Claimant’s counsel. In her witness statement of the 30th August 2013 the Claimant only says in relation to this aspect, *“it is extremely difficult for me to perform some basic and simple tasks. For example, it takes great effort for me to pick something up off the floor; it also takes me a longer time to complete household chores.”* There is no evidence that the Claimant is unable to perform these chores. Further and as stated above Dr. Dundas on the 16th February 2011 recommended a resumption of a fairly normal lifestyle. This to my mind involves the doing of household chores. The probability of osteoarthritis or osteoarthrosis developing in 10 – 15 years is the only basis on the evidence before me for an award. All the vicissitudes of life are to be considered. In 15 years, she will be approximately 55 years old. A period of reliance on future care we can assume would, even without injury, have commenced by the time she

was 65 or 70 years. 10 years purchase 15 years from now necessitates a discounted multiplier of 4. It is impossible to know what the cost of such assistance will be at that time hence it is convenient to use as the multiplicand the \$2,000 per fortnight paid at this time. The award for Future Care is therefore: $2000 \times 26 \times 4 = \$208,000$.

[19] We come now to the issue of Handicap on the Labour Market. Both parties were ad idem as to the legal definition of the circumstances in which this head of damages is awarded. The question is whether there is a real or substantial risk that the Claimant will lose her job at some time in the future. If there is such a risk then compensation ought to be paid for the value of the risk and the difficulty the Claimant may have (due to the injury) of getting another job; see *Moeliker v R. A. of Reyrolle & Co. Ltd. (1977) 1 AER 9*. In that case it was noted the trial judge awarded £750 although of the view that the chance of losing his job was remote and the chance of his not being able to get another job was also remote. The Court of Appeal upheld the award as being an accurate reflection of the relevant risks. Contrary to the submission of the 2nd Defendant's counsel therefore an award under this head may be made even where the respective risks are low provided they are not fanciful or negligible.

[20] In the matter at bar, the evidence is that the Claimant is very likely to develop osteoarthritis or osteoarthrosis in the future. Further her department has been designated an Executive Agency. Counsel submitted that the fact that the Claimant could only work at certain locations and had not in the 5 years since the accident acted as a supervisor, and further was now at an Executive Agency, all pointed to an increased possibility she may someday in the future lose her job. Her disability would necessarily affect her competitiveness. Counsel for the Crown submitted that as she was still a Crown servant her security of tenure should be taken into account and referenced dicta in *AG v Ann Davis SCCA 114/2004* decided 9th November 2007. I bear in mind however that in that case at the time of the accident the Claimant was a temporary clerk whereas by the date of the trial she was on permanent staff in the Government service. I bear in

mind also that given the vicissitudes of our economy, budgetary constraints and IMF dictates the possibility of job loss in the public service cannot be regarded as remote as it once was. I also bear in mind however that the Claimant has recovered very well from the injury (as per Dr. Dundas' final assessment) and that she is qualified in other areas. She holds a Diploma in Marketing and a Bachelor of Business Administration in Management from the University of Technology and, a Master of Science degree in Human Resource Management from the University of the West Indies. Surely, these qualifications enhance her ability to compete notwithstanding her permanent partial disability of 15%. In all the circumstances, I award \$750,000 with respect to the Claimant's Loss of Earning capacity.

[21] In the result damages are assessed as follows:

General

Pain suffering and loss of amenities	\$3,000,000
Future Care	\$ 208,000
Handicap on the Labour Market	\$ 750,000

Special

Domestic Help, medical expenses and Transportation	\$785,572.16
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[22] Interest will run on the Special Damages at a rate of 3% per annum from the 19th December 2008 to the date of this judgment and on General Damages @ 3% from the date of service of the claim form to the date of this judgment.

Costs of course go to the Claimant against the 1st and 2nd Defendants to be taxed if not agreed.

David Batts
Puisne Judge