



[2023] JMSC Civ.112

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017HCV00440

BETWEEN **MICHELE THERESA LEE** **CLAIMANT**
AND **UNIVERSITY OF THE WEST INDIES** **DEFENDANT**

IN OPEN COURT

Ms. Christine Mae Hudson and Ms. Judaska Shaw instructed by K. Churchill Neita and Company for the Claimant

Mr. Matthew Royal and Mr. Immanuel Williams instructed by Myers Fletcher and Gordon for the Defendant

Heard: May 29, 2023, and June 16, 2023

Negligence – Occupier’s Liability – Obvious Risk – Handicap on the Labour Market

CARR, J

Introduction

[1] The Claimant was a student at the Faculty of Law, University of the West Indies Mona, on the 14th of February 2011. At about 5:00 pm that day she entered the faculty’s ground floor and walked towards Lecture Room 2 which was to the rear of that floor. The area was a green space with an opening in the roof that allowed natural light and resulted in the area being open to the elements. While walking

along the corridor she slipped on the tiles and fell. She was injured because of the fall and still suffers from pain to this day.

The Claim

[2] The Claimant filed an amended claim seeking the following relief.

1. Damages for personal injury and loss suffered as a result of an accident which occurred on or about the 14th of February, 2011 at the Faculty of Law, University of the West Indies situate at the Mona Campus, Mona, Kingston 7, in the parish of Saint Andrew as a result of the breach of statutory duty of the Defendant, and or the negligence and or the carelessness and or recklessness of the Defendant and or their authorized servants and/or agents and/or employee. For that the Claimant was at all material times a student of the said Faculty of Law at the University of the West Indies Mona Campus and was at all material times lawfully authorized to be on the Defendant's premises when the Claimant suddenly and without any warning slipped on a wet area of the tiled floor of the Defendant's premises thereby causing the Claimant to viciously fall to the ground causing severe injuries, losses and damage. The accident was caused solely by the negligence and or carelessness and or recklessness of the Defendant and or its authorized agents and or servants and or employees.
2. Interest thereon pursuant to the Law Reform (Miscellaneous Provisions) Act at such rate and for such period as this Honourable Court shall deem fit.
3. Special Damages.
4. Damages.
5. Costs and Attorney's costs.

The Law

- [3] The Claimant has the burden of proving on a balance of probabilities that the Defendant was negligent. To establish this the following must be shown.
- a. That the Claimant was owed a duty of care by the Defendant.
 - b. That the Defendant breached that duty.
 - c. That because of that breach the Claimant suffered damage that is not too remote.
- [4] And or in the alternative, the Claimant has asked the court to find that the Defendant also breached the **Occupier's Liability Act** which 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 there¹.
- [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 visitor².

Issues

- [6] The Defendant has challenged the claim on the ground that the Claimant was either negligent or contributorily negligent. The two main issues in this case can therefore be summarized in this way:
- a. Did the Defendant fail in its duty of care to the Claimant?
 - b. Did the Claimant by her own actions cause or contribute to the incident?

¹ Section 3 (1) and (2)

² Section 3 (5) and (7)

Discussion

The Evidence

- [7] The Claimant's case was supported by her evidence, and that of Mr. Ralston Dickson. Both persons gave witness statements which stood as their evidence in chief. The Claimant was cross-examined; however, Mr. Dickson was not.
- [8] The Claimant acknowledged in her witness statement and in cross examination that it was raining on the 14th of February 2011. It is her evidence that the rain stopped a few hours before she entered the open space area at the faculty. Prior to her slipping and falling she did not observe any water on the floor. It was after she got up that she realized there was water there. She said her hands were wet as well as her clothes.
- [9] In cross-examination she told the court that her clothes were wet and dirty and that it was obvious to others. She was asked if she agreed that that there was at least a significant amount of water on the floor and she said it would have been significant, yes. It was suggested to her that with the presence of a significant amount of water that she ought to have observed it if she was taking care. She disagreed with that suggestion. It was also suggested to her that she was walking and talking with her friends and that she was distracted, she denied this.
- [10] Mr. Dickson in his witness statement indicated that there was a light rain earlier in the day, late morning, which had stopped a few hours after. He observed that the area was clear while he was walking with the Claimant along the corridor. He noticed when the Claimant slipped and fell. After she was assisted, he noticed that the area where she fell was wet. He did not notice that before.
- [11] The evidence on behalf of the Defendant came from the Facilities Manager for the Faculty of Law, Ms. Marjorie Henry. Ms. Henry indicated in her witness statement that she received a report of the incident involving the Claimant on the same day. It was her evidence that the area where the incident occurred is an outdoor space, and that it was expected that passers-by would be able to notice

that the area was wet due to the heavy rainfall that day. She described the area as well-lit and stated that the presence of rainwater should be visible by the naked eye. The tiles were non-slip tiles which were designed to safeguard visitors from the risk of slip and fall injuries.

[12] Ms. Henry also spoke to the general maintenance schedule for the grounds. It was her evidence that the grounds were regularly monitored for hazards by herself and her two full time janitors.

[13] In cross-examination she was asked whether the area was monitored after the rain fall that day. Her response was that she could not recall. She stated that the area was an outdoor space and that they could not eliminate all the water in those circumstances. She agreed that it was necessary to put up signs in that area when it rained, and the place became wet. She saw the need for those signs but admits that there were none in place on the day in question.

[14] In answer to Counsel, Ms. Henry indicated that she could not recall if the rain fall was heavy, but she knew that there was water on the corridor. She could not recall seeing the water personally and could not say if she visited the area shortly after the incident.

Did the Defendant fail in its duty of care to the Claimant?

[15] The test for negligence is like that for breach of the Occupiers Liability Act. The analysis of the evidence will therefore subsume both areas of the law. It is safe to say that there is no dispute that the Defendant owed a duty of care to the Claimant. The Claimant was lawfully on the grounds of the University campus as a student. They owed her a common duty of care to ensure that the premises were reasonably suited for her use in that capacity.

[16] The area by all accounts was accessible to students of the faculty. The corridors were the entry points for lecture rooms, tutorial rooms as well as public bathrooms. It was also the area which was to be utilized for a function that afternoon. It is my considered view that the Defendant ought to have taken the

necessary precautions in these circumstances to ensure the safety of all users of the premises to include the Claimant.

- [17] The fact that the area is an open-air space is known not only to the Claimant but also the Defendant. They were therefore acutely aware of the fact that with rainfall the area could possibly become inundated with water. That is the basis upon which they installed the non-slip tiles. It is also the evidence of Ms. Henry that even with light rain fall, once the breeze is blowing the area would become wet. While I accept that during the rain fall nothing could be done to mitigate water which might have accumulated on the floor, I do not find that it is unreasonable for the Defendant to be asked to clean up that area after a shower of rain since it is the access point to so many other places along the corridor.
- [18] If the system of monitoring for hazards is as robust as Counsel for the Defendant claimed in his submissions, the area should have been cleaned after the rainfall. If this was not so, signs should have been posted warning persons of the danger of walking along that corridor. The necessity for signs was made plain by the evidence of Ms. Henry, and the admission that they were not present is sufficient for this court to find that the Defendant breached its duty of care to the Claimant.

Did the Claimant by her own actions cause or contribute to the incident?

- [19] In all the cases cited by Counsel for the Defendant on this issue, the principle to be adopted is this; the statute has codified common law in relation to the duty of the occupier of a premises. It has also provided that an occupier may expect that a person will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
- [20] Counsel for the Defendant has argued that the Claimant did not guard against the special risk of walking along the corridor after rainfall in an open-air space. To that end he cited several cases. All of which can be distinguished from the

present one. The case of **Elita Flickenger v. David Preble and Xtabi Resort Limited**³, involved a man who went swimming in rough seas along the coastline of Jamaica. In that case warning signs were posted and ignored leading to the death of the claimant's husband.

[21] In the case of **Pamela Minor v. Sandals Resorts and ors**⁴, K. Anderson, J found at paragraph 72 of that judgment that the action of the claimant was not equivalent to being careful. She descended stairs without using the handrail on a day when it rained shortly before her fall, and in circumstances where she admitted to seeing puddles of water on the floor.

[22] In the case of **Hannah Kay James v. Jamaica Urban Transit Company Limited**⁵, Wolfe- Reece, J, found that the credibility of the witness was a material factor in the determination as to the issue of liability. She did not accept that the staircase was shiny, and she found that the claimant's evidence was inconsistent in several material aspects, especially in relation to her carefully descending the stairs while holding the handrails. This case was also relied upon by Counsel to strengthen his submissions in respect of familiarity with the premises and the need to exercise care in those circumstances. Wolfe-Reece, J, found that the claimant's familiarity with the staircase heightened the need for her to be aware of the inherent dangers associated with its use.

[23] In examining all the cases, I must consider the evidence and circumstances surrounding the Claimant's fall in this case. Each case must turn on its own facts. The Claimant in cross-examination admitted that she was familiar with the area where the incident occurred. She knew it was an outdoor area and she was aware that it rained earlier that day. She also admitted that the amount of water

³ [2015] JMCA Civ. 19

⁴ [2015] JMCA Civ. 256

⁵ [2019] JMCA Civ. 213

on the floor must have been significant, this she said was so because her hands and clothing were wet.

[24] Ms. Henry stated that the presence of water should be visible by the naked eye. This is pure conjecture on the part of Ms. Henry. She herself did not visit the area after the report to see if the rainwater was visible. She therefore cannot say with confidence that it was. I therefore accept the evidence of the Claimant and her witness that the water was not observed by them while they were walking.

[25] The Claimant's familiarity with the premises does raise an issue that must be considered. Did she exercise sufficient care in accessing the corridor that day. She was aware that it was an open space area where rain fall would come in. She was aware that it rained that day. In her witness statement she indicated that the rain stopped two or three hours before she fell. There was therefore the potential for rainwater to be on the floor. In pulling her bag along with her laptop in hand was she paying specific attention to her surroundings on that day? Given the significant amount of water that must have been present on the floor (based on her evidence) I do not find that she was paying close attention to her surroundings on the day in question.

[26] I find therefore that in the circumstances of this case both parties share liability. I am not of the view, however, that the Claimant shares the greater responsibility as I am not satisfied that the Defendant did all it reasonably could to ensure the safety of the users of the premises.

[27] In summary, I find that the Defendant was negligent, as it breached its duty of care, which resulted in injury to the Claimant. I would apportion liability in this case at 80% to the Defendant and 20% to the Claimant.

Damages

[28] It is a trite principle of law that in assessing damages a court must consider past present and future loss. The court must seek to put the Claimant in the position she would have been had the tort not been committed. Although previous

authorities can be used as a guide the court must take a wholistic approach in determining an award of damages.

Special Damages

[29] At the commencement of the trial Special Damages were agreed subject to liability in the sum of \$465,928.96. Considering the apportionment of damages, the sum when reduced by 20%, leaves the Claimant with an award of \$372,743.17.

General Damages

[30] The Claimant relied on a total of eight Medical Reports in support of her Claim. Between the years 2011 and 2018, the Claimant visited a total of four doctors and attended physiotherapy in relation to her injuries. She was found to have injuries to her cervical and lumbar spine and suffered pain to her neck, back, knees, ankle, leg, arm, and shoulder along with diminished strength in her right hand. Dr. Neville Ballin became her pain management doctor in 2012. In 2014, she was referred to Orthopaedic Surgeon, Dr. G. Dundas, who upon examining her MRI, X-rays and medical history found that she had Myofascial Pain Syndrome or Fibromyalgia. The MRI also revealed that there were disc herniations on the Claimants spine. Dr. Ballin in his Medical Report dated June 30, 2015, agreed with the findings of Dr. Dundas, and found that the Claimant suffered a whole person disability of 9 %.

[31] The Claimant was reviewed by Dr. Ballin in August of 2018. In his fourth and final Medical Report dated November 20, 2018, he indicated that on examination of the Claimant, he found multiple trigger points in the trapezius muscle with referred pain to her neck, shoulders, and upper back. She also had trigger points in the right gluteus maximus.

[32] He reported that the Claimant continues to have severe generalised pain affecting her neck and shoulder with radiation to her right arm and lower back. He found that she has low back pain with radiation to the right leg. He noted

minimal changes in the Claimants upper limb symptoms but found that there was a worsening of the lower limb symptoms as she had constant radicular pain in her lower back. He opined that she would require ongoing care which includes medications, lifestyle modification, physical and exercise therapy and may also require interventional pain management.

[33] In her witness statement the Claimant stated that her injury has affected her daily life, work life, marriage, and her role as a parent.

[34] Dr. Ballin confirmed that the Claimant's home, work, and family life were affected. He reported that her injury affected her ability to do housework, limited her interaction with her children and impaired her ability to sit at her workstation for extended periods.

Submissions by Counsel for the Claimant

[35] Three authorities were relied on by the Claimant. As admitted by counsel the case of **Barbara Rowe Anderson v Mohini Enterprises Limited & Anor**⁶ was most like the case at bar. The claimant in that case developed myofascial pain syndrome following a fall. She sustained soft tissue injury to her back and buttocks and thereafter had pain to the left side of her head, neck right wrist, left chest, left buttock, and left hip. Dr. Ballin assigned her a 10 % whole person impairment.

[36] Her condition affected her when walking, reversing, standing, or sitting for extended periods and during sexual intercourse. She was unable to do her chores and her hobby of baking had to be halted because of her condition. She was awarded the sum of \$4,000,000.00 at CPI of 58.4. When updated the award would be \$8,726,027.39 at a CPI of 127.4 for April 2023.

⁶ Claim No. 2007 HCV 00802, unreported judgment delivered January 2010

- [37] In *Mobrey Lewis v Everod Lewis*⁷, the claimant was assigned a whole person impairment of 7% after sustaining an injury to the thoracic and lumbar spine which caused restricted range of motion of the cervical spine as well as radiculopathy to the upper limbs bilaterally. An award of \$2,000,000.00 was made in November 2007 at a CPI of 43.6 which updates to \$5,844,036.69 at a CPI of 127.4 for April 2023.
- [38] In *Alban George Laing v Vinton Dennis & Anor*⁸ the claimant suffered soft tissue and whiplash injury with back pains. The Claimant also suffered a prolapsed in vertebrae disc with nerve root compression and was assigned a 10 % whole person impairment. An award of \$8,000,000.00 at 127.8 in February 2023, updates to \$7,974,960.87 at CPI of 127.4 for April 2023.
- [39] Counsel relied on the *Lewis* and *Laing* cases, as they displayed a reasonable measure of similarity in that the parties sustained spinal injuries. Counsel submitted that the award to be received by the Claimant ought to be higher than that awarded in those cases.
- [40] Counsel also argued that the Claimant is eligible for an award for handicap on the labour market but admitted that she is not unemployable and retains her ability to earn, but it is her evidence that the pain causes her to lose productive hours and days. Counsel argued that the Claimant should be awarded a lump sum of \$2,500,000.00 citing the case of *Andrew Ebanks v Jephther Mclymont*⁹ which states that a claimant must be compensated if the financial impact of loss is delayed or eliminated.

⁷ Claim No. 2006HCV02643, unreported judgment delivered November 2007

⁸ [2023] JMSC Civ. 28

⁹ Claim No. 2004 HCV 2172

Submissions by Counsel for the Defendant

- [41] Counsel relied on two authorities to support their argument that \$3,700,000.00 is an appropriate award in damages for the Claimant.
- [42] In the case of **Wright v Kurbiton Limited**¹⁰ the claimant was awarded the sum of \$1,900,000.00 in June 2019 which updates to \$ 2,445,050.50 as at April 2023 for disclosed neck pain, soft tissue injury, tenderness to the cervical spine, loss of normal cervical lordosis and degenerative disc disease, mild disc herniation and chronic discogenic pain. The claimant was found to have a 2% whole person impairment.
- [43] The claimant in the case **Buchanan v Seacoast Trucking Limited**¹¹ suffered mild whiplash injury, pain upon movement and pain to left knee, her neck and lower back, loss of cervical lordosis, vision impairment, muscle tenderness and loss of range of motion and was assigned a 5% whole person impairment. In May 2009, the Court awarded the sum of \$2,100,000.00 which updates to \$4,991, 417.91 as at April 2023.
- [44] Counsel argued that though the Claimant reports a higher whole person impairment, the injuries sustained in **Buchanan** are more severe and justifies a reduction in the award to the Claimant. It was submitted that the Claimant's injuries are more in line with that of the case of **Kurbiton**.

Analysis and Discussion

- [45] I found that the cases of **Barbara Rowe** and **Kurbiton** are more in keeping with the injuries suffered by the Claimant. The **Barbara Rowe** case is preferred due to the similarities in injuries as well as the residual effects of the fall. I noted that Ms. Rowe at the time of the incident was fifty years old, suffered a 10 % whole body impairment and seemed to have experienced continued pain in more areas

¹⁰ [2019] JMSC Civ. 154

¹¹ Claim No. 2008 HCV 00638

of her body than the Claimant. The award for general damages will have to be reduced to factor in the differences as stated. The award of \$4,000,000.00 in January 2010 at CPI of 58.4 updates to \$8,726,027.39 at CPI of 127.4 for April 2023. The sum of \$8,500,000.00 is reasonable in the circumstances. With the finding of contributory negligence that sum is further reduced to \$6,800,000.00

Handicap on the Labour market

[46] Anderson J in his ruling in the case of **Robert Minott v South East Regional Health Authority and Attorney General of Jamaica**¹², in adopting the submissions made by Counsel, stated that handicap on the labour market involves assessing two risks: The first is that the claimant will be out of work in the future for any reason and the second is, if he should be, that because of the accident he will be less able to obtain fresh employment or employment at equivalent pay.

[47] There has been no evidence presented to the court as to how the Claimant's injury has affected or will possibly affect her earning capacity or her prospects of employment. What is gleaned from the evidence is that the Claimant is now a practicing Attorney- at- Law.

[48] There is no evidence to substantiate the finding that she will be out of work in the future. Neither is there any evidence to suggest that she will be unable to obtain employment at an equivalent salary. The claim for damages under this head is refused.

Orders:

1. Liability is apportioned at 80% to the Defendants and 20% to the Claimant.
2. General Damages is awarded in the sum of \$6,800,000.00 with interest at 3% per annum from June 9, 2017, to June 16, 2023.

¹² [2017] JMSC Civ 218, paragraph 111

3. Special Damages is awarded in the sum of \$372,743.17 with interest at 3 % per annum from February 14, 2011, to June 16, 2023.
4. Costs to the Claimant to be agreed or taxed and apportioned at 80% to the Claimant and 20% to the Defendant.