



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV2528

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| BETWEEN | LORNA ANDERSON-SAVAGE | CLAIMANT |
| AND | SANDALS OCHO RIOS LTD | DEFENDANT |

Mrs. Janice Gaynor-Brown for Claimant

Charles Piper for Defendant

Heard: September 22, 2008, October 7, 8 & 10, 2008, December 11 & 12, 2008

**Liability for slip and fall- Occupiers' Liability-Negligence Causation-
Personal Injury Pre-existing degenerating disease or trauma -
Damages for pain and suffering accelerated or aggravated by
accident.**

Daye, J

[1] On a day between August and December 2000 the claimant, a 42 years old, a room attendant employed to the Defendant's hotel for the past 9 years fell during the course of her duty of cleaning a light fixture in the bathroom of a hotel room.

She testify in chief when, where and how she fell (Witness statement paragraphs 2 & 3). It was after she had cleaned the light fixture in the bathroom of the room she stepped from the face basin counter to the base of the toilet and suddenly slipped and fell. She claimed this was the only method of doing this chore. She did not give any direct evidence as to what part of her body was injured that is where she sustained any trauma.

Injury

[2] However she explain that almost immediately after the fall she began to feel pain to her back, among other complaints. After visiting the doctor and during three (3) days sick leave she stated she “Noticed that I continued to feel pain especially to my back and my leg”. An inference on this evidence may arise that the claimant sustain trauma to her back. While she continued her employment after this injury she sought medical treatment for the pain to her lower back and leg.

Medical Treatment Diagnosis

[3] There is evidence from Dr. Delroy D. Dawson, a pain expert specialist, consultant in Anesthesia and pain management who treated the claimant that she sustained trauma to her back. **Exhibit 6** which is the medical report dated June 16, 2008 of this doctor describe that the claimant fell with her legs played and also hit her back on the ground. This doctor’s report does not disclose the source of the information about the fall whether it was a self report of the claimant or a summary of report he received about her.

[4] Dr. Dawson also reported that Mrs. Savage score for pain was between 7 and 8 on a 11 point scale. Her pain score was between 7 and 8 on most visits. Her rateable pain impairment was moderate to severe impairment based on the American Medical Association Guideline Evaluation of permanent impairment. It was his opinion that she would require pain therapy for on indefinite period.

[5] Dr. Dwight Webster, a Consultant Neurosurgeon treated the complainant on August 2005. He was another expert witness called on her behalf. Her injury in his opinion was primary due to having mild disc bulges of L3-4, L4-5 and L5-S1. There was no indication for surgery. (**Exhibit 5** Medical Report dated June 6, 2005). In a further report dated My 21, 2008 he assessed her cervical disc disease at 10% and lumbar disc disease at 5%. Her total PPD was 15% of the whole person. She had cervical disc disease with C7 radiculopathy and lumbar disc disease.

[6] To some extent Dr. Webster based his assessment on the result of an MRI done on the lumbar spine of the complainant on April 15, 2003 as also another done on November 18, 2004. He did testify under cross examination that he did not receiving or requested an x-ray of the patients lumbar spine, through this would have been helpful.

[7] Dr. Webster's further opinion about the complainant injury is that "The multiple disc bulges (cervical and lumbar) could either be due to a degenerative process, trauma or a combination of both. The relative contribution of each of the possible pathological processes to Mrs. Savage's condition is unknown. Trauma can result in a significant worsening of the degenerative condition".

[8] It is the duty of the claimant in law to prove her claim viz (a) she fell (b) she sustained back and leg injury(c) it was the fall that caused the injuries she claim happen to her.

Liability/Admission

[9] Counsel Mr. Charles Piper for the defendant announced to the court early in the trial that he was not challenging the issue of liability. From that position the only issue that remain for determination was the question of damages. However, at his closing submissions Mr. Piper contended that the claimant had not on her own evidence satisfied the court nor on her own expert witness evidence that it was the fall that caused the injury her doctor testified she had. To this extent at the penultimate stage of the trial the issue of causation was made a live issue. The issue is related and inter connected to the issue of liability. Thus the issue of liability was brought back into focus. The way it re emerge does and did lead to some disadvantage to the claimant who did not focus on it in the light of the defendant's counsel's early announcement. Nonetheless evidence was lead on the issue and it had to be addressed.

Causation/Damages

[10] The simple point of the defendant is that the lumbar or back injury of Mrs. Anderson Savage may be due to a degenerative disease and not by the fall. Counsel Mr. Piper elicited in cross examination of Dr. Webster that he was unable to say in Mrs Savage case the injury was due to degeneration or trauma. The doctor explained that degenerative disease without trauma is arthritis. He says degenerative disease of the spine without trauma known can be painful and is very painful when aggravated. The defendant is therefore highlighting the fact that the complaint of pain by Mr. Savage is due to natural cause and aggravation by the claimant herself.

[11] The authors of **Kemp and Kemp, The Quantum Damages**, 11th cumulative supplement, the 3rd edition 1973 in chapter 3 paragraph 1094 and paragraph 1111 dealt with two issues relevant to causation. They are:

1. The effect of pre-existing disability. They show the court has to take into account pre-existing disease including cases of acceleration of osteo-arthritis. It can reduce a claim for loss of future earnings.
2. Supervising accident. They show that a claimant who suffered leg injury in a road accident and was after shot in the same leg in a robbery and which leg was amputated ought not to suffer reduced damages on that account.

[12] Further in the **chapter 24** the learned author dealt with injuries to the neck. A case was cited, where a claimant sustained a blow to the neck which medical examination showed had aggravated and accelerated by 5 to 10 years a condition of cervical spondylosis pre-existing but was symptoms free –resulting in pain to the neck. The court nonetheless made an award of damages for pain and suffering. **(Smithville vs. William Leach Building Co. Ltd)**. So too did the court award damages for pain and suffering to a claimant, who had a pre-existing arthritic condition to the spine which was aggravated by a injury to the neck and shoulder. This claimant injury is to the lumbar and not to the neck. But the issue of aggravation and causation is what is relevant. In the Cayman Appeal, **Jeff Eaton v. Birthroy Johnston**. Privy Council Appeal No. 38 and 16 of 2006., del. January 2008 (see

paragraph 29-34) The Privy Council acknowledge and addressed the issue of causation briefly even though there were concurrent findings of fact settling it and it was not raised by appellant in the courts below. The court opined.

[13] “More importantly it was common ground from the time of the first MRI that there was a pre-existing degenerative change in the plaintiff’s cervical spine, would whatever may have been the cause. It was the shock and jarring by the accident which triggered off the pain first symptoms. It was not suggested to the Judge that the accident merely accelerate the onset of painful symptoms which the plaintiff would eventually have suffered sooner or later”.

[14] I abstract from the cases where a claimant is symptom free of pain before an accident or incident, but has a pre-existing degenerative disease, if the incident or accident trigger the painful symptom then it is that factor that cause the injury or pain complained of and the claimant would have provided the necessary proof of causation.

Effect of injury on claimant

[15] Having determined the principle of causation I now return to the claimant evidence of the effect of this lower back and leg injury on her. The effect may be summarised as follows:

Work

[15] The claimant’s evidence is that after the accident she had difficulty doing her household chores because of the pain. She testifies she had to pay someone to clean and wash. She had constant back pain on the job (paragraph 5 of witness of statement).

Family

[17] Her husband had to help with the household work. She found it difficult to lift and bathe her new born baby son after the accident. She was not able to run with and play with her son as he got older because of the pain she experienced (paragraph 8 Witness Statement). The pain affected her sexual relationship with her husband. She no longer dance and exercise due to the continuous pain.

Earnings

[18] She is unable to rear goats due to the pain and thereby suffer a loss of additional income. She could not however quantify the amount she earned from this private endeavour.

Gratuity

[19] After accident she lost her gratuity and was only paid basic salary. Before the accident she would earn \$4,000 to \$5,000 per week gratuity plus her basic pay. In October 2006 the hotel stopped paying her any salary. Prior to that in January 2006 the hotel stopped paying her medical bills and transportation cost to visit the doctor for treatment for her injury.

Video Evidence

[20] Mr. Piper for the defendant hotel focused his cross-examination of the claimant on her evidence that the injury she sustained has affected her ability to work and to enjoy her usual social activity. He relied on a video recording which was admitted in evidence as **Exhibit 3**.

[21] This video was recorded by a private investigator who was assigned by the insurance company of Sandals to observe and report on the claimant activity after the fall. The video depicted her firstly at her home in her community. She reared chicken. She was doing normal labour such as lifting heavy trays to feed the chicken. Then secondly she was depicted operating a tuck shop at Ocho Rios. There she participated at the invitation of the investigator in dancing what is called the "Dutty wine" and entertaining her customers without any appearance of discomfort or

distress. The defendant's contention is that the claimant's injuries were not as long lasting as she claim nor did it affect her ability to work or enjoy her normal life.

Expert Medical Evidence

[22] Mr. Piper pursued this line in cross-examination of the two doctors called as expert witnesses for the claimant. Dr. Dawson responses were as follows in his evidence in chief.

"She had epidural injection. It depends if she could go back to gainful employment but she was still limited in her activity. She was limited by pain and in particular by sustained activity. She would not have been able to undertake a full day of work".

In Cross-examination, he replied:

"My opinion through the treatment of Mrs. Savage is that she could not do heavy work for sustained periods I would have cautioned Mrs. Anderson-Savage about not doing heavy work that would not assist her recovery. It may aggravate her pain".

He went on to explain if the claimant had surgery he recommended then he expected she would return to useful and gainful employment.

[23] Then Dr. Webster evidence and Cross-examination is as follows:

"When I refer to degenerative disease I am referring to arthritis. Some people are more prone to develop arthritis from an early age than another person. Vigorous dancing if there is significant pathology can aggravate arthritis. Yes, lifting heavy things can aggravate it. Yes if someone lift pails, heavy enough to feed animals that can also aggravate it".

"I did not know she was operating a small chicken farm. I agree the consistent lifting of heavy object while I was treating her would have the result of aggravating her condition."

"When I looked at the video I notice that Mrs Savage bend over a lot and picked up things from time to time. I would not advice dancing to Mrs. Savage while she was being treated".

“What I saw on the video about Mrs. Savage I do not consider it surprising if she was properly medicated. The dancing I saw of her was about one minute. It was relatively short.”

“Her score for pain were 9 or 11 point scale. Her pain score was between 7 and 8 on most visit.”

Findings and Analysis

[24] The court found the claimant was injured as a result of the fall she had. I accept the medical opinion of her expert witness, the Neurosurgeon, that he assessed her as having mild Lumbar stenosis.

I also accept and find in reliance on this doctor's report that her condition was due to disc bulges of the lumbar and cervical vertebra. In short she had cervical disc disease and lumbar disc disease. I further find that these conditions are degenerative disease that may occur without trauma and is commonly known as arthritis. Medically arthritis is painful without trauma and very painful when aggravated by trauma.

I find claimant suffered moderate to severe pain as a result of the injury as indicated by her high rating on the scope from pain. Her impairment was moderate to severe and 15% of the whole person.

The claimant condition required treatment by therapy. However, surgery was not mandatory. The nature of the injury would cause recurring pain.

The pain first symptom felt by the claimant was caused or triggered by the fall. She appears to have a pre-existing degenerating, arthritis which was symptomless. However it was the fall or trauma that caused the onset of this condition and symptom.

[25] The claimant may have aggravated her condition by her post accident activity of lifting heavy object in the rearing of her chicken and her tuck shop. But I hold that these activities did not substantially aggravate her condition.

[26] One factor cannot be ignored is that the claimant is resourceful and entrepreneurial. She engaged in small endeavours to secure her livelihood and increase her income. This should not be used against her in her claim and the

damaged she seek from the court. I do not find that she acted in a manner that did not mitigate her damage. She worked as much as the pain would allow her and she did seek medical treatment for her injuries even specialist doctors.

[27] I find the claimant is sincere when she give evidence that the injury she sustained affecting her (a) work (b) her family, (c) her enjoyment of life and (d) her earnings. The aeration affect as her would be the earlier years of her injury. But I find that the effect of the injury as her was not so debilitating after 2006 that she could not engage in her normal industrious self employment.

[28] The main effect this injury would have is the recurrent pain which was a real one and was moderate to severe. She would be entitled to general damage for her pain and suffering and loss of amenities from this fall. She would also be at a disadvantage in comparison to other workers for this type of work in the hotel sector due to the physical demands of her job.

[29] She would also be entitled to special damages that is out of pocket expenses incurred as a result of this fall caused by her employer. But special damage must be specifically proved. It is a fundamental rule that a clamant must produce proof of payment expenses before a court can award special damages for any expenses. The claimant was not able to prove some of the expenses she claimed. Having regard to the courts finding the court give judgement for the claimant as follow:

General Damage

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|------|---|-----------------|
| [30] | Paint and Suffering and loss of amenities | \$1, 600,000.00 |
| | Handicap on the Labour Market | \$500, 000.00 |
| | No award for loss of earning – not proved | _____ |
| | No award for loss of future earning – not proved | _____ |
| | No award for future medical expenses – not proved | _____ |

Special Damages \$31, 771.75

| | |
|---|---------------|
| I. Medical and pharmacy (proved) | \$ 20, 271.75 |
| II. Medical Report (proved) | \$ 1, 500.00 |
| III. No award – Transportation (not proved) | |
| IV. No award - Household help (not proved) | |

Interest on general damage at 6% per annum from the 26th August 2005 to the 12th December 2008.

Interest on special damage at 3% per annum from August 31, 2000 to December 12, 2008.

Cost to claimant to be agreed on taxed.