

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 2007/04212

BETWEEN	BRENDA GORDON	CLAIMANT
AND	JUICI BEEF LIMITED	DEFENDANT

S. Kinghorn, L. Clarke and D. Archer instructed by Kinghorn and Kinghorn for Claimant

V. Chen and S. Edwards instructed by Chen Green & Company for the Defendant

Heard: January 20, 21 and April 14, 2010

Negligence - Occupiers' Liability - Breach of Contract -
Medical Report not treated as Expert Evidence – Handicap
on the Labour Market whilst employed

Lawrence-Beswick J

1. The claimant, Brenda Gordon was injured whilst she worked as a chef at Juici Beef Limited, the defendant. In this suit she sues for damages alleging that Juici Beef was negligent or breached its contract of employment with her or breached the Occupiers' Liability Act, resulting in the injury.

2. Ms. Brenda Gordon started working with Juici Beef Limited on December 14, 2001, as a cook. In addition to preparing meals she washed items necessary for use in the preparation process.

3. About two weeks later, she had washed a pot and was walking over to where the pots were stored when she slipped in water on the floor. In an effort to prevent a fall, she grabbed the sink where the pots were washed but the sink gave way. Ms. Gordon fell on her buttock.

4. About two weeks later the mild pain that Ms. Gordon had been feeling after the fall became severe. Relief came from medical treatment, and she continued her normal duties at Juici Beef Limited. However, the severe pain recurred with the result that surgery was performed on her back. The pain she now endures is much reduced but her lifestyle has been drastically altered.

She remains employed to Juici Beef Limited and her duties have been altered to accommodate her limitations.

5. Juici Beef Limited's defence is that Ms. Gordon should have expected that water from washing the pots would spill on the floor and therefore it was Ms. Gordon's negligence that caused her injury. Further, in its defence, Juici Beef Limited pleads that it provided a safe system of work with requisite warnings and instructions and it was Ms. Gordon who failed to heed the warnings and instructions thereby causing her own injury.

6. However, there was no evidence in support of these pleadings. Defence witness Edgar Allen swears in his witness statement that Ms. Gordon herself spilled the water, but admits in cross-examination that he did not see her fall or how she fell.

7. Ms. Gordon's evidence is undisputed that the tiling of the kitchen floor was slippery and would become even more slippery when wet.

Liability

8. It is admitted by Juici Beef Limited that Ms. Gordon lawfully came unto the premises occupied by it. By Section 3(2) of the Occupiers' Liability Act, Juici Beef Limited had a duty "to take such care as in all the circumstances ... is reasonable to see that [Ms. Gordon] will be reasonably safe in using the premises for the purposes for which [she] is ... permitted by [Juici Beef Limited] to be there."

9. It is agreed that Ms. Gordon was at the premises to cook and to use the sink to wash the items used to cook. She was required to lift these washed items from the sink and take them to areas where they would be used.

10. I accept as true, Ms. Gordon's undisputed evidence of the slippery nature of the tiling in the kitchen and of the presence of water on the floor with no provision made to prevent injuries caused by the slippery floor.

It is undisputed that in the kitchen where Ms. Gordon fell, washing occurs frequently and "someone would always be at that sink using it for some purpose."

11. Juici Beef Limited had an obligation to make provisions to make the workplace safe.

It is true that by Section 3(3) (b) Occupiers' Liability Act, Juici Beef "may expect that [Ms. Gordon] will appreciate and guard against any special risk ... **so far as [Juici Beef Ltd] leaves [her] free to do so.**" (Emphasis supplied) But there is no evidence of any special footwear or covering on the floor or any other equipment to facilitate movement and turning with heavy items on a slippery floor. There was a pot in use which weighed 18 pounds.

12. A bald pleading in the defence denying a breach of the Occupiers' Liability Act does not suffice. The pleading that she spilled the water on the floor is unsupported by evidence. In any event, did Juici Beef Limited expect that Ms. Gordon would stop after washing each item when water spilled, remove the water, then move with the item? This in my view would be an unrealistic expectation.

13. There is no evidence of Ms. Gordon having received special instructions or equipment concerning this situation, nor indeed of any warning signs and notices placed at the premises.

Mr. Chen, on behalf of Juici Beef Limited submitted that Juici Beef Limited had discharged its duty to provide reasonable working conditions, or if not Ms. Gordon had contributed to her injury.

14. Mr. Allen's witness statement refers to instructions which Juici Beef gives to employees to ensure safety. He gives no details of those or of any special provisions to deal with a wet, slippery floor.

Indeed, Ms. Gordon's evidence is that she worked for some two years before being provided with shoes.

15. Ms. Gordon's evidence that she did not see the water on the floor is uncontradicted and there is no evidence as to the manner in which she contributed to her injury.

16. I find therefore that Juici Beef Limited allowed Ms. Gordon to walk on the slippery, unsafe floor with no provision to prevent injury. Juici Beef Limited breached the Occupiers' Liability Act which resulted in injuries to Ms. Gordon's back.

In view of my findings it is not necessary for me to make determinations under the other bases for the claim. I give judgment for the claimant, Ms. Gordon.

Damages – General

Pain and Suffering

17. Ms. Gordon's evidence is that as a result of the injury, she has suffered back pain from double level lumbar disc prolapse, injury to two lumbar discs, compression of the lumbar nerve roots, with numbness to both feet.

The injury was in 2001 and the pain has continued unabated, in varying degrees, since then.

Ms. Gordon's evidence is that sexual intercourse is now painful and she cannot exercise and is now fat because of that.

Medical Evidence

18 Ms. Gordon was medically examined by several doctors during various stages of her treatment.

Mr. Carl Bruce, consultant neurosurgeon, performed surgery on her back in November 2005 and found her to be pain free "currently," after the surgery.

Dr. Melton Douglas, a consultant orthopaedic surgeon examined her in March 2006 and as an expert, opined that she will continue to have mechanical back pain and her function will be impaired permanently. Her pain would vary in severity. He assessed her permanent partial disability as 13% of the whole person.

A year later, in April 2007, Dr. Philip Waite, another orthopaedic surgeon also examined her and in his report states that in his opinion Ms. Gordon's injuries would

continue to cause discomfort and impairment. He assessed her permanent partial disability at 5% of the whole person.

19. At the Case Management Conference of January 20, 2009, permission was granted to the claimant Ms. Gordon, to call Dr. Melton Douglas as an expert witness.

However, Defence Counsel Mr. Chen urged this Court to recognize that he, Mr. Chen, was labouring under a misapprehension that the understanding was that all medical reports were being considered as expert evidence and that Mr. Kinghorn was aware of that. There is no evidence of such an understanding and Mr. Kinghorn denies that it existed.

20. However, Mr. Kinghorn reluctantly agreed that the report of Dr. Waite be admitted into evidence, but not as the report of an expert as it had not been prepared according to the Civil Procedure Rules 2002 and also as there had been no permission granted for it to be treated as expert evidence.

The difference between the estimates of permanent partial disability is obvious.

21. Dr. Waite's report shows that he relied on the 4th edition of American Medical Association's Guides to Evaluation Permanent Impairment, whereas Dr. Douglas' report shows that he relied on the 5th edition of the same volume. Mr. Kinghorn submits that therein may lay the reason for the difference.

22. I have no basis to accept Mr. Kinghorn's submission. I have been deprived of any evidence which may account for the vast difference in the opinions of the doctors.

However, Dr. Douglas' evidence is the only expert evidence before the court. The Order in 2009 which specified that his evidence was the expert evidence to be considered was made in the presence of both Mr. Chen and Mr. Kinghorn and both

parties were aware of the existence of all the doctors' reports at the time. There has been no application to vary the Order. .

23. In these circumstances, I regard the evidence of Dr. Douglas as being the only expert evidence in the case and I rely on it.

The other reports I regard as being reports of doctors who are not treated as being experts in this particular case due to the operation of the Civil Procedure Rules.

I therefore accept on a balance of probabilities Dr. Douglas' opinion that Ms. Gordon's partial permanent disability is 13% of the whole person.

Assessment of Damages – for the pain and suffering

24. Mr. Kinghorn submits on behalf of Ms. Gordon that an award of \$5 million is appropriate based on three authorities, **Marie Jackson v Glenroy Charlton** CL1999/J113, **Sascha Grant v JUTC** HCV03081/2005 and **Marcia McIntosh v Elite Wholesale** HCV1973/2005.

In these Supreme Court authorities, the updated awards were \$4.6 million, \$4.5 million and \$4.8 million respectively where permanent partial disabilities were 8%, 10% and 15% respectively. In those cases, the litigants had pain but no surgery.

25. Mr. Chen's submissions on damages were based mainly on permanent partial disabilities less than 13%.

26. In my view an award of \$4.6 million is appropriate for Ms. Gordon's pain and suffering.

Handicap on the Labour Market

27. Juici Beef Limited has continued to employ Ms. Gordon as a cook. Indeed, it was not until after the accident that Juici Beef entered into a formal contract with her.

However, her evidence that certain tasks she can no longer do, is unchallenged. She does not chop the meat; her washing-up is reduced as the pots are too heavy for her to lift. Her duties have been tailored to accommodate her disability. Dr. Douglas opined that “she can continue in her present job providing she continues to make this appropriate life style modification. The condition can worsen and under such circumstances she will have to seek a job with lighter duties.”

Ms. Gordon claims damages for handicap on the labour market.

28. Because Ms. Gordon continues to be employed at Juici Beef Limited, the first question is whether there is a real risk that Ms. Gordon will, at some time before the end of her working life, lose her job at Juici Beef and be thrown on the labour market.¹

Ms. Gordon’s employment in the labour market was in an unskilled capacity until she was employed by Juici Beef as a chef/cook.

29. Although Ms. Gordon continues to be employed by Juici Beef, it is my view that there is a real risk of losing her job there because of the necessity to make adjustments to what she would normally be required to do as a chef/cook. There is no evidence of any special skill she brings to the task which would encourage Juici Beef to continue to employ her with her special needs which, according to Dr. Douglas, can become worse. Nor is there any undertaking from Juici Beef to continue to employ her.

I need to consider further what her chances of getting an equally well paid job would be. In my view it is not likely that any other employer would hire her as a chef/cook when standing and sitting and washing pots is a challenge to her.

30. In my view she will be handicapped on the labour market. I now proceed to quantify the damages payable under this head. The methods available are varied. The

¹ [Moeliker v A. Reyrolle & Co. Ltd 1977 1 All ER 9 at p 16].

difficulty in assessing damages under this head was recognized in **Moeliker** (supra) where Browne L.J. said:

*"It is impossible to suggest any formula for solving the extremely difficult problems involved in ... assessment of damages for handicap on the labour market. A judge must look at all the factors which are relevant in a particular case and do the best he can."*²

There is no evidence of any present or clearly foreseeable financial loss to Ms. Gordon. Assessment by the multiplier/multiplicand method would require a calculation of future loss based on actual figures.

31. The multiplier/multiplicand method cannot provide a complete answer to this assessment because of the many uncertainties involved.³ There is no evidence of the general employment situation in her trade or of other specialized or non specialized jobs available in her field of work and their wages.

32. I therefore prefer to assess the value of the risk by awarding a global sum as discussed in **Monex Ltd. v Mitchell and Grimes**.⁴

I therefore make an award of \$150,000.00 being the amount which I have awarded in recent cases where the complainant's skill was similar to Ms. Gordon's.

Future Medical Expenses

33. Mr. Kinghorn urges the court to award \$1.45 million as this is the amount estimated for future surgery which Ms. Gordon might need to have. It is my view that the evidence of the need for such surgery is insufficient to allow me to make an award under this heading.

² At p. 17

³ [**Molieker v A. Reyrolle** supra at p 16].

⁴ SCCA 83/96

Damages – Special

34 Medical expenses were agreed at \$61,500.00 and the unchallenged evidence is that Ms. Gordon travelled at least six times to Dr. Douglas at a cost of \$3,600.00.

35. Damages are assessed as follows:

General Damages

Pain and suffering and loss of amenities - \$4.6 million with interest at 3% per annum from October 30, 2007 to today.

Handicap on the labour market - \$150,000.00

Special Damages

Special Damages \$65,100.00 with interest of 6% per annum from December 14, 2001 to June 21, 2006 and at 3% per annum from June 22, 2006 to today.

Costs to the claimant for no more than two attorneys-at-law to be agreed or taxed.