IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2017HCV02991

BETWEEN	**KIERON THOMAS**	**CLAIMANT**
AND	**BRANCH DEVELOPMENTS LIMITED t/a IBEROSTAR ROSE HALL BEACH AND SPA RESORT**	**DEFENDANT**

Ms. Christine Mae Hudson and Mrs. Isha Robinson instructed by K. Churchill Neita and Co. for the Claimant.
Mr. Chad Lawrence and Mr. Joerio Scott instructed by Samuda and Johnson for the Defendant.
Heard: October 21, 2021 and January 28, 2022
Negligence – Occupier's Liability – Damages – Loss of future earning capacity/handicap on the labour market – Multiplier/Multiplicand approach

CORAM: Carr, J

INTRODUCTION

[1] The Claimant (Mr. Thomas) was employed as an entertainment co-ordinator in January of 2014. He was a part of a group of persons that performed at a show at Iberostar Rose Hall Beach and Spa Resort (the Hotel) on the 18th of January 2014. During the performance Mr. Thomas slipped and sustained injuries to his right knee.

[2] He has brought this claim against the Defendants in negligence and or breach of statutory duty under the Occupier's Liability Act.

ISSUES

1. Whether the Hotel was negligent in staging the show?
2. Whether the Hotel breached their common duty of care to users of their property pursuant to the Occupier's Liability Act?

THE LAW

[3] The tort of negligence is proved when a Claimant can satisfy a court as to the following:

a. That they were owed a duty of care by the Defendant.
b. That the Defendant breached that duty.
c. That as a result of that breach the Claimant suffered damage, and that damage is not too remote.

[4] **The Occupier's Liability Act** provides that an owner or occupier of premises has a duty to all his visitors. The duty is described as a common duty of care. It is a 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.[1]

[5] In determining whether an occupier has discharged their duty of care under the Act a court must have regard to all the circumstances of the case. 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.[2]

[6] The burden of proof rests with the Claimant and the standard of proof is on a balance of probabilities.

THE EVIDENCE

[7] The only witness as to fact in this case was Mr. Thomas. His witness statements were permitted to stand as his evidence in chief and he was cross-examined. He

[1] Section 3 (1) and (2) of the Occupier's Liability Act
[2] Section 3 (5) and (7) of the Occupier's Liability Act

gave evidence that he was originally to perform a show entitled Mr. Tropical on the 18th of January 2014. However, due to rain, the show was changed to the Tuitti Fruitti show. This show included flips, acting and dancing. He indicated that the Tuitti Fruitti show was being performed for the first time under a new manager. From his previous experiences with the show he was aware that it required props as well as dance gears such as jazz shoes. It was also his view that prior to the staging of the show the stage would be cleaned.

[8] On the night in question concerns were raised to the manager that the team had not had any previous rehearsals of the show and that they did not have the necessary items to perform. The manager scoffed at these concerns and the entertainment crew proceeded to perform.

[9] The performance took place subsequent to an act by a fire dancer. Mr. Thomas performed his routine and in the process of executing a back flip he landed on something slippery and his knee twisted. He fell on the ground and realized that he could not move his right foot.

[10] He was taken to the nurse on property and he observed that his knee was swollen. He attended the Trident Medical Complex in Montego Bay on the Monday following the incident. He was examined by a Doctor and he received pain killers and two weeks' sick leave.

[11] He denied that he voluntarily assumed the risk of injury by performing in the show. He said that prior to his performance he did not see any kerosene on the floor. It was while he was on the ground, after he fell, that he recognized the smell of kerosene on his person.

[12] He was challenged repeatedly on the issue of the fire dancer's performance. It was suggested to him that the fire dancer never performs in the theatre. He disagreed. In his witness statement however he stated at paragraph 9, *"The fire dancer then went through his routine. This shock me because I never see the fire dancer perform in the Black River Theatre before."*

[13] He agreed in cross-examination that the theatre was enclosed and had curtains as well as a sprinkler system. In his witness statement at paragraph 4 he stated, *"Based on what was said to me by my previous managers I came to understand that the reason that the fire dancer does not perform in Mr. Tropical is because of the risk of fire from the use of the kerosene oil inside the theatre which has many curtains and also a wooden floor."*

[14] The sole witness for the Defendant was Dr Garfield Ferguson. His witness statement was admitted and stood as his evidence in chief. He indicated that he was the Human Resources Manager for the Hotel. He maintained that at all material times the Hotel provided a safe and satisfactory place of work for Mr. Thomas to perform and the stage, he said, was cleaned after all performances. He stated that this was in particular the case for Mr. Thomas's performance. He denied that the stage was slippery and he was unaware of any report being made to that effect.

[15] He denied that the Hotel was negligent and instead laid the blame at the feet of Mr. Thomas. It was also his evidence that the Hotel had nothing to do with the dance routines that were choreographed or presented. Mr. Thomas, he said, had represented to management that he was a professional dancer, with the required skills and experience to perform in the show. He failed to take care in the performance of his routine and as such any injuries he sustained were of his own making.

ANALYSIS AND DISCUSSION

Whether the Hotel was negligent in staging the show?

[16] This issue arises out of the assertion that the entertainment manager proceeded to stage the show without the necessary rehearsals and props. In doing so he was negligent and breached his duty of care to his employees. The entertainment manager is not a party to this suit. As such the question which first has to be determined is whether the Hotel was responsible for the staging of the show? Was

the management team an agent or servant of the hotel or an independent contractor?

[17] In his witness statement Mr. Thomas made it clear that he was employed by Employ Limited and placed to work at the Hotel. He was a part of a group called Star Friend which was managed by Rafael Murguia. There is no contract of employment which has been presented to this court.

[18] There is no connection that can be made, from the evidence, between the management of the entertainment group and the management of the Hotel. The unchallenged evidence of Dr Ferguson was that the Hotel was not responsible for the choreography or the presentation of the show. The decision by Mr. Murguia to proceed with the show without the necessary props and rehearsals cannot therefore be attributed to the Hotel.

[19] If this view is not accepted, it is also worth noting that the decision to perform the show in those circumstances has not itself been established to be an act of negligence, especially in light of the fact that Mr. Thomas's claim is based on his slipping on a substance on the stage. This he said was the sole reason for his injury.

[20] The evidence therefore, does not support a finding that the Hotel was negligent in staging the show. The Hotel can only be liable for the acts of its servants or agents and it has not been established that Employ Limited was its servant or agent. Further it has not been proved that the act of performing the show was negligent, in that, there is no evidence to satisfy a court that in doing so it resulted in Mr. Thomas's injury.

Whether the Hotel breached their common duty of care to users of their property pursuant to the Occupier's Liability Act?

[21] There is no dispute as to the fact that the Hotel was in charge of the premises. There is also no question that Mr. Thomas was an invitee to the premises as he

was asked to perform in a show there. The question left to be answered is whether the hotel provided a safe place for the entertainment crew to perform their routine.

[22] Counsel on behalf of the Hotel has argued that they did all they could to provide a safe space for the performers. He has asked the court to find that Mr. Thomas is not a witness of truth. He supports that argument by suggesting that the fact that the fire dancer's show was never usually performed inside the theatre must mean that Mr. Thomas is lying. He also argued that it is preposterous for the show to have been performed in circumstances where there was a sprinkler system in place and there was a likelihood of a fire due to the curtains and the wooden stage inside the theatre. He urged the court not to accept that the fireman show took place inside the theatre that night.

[23] It was submitted, that if the court is not so minded to make such a finding, that it can in the alternative be said that Mr. Thomas knowing the dangers associated with the performance of the fire dancer inside the theatre ought not to have gone on stage. As such he is contributorily negligent and the court should reduce any award in damages proportionate to the risk he took by performing.

[24] Counsel on behalf of the Claimant submitted that the case would turn on the view that the court takes of the evidence. Up to the time of preparation of this judgment there was no reply to the further submissions filed on behalf of the Defendant.

[25] Mr. Thomas denied all the suggestions put to him in respect of the fire dancer show. His evidence that he was shocked to see the fire dance perform in the theatre compared to his answer to Counsel's suggestion in cross-examination is an inconsistency. However, it does not in my view result in his evidence being rendered unreliable. At paragraph 5 of his witness statement he indicated that *"rain started to fall and this activity had to move indoors."* That is not an unusual occurrence and provides a reasonable explanation for the show being performed inside the theatre.

[26] Counsel's argument that the sprinkler would have gone off and the entire theatre would have been overcome by flames is a stretch of the imagination to say the

least. It would require the court to speculate as to the functionality of the sprinkler as well as to determine the extent of the fire used in the performance. The fact that the show is not normally performed in the theatre does not mean that on that particular day it was not done. There are many instances where what is usually done is aborted due to new and changing circumstances.

[27] Mr. Thomas further stated that he entered the stage immediately as the fire dancer's performance ended and it was during his routine that he slipped and fell. By his evidence the stage was not cleaned subsequent to the fire dancer's performance. The evidence of Dr Ferguson cannot be relied on to refute Mr. Thomas's claim. In cross-examination Dr Ferguson was asked whether he was in the theatre on the night in question and he responded that he was not. His witness statement can only be relied on in so far as it speaks to the policy of the hotel. The determination as to the facts, rests entirely on the evidence of Mr. Thomas, and there is nothing which was raised in cross-examination that would render him an untruthful witness.

[28] As there is no evidence to contradict him and as I have found that he has not been discredited, I accept and find as a fact that Mr. Thomas slipped on something on the stage and twisted his knee.

[29] Mr. Thomas's explanation for not going to the Doctor immediately is also accepted by this court. He indicated that he did not want to go to Cornwall Regional and that he could not think of any medical facility that would be opened on Sunday.

[30] I do not accept the argument that he was contributorily negligent. The danger, as he put it, relative to the fire dancer's performance was in respect of the likelihood of fire. There is also no evidence to indicate that he executed his routine incorrectly or in a manner which was unsafe in the circumstances. It was the responsibility of the Hotel to ensure that the stage was cleaned in order to provide a safe place for the performers using that space. The fact that Dr Ferguson emphasized their policy and procedure is indicative of the importance of this being done. Mr. Thomas's

decision to perform that evening cannot be seen as assuming a risk, when he could not reasonably have foreseen the danger of spilled liquids.

[31] I find that the Hotel did not provide a safe place for the entertainment crew to conduct their performance. They failed to clean the stage after the fire dancer's act and as a result Mr. Thomas slipped in a substance, fell and was injured.

DAMAGES

Special Damages

[32] Special damages were agreed in the sum of $195,544.40. This sum is awarded with interest at 3% from the 18th of January 2014 to the 28th of January 2022.

General Damages

Medical Reports

[33] The medical report of Dr Douglas Street formed part of the evidence before this court. The report indicated that Mr. Thomas was seen on the 20th of January 2014. On examination there was tenderness and swelling of the right knee with reduction in the range of movement. He was not expected to have any significant long term complications from his injuries. An x-ray was requested but was not done. He was reviewed on the 24th of January 2014 after complaining of continued pain. He was found on that date to have right calf swelling and he was referred to the Cornwall Regional Hospital for further assessment.

[34] The report of Dr Dane Miller was presented to the court. He outlined the injuries suffered by Mr. Thomas as follows:

a) Complete right anterior cruciate ligament tear.
b) Lateral meniscus radial tear of the posterior horn (white on white zone).
c) Medial meniscal cyst.
d) Positive pivot shift test

The Diagnosis was as follows:

a) Lateral meniscus tear

b) Right anterior cruciate ligament tear
c) Bone bruises in medial and lateral tibial and femoral condyles

[35] In 2016 Dr. Grantel Dundas prepared a report. His diagnoses were:

a) Status post ACL reconstruction right knee with bone-patellar tendon-bone graft
b) By history medial meniscal tear with debridement

It was observed that Mr. Thomas had not yet reached his maximum medical improvement and he was recommended for further physical therapy to enhance his quadriceps strength and range of motion.

Claimants' Submissions

[36] Counsel for the Claimant relied on the final report of Dr. Dundas which outlined the following:

a) Right thigh girth was 3cms less than the left
b) Left calf girth was 1.5cms less than the right
c) Flexion was 105 degrees on the right compared to the left
d) Anterior pre patellar 7cms scar and 1cm circular scar 7cms medial to the tibial tuberosity
e) Positive tinel's sign at graft entry portal which indicates some degree of infrapatellar nerve trauma
f) Vastus Medialis Obliqus was quite wasted
g) Positive anterior drawer sign indicating that the present tension of the cruciate ligament reconstruction is suboptimal

[37] He was re-examined post physiotherapy, and diagnosed with anterior cruciate ligament insufficiency of the right knee, chondromalacia patellae right knee and muscle atrophy and assigned a 18% lower extremity impairment or 7% of the whole person. Mr. Thomas, it was submitted, still suffers from pain when exposed to cold temperatures. He has trouble finding gainful employment as he is no longer able to safely engage in dancing and acrobatic activities.

[38] The cases of **Huclen Carter v. Paulette Barnett-Edwards & Clifton Edwards**[3] and **Marcia Golding v. Jamaica Urban Transit Company Limited**[4] were relied upon and the sum of $8,000,000.00 was suggested for pain and suffering and loss of amenities.

[39] A claim was also made for loss of future earning capacity/handicap on the labour market. It was submitted that although Mr. Thomas was not unemployable, he would have a challenge competing with other able bodied persons when seeking employment due to his disability. The case of **Andrew Ebanks v. Jephther McClymont**[5] was cited. Counsel submitted that the court should apply the multiplier/multiplicand approach. Mr. Thomas is now 37 years old and using a multiplier of 11 years along with his former salary of $34,000.00 amounts to a sum of $9,724.000.00.

Defendant's Submissions

[40] Counsel submitted that an award of $3,000,000.00 for general damages was appropriate in the circumstances. He relied primarily on the case of **Raymond Harvey v. Sports & Divers Club Limited and Desmond Downer**[6]. The Claimant in that case it was submitted suffered similar injuries to Mr. Thomas. An award of $2,600,000.00 was made which updates to approximately $3,500,000.00 presently.

[41] Any award in damages it was argued should be reduced as a result of Mr. Thomas's failure to mitigate his loss. He failed to attend all the recommended physiotherapy sessions.

[42] No award should be made for loss of future earnings/handicap on the labour market, as there is no evidence to support a finding that Mr. Thomas is unemployable or unable to pursue other avenues of employment. Mr. Thomas

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[3] Unreported Judgment delivered July 2006 entered in Judgment Binder 738 Folio 419
[4] Unreported Judgment delivered October 2007 entered in Judgment Binder 742 Folio 309
[5] Claim No. 2004 HCV 2172 Unreported Judgment delivered on March 8, 2007
[6] [2014] JMSC Civ. 205

failed to make a real attempt at finding suitable employment and as such failed to mitigate his loss. Further there is no evidence that Mr. Thomas would have remained on the job had the accident not occurred. Counsel pointed to the ravages of the pandemic and the fact that several persons in the hotel sector have lost their jobs. He relied on the authority of **Linette Duncan-Walker v. Clear Clarke and Ian Anthony Golding**[7] **.** It was suggested that a multiplier of 7 should be used if the court is not in agreement with that point.

ANALYSIS AND DISCUSSION

[43] The Court in the determination of damages must seek to compensate the Claimant for the injuries suffered once and for all. An assessment of damages must take into consideration past, present and future loss and must compensate the Claimant in such a way as if the tort had not been committed. The guiding principle is that a court must not seek to rely on precedents but must instead look to former authorities as a guide as to the current range of damages.

[44] I have considered Counsel's submissions that Mr. Thomas did not attend all of the recommended physiotherapy sessions. The medical report of Dr Dundas refers to post physiotherapy and the witness statement of Mr. Thomas speaks to his attendance at several such sessions, as well as continuing the exercises he was given by the therapist at home. This submission is therefore not supported by the evidence.

[45] I have examined the authorities presented to the court. In the case of **Huclen Carter v. Edwards et al,** the Claimant suffered a fracture of the lower pole of the patella. He had to undergo surgery and the patella tendon was re-implanted. The patient on final examination was found to be fully rehabilitated. In the case of **Marcia Golding v. Jamaica Urban Transit Company** the Claimant suffered Grade 1 chondromalacia of the medial tibial plateau and a tear of the posterior horn of the lateral meniscus. She was found to have a five percent (5%) temporary

[7] Suit No. C.L. 2002/D081

lower extremity impairment or two percent (2%) whole person impairment. She would in future require a total knee replacement in order to be relieved of her pain.

[46] The Claimant in the case of **Andre Clarke v. Alexander Atkinson**[8] suffered from a fracture of the upper end of the right femur, scars and limitation of movement. He had a fifteen percent (15%) permanent partial disability of the right lower limb and an eight percent (8%) whole person impairment. **Raymond Harvey v. Sports & Divers Club Limited and anor**[9]**,** the medical diagnoses of the Claimant based on an MRI to the knee revealed a ruptured right anterior cruciate ligament, torn right medial meniscus of knee and a torn right lateral meniscus of knee. He was rated as having a four percent (4%) whole person impairment and a sixteen percent (16%) impairment of the lower extremity. The final authority cited was that of **Patrice Brown v. Kingston Wharves Limited and anor**[10]. The Claimant in that case was diagnosed as having a posterior cruciate ligament repair with residual insufficiency, anterior cruciate ligament insufficiency and lateral collateral ligament insufficiency. Permanent impairment was assessed at thirty-seven percent (37%) of the left lower extremity which amounted to fifteen percent (15%) of the whole person.

[47] The cases of **Huclen Carter** and **Andre Clarke** are not in line with the injuries of Mr. Thomas. The other three cases are more relevant. **Marcia Golding** when updated using the revised Consumer Price Index amounts to $3,677,536.23. **Raymond Harvey** updates to the amount of $4,018,344.00 and **Patrice Brown** when updated is $3,693,103.00. The range therefore is between the sum of $3,600,000.00 at the lower end and $4,000.000.00 at the higher end. I am minded in the circumstances taking into account the fact that Mr. Thomas has been assessed as having a whole person disability of seven percent (7%) to make an award more in keeping with that of the case of **Patrice Brown**, with a reduction based on the severity of the impairment in that case. An award of $3,400,000.00

[8] Claim No HCV 5108 of 2005 unreported
[9] Supra. 6
[10] [2014] JMSC Civ. 231

is made with interest at 3% from the 3rd of October 2017 to the 28th of January 2022.

Loss of future earnings and handicap on the labour market

[48] It has been established that damages are awarded under this head where the Claimant can establish that he has lost something permanent. It is the loss of the ability to compete in the open labour market. The evidence of Mr. Thomas is that due to his injury he can no longer perform as a dancer. He has lost that ability and has had to resort to seeking alternative employment. His efforts at obtaining employment has been stymied by his visible injury, and he has indicated that he has applied for jobs without success. I find and accept that Mr. Thomas has lost his ability to perform as a dancer. He has lost prospective future earnings and is handicapped by reason of his injury, as he is not able to compete with able bodied persons on the labour market for employment of that nature.

[49] The case of **Moeliker v A. Reynolle & Co. Ltd**.[11] established the principles applicable for loss of earnings. The Court held that there must be a substantial and not merely a fanciful risk that the claimant will lose his present employment before the end of his working life, and be thrown into the labour market, in a less competitive position. There is no dispute in this case as to that fact. Mr. Thomas was made medically redundant in August of 2015. He has lost his employment and has to seek alternative employment on the labour market as a result of his injury.

[50] Sykes J., as he then was, summarised the different methods for quantifying loss of earning capacity in **Andrew Ebanks v. Jeaphther McClymouth**[12]

i) If the claimant is working at the time of the trial and the risk of losing the job is low or remote, then the lump sum method is more appropriate and the award should be low.

[11] [1977] 1 All ER 9

[12] Claim No. 2004 HCV172 unreported and delivered March 8, 2007, at paragraph 53

ii) If the claimant is working at the time of the trial and if there is a real serious risk of losing the job and there is evidence that if the current job is lost there is a high probability that the claimant will have difficulty finding an equally paying or better paying job, then the lump sum method may be appropriate depending on when the loss is seen as likely to occur. The size of the award may be influenced by the time at which the risk may materialize.

iii) If the claimant is a high income earner the multiplier/multiplicand method may be more appropriate.

iv) The lump sum is not arrived by reference to any comparison with previous cases.

v) If the claimant is not working at the time of the trial and the unemployment is a result of the loss of earning capacity, then the multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind of employment.

[51] In this case Mr. Thomas is presently unemployed. This is partly due to the fact that he can no longer work as an entertainment co-ordinator based on his injuries. He indicated in his witness statement that he graduated from high school without the benefit of CXC subjects. Prior to his job as an entertainment co-ordinator he worked in construction as a labourer. He can no longer do that type of work due to the injury to his knee.

[52] I am satisfied that the correct approach to be adopted under this head of damages is the multiplier/multiplicand method. I take into account that at the time of trial Mr. Thomas was 36 years old. He lost his job in August of 2015 when he was approximately 30 years of age.

[53] The average age of retirement for men in Jamaica is 65. I have considered that in his previous line of work he would perhaps have retired earlier given the nature of his job. As an entertainment co-ordinator, youth is preferred. I am of the view that

the approximate age of retirement for persons in that line of work would be 45 years. He therefore lost the benefit of some fifteen years of employment in the entertainment sector. I take into consideration the fact of the pandemic and the loss of that year due to the closure of hotels, I also take into account the vagaries of life and the issue of life expectancy as well as the nature of his employment. Given those factors a multiplier of 8 is considered appropriate.

[54] Mr. Thomas indicated that he earned approximately $33,000 to $35,000 per fortnight plus gratuity. Although a figure was included in the particulars of claim for gratuity there was no evidence in support of this. Neither did he exhibit any payslips to his witness statement or particulars of claim to satisfy the court as to his true salary. I have nonetheless accepted his evidence as to his basic salary as this was unchallenged. I find that the sum of $33,000 per fortnight is acceptable. When calculated that figure totals $792,000.00 per annum. Using a multiplier of 8, I make an award of $6,336,000.00 for loss of future earning capacity/handicap on the labour market.

ORDERS:

1. General Damages is awarded as follows:
   a) For pain and suffering and loss of amenities, the sum of $3,400.000.00 with interest at 3% from October 3, 2017 to January 28, 2022.
   b) For loss of future earning capacity/handicap on the labour market the sum of $6,336,000.00 is made.
2. Special Damages in the sum of $195,544.40 is awarded with interest at 3% from the 18th of January 2014 to the 28th of January 2022.
3. Costs for both Attorneys – at – Law to the Claimant to be agreed or taxed.