

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV1999/0123

BETWEEN:

GLORIA LAKE

Claimant

And

ANTIGUA COMMERCIAL BANK

Defendant

Appearances:

Mr Kendrickson Kentish for the Claimant

Mr Septimus Rhudd for the Defendant

.....
2006: February 10th

March 17th

June 28th
.....

JUDGMENT ON ASSESSMENT OF DAMAGES

[1] **Blenman, J:** This is a judgment based on an application for assessment of damages.

Background

[2] In 1992, Ms Gloria Lake (Ms Lake) was employed by Antigua Commercial Bank (the bank) as a part time teller. As part of her duties, she was required to lift and examine vouchers boxes and ledgers. Subsequently, she was employed by the bank, as a clerk, on several short term contracts for periods of one year.

[3] In 1995, she began to suffer with back pains and was treated by Dr KK Singh (Dr Singh), Orthopaedic Surgeon.

[4] In 1996, her contract was renewed for one year. The bank did not renew her contract after 1997.

[5] On the 15th November 1996, Ms Lake suffered further injuries to her back when she walked into a puddle of water that had accumulated on the floor of the bank and fell. She underwent surgery in the hope of having her injuries corrected and has obtained some relief from the pain she suffers. However, she still experiences severe pain.

[6] Ms Lake filed a claim against the bank for damages based on the injuries she sustained on 15th November 1996 due to its breach of duty of care.

[7] Mitchell J gave judgment for Ms Lake on 1st April 2004 and ordered damages to be assessed.

Application

[8] On 15th October 2005 Ms Lake filed an application for assessment of damages. She filed an affidavit in support of her application.

Consent judgment

[9] On 23rd June 2005 Consent Judgment was entered against the bank as follows:

- | | | |
|-----|--------------------------------------|--------------|
| (a) | Pain and suffering loss of amenities | \$100,000.00 |
| (b) | Future Medical Care | \$200,000.00 |
| (c) | Past loss of earning | \$100,200.00 |
| (d) | Past medical and related expenses | \$360,453.19 |

Ms Lake's evidence

[10] She said that as a consequence of the injuries she sustained she is unable to work. At the time of her injuries she earned a salary of \$1670.00 per month. She is now 58 years old and complains about chronic pain caused by injuries she sustained from the fall. She has been diagnosed as suffering from myofascial pain syndrome.

[11] She was not cross-examined.

Dr Singh's evidence

- [12] Dr Singh who treated Ms Lake for several years provided the Court with a medical report dated 29th April 2005 and stated as follows:

"Kindly review my initial medical report dated 29th February, 1997 along with the assessment of disability addressed to Lake and Kentish dated 4th October, 1997 and various other reports written on Mrs Lake concerning the occupational injury which she sustained while at work on 15th November, 1996.

Lately I have seen Mrs Gloria Lake with severe disabling pain from her low back radiating into her buttocks and further lower extremity left>right.

I further certify that the disability assessment reported in the letter dated 13th October, 1997 addressed to Lake and Kentish, Barristers-at law is the evaluation of her permanent physical impairment on account of permanent loss of her lumbo-sacral movements.

However, Mrs Lake's percentage of permanent physical impairment increases when she is in such attacks of pain.

Looking at the entire clinical picture, and the residual disabilities on account of occupational injuries, Mrs Gloria Lake **is medically unfit to work in her previous capacity and is 14% permanently disabled as a whole person/human being.**"

Cross examination of Dr Singh

- [13] Initially, Dr Singh stated in cross examination that Ms Lake could no longer work. Dr Singh was subjected to very intense cross examination by learned counsel Mr Septimus Rhudd.
- [14] Counsel cross-examined Dr Singh at length vigorously over a period of two days. Dr Singh later said, in cross-examination, that the true position is that Ms Lake "may be able to do some type of work."
- [15] Under further and cross-examination, Dr Singh stated that Ms Lake could do some work even though she is not able to maintain the same position for more than (one) 1hour. He was of the view that Ms Lake is disabled but is able to work.

- [16] Further, Dr Singh stated that while Ms Lake can work she would need to change position or rest after periods of 1 (one) hour. He is of the considered view that it is possible “that she can work in other capacities.” Dr Singh further stated that the 14% permanent disability did not include the pain Ms Lake suffers.

Dr Bedaysie’s report

- [17] Annexed to an affidavit filed by Juliet Dunnah on behalf of Ms Lake, is a medical report from Dr Henry Bedaysie dated 26th April 2005. He is one of the doctors who treated Mrs Lake for her injuries. Dr Bedaysie stated as follows:

“This is to certify that I performed surgery on the above mentioned patient on the 3rd July 2003 in Trinidad. She had laminectomy of the Lumbar Spine L3/L4 and L5. she has had at least fifty percent improvement since surgery.

On my last visit to Antigua on February 18, 2005 she still complained of low back pains while standing or sitting for long periods.

It is my opinion that Lady Lake will be incapable of work for an indefinite period since her condition is likely to remain permanent.”

- [18] Dr Bedaysie was not present in court neither was a request made to cross-examine him.

Issues

- [19] As agreed by counsel, the assessment before the court is held in order to determine:
- (a) Ms Lake’s future loss of earning, with effect from the 23rd June 2005.
 - (b) The Court is also required to determine the interests and costs applicable to the damages agreed to by both counsel.

Submissions on behalf of Ms Lake

- [20] Learned counsel Mr Kendrickson Kentish urged the Court to accept that Ms Lake could no longer work as a result of the injuries she sustained. Mr Kentish relied on the evidence of Drs Bedaysie and Singh in support of his contention. Mr Kentish said the veracity of Ms Lake’s evidence in this regard was not challenged in as much as she was not cross-

examined and since Ms Lake's evidence is that she cannot work the Court must accept her evidence.

[21] Ms Lake further submitted that the Court is obliged to accept her uncontroverted evidence to the effect that prior to the injuries she earned \$1670.00 per month. Counsel submitted that since Ms Lake's evidence as to the extent of the pain she experiences was not controverted, the bank is debarred from advancing the position that despite her injuries she could still be at work.

[22] Mr Kentish very helpfully referred the Court to **Alphonso v Ramnauth (1997) 56 WIR at p.183.**

Bank's submissions

[23] Learned counsel Mr Septimus Rhudd, urged the court to accept the evidence obtained from Dr Singh under cross examination. Mr Rhudd said that Dr Singh is the orthopaedic surgeon that attends to Ms Lake and she relied on his medical evidence in support of her contention as to the extent of her injuries. Dr Singh stated in cross examination that "it is possible that she can work in other capacity" The Court should accept the doctor's evidence in so far as it contradicts Ms Lake's on the issue of whether or not she could no longer work.

[24] Mr Rhudd submitted that Ms Lake has been left 14% permanently disabled and can still obtain gainful employment in a clerical position. She is largely unskilled and has no specialized training.

Court's findings

[25] In my determination of the issue of whether or not Ms Lake can no longer work I have reviewed all of the evidence adduced. However, I pay particular regard to the medical evidence of Dr Singh, given under cross-examination.

- [26] In view of the evidence that is before the court, I have no doubt that Ms Lake was seriously injured as she has stated and that she experiences pain. The medical and other evidence clearly attest to this.
- [27] However, I am of the respectful view that the evidence that emanated from Dr Singh after consistent and skilful cross-examination, over a period of two days, clearly indicates that Ms Lake could work even though she would have to change positions after periods of 1 hour. I am therefore of the view that the Dr Singh's evidence in cross examination reflects the true state of affairs. I do not believe that Ms Lake is totally disabled and can no longer work, as she would have the court believe.
- [28] To make it clear, wherever Dr Singh's evidence contradicts the evidence of Ms Lake where she stated that she could no longer work I prefer and accept his evidence namely that it is possible for her to work. I am therefore not of the view that Ms Lake could no longer work as was urged by learned counsel Mr Kendrickson Kentish on her behalf.
- [29] I therefore agree with the submissions of learned counsel Mr Septimus Rhudd that Ms Lake could still work, though at a reduced rate.

Future Loss of Earnings

Ms Lake's submissions

- [30] This head of damage is meant to compensate a claimant for the loss of money she would have earned as salary during her normal working life had the accident not occurred See: **Sarju v Walker (1973) 21 WIR 86.**
- [31] Learned counsel Mr Kentish posited that the Court should utilize the multiplicand of \$1670 per month since that is the figure in evidence in relation to her last salary. He urged the Court to accept that had Ms Lake not been injured she would have worked until the age of 65. The Court should therefore calculate the earnings she would have made annually based on the multiplicand using a monthly of salary \$1670.

[32] The thrust of Ms Lake's case is that she is unable to work.

[33] Mr Kentish further urged the court to apply a multiplier of 12 to the multiplicand obtained from the use of \$1670, since this was her gross salary, in determining her loss of future earnings.

Bank's submissions

[34] Mr Rhudd advocated that Ms Lake was under a duty to mitigate her losses and she has failed to do so. Counsel posited that had Ms Lake made the effort she would have been able to obtain alternative employment at least 2 years after she sustained injuries. Mr Rhudd further stated that the Court should accept the bank's contention that it was reasonable for Ms Lake to seek and find alternative employment within 2 years of her injuries. The applicable multiplier should be 2.

[35] For his part, Mr Rhudd contended that Ms Lake's net salary was \$1549.94 and that the Court should utilize this figure as the basis of the multiplicand.

[36] Her total loss of future earnings should therefore be $\$1549.94 \times 2 =$

Court's analysis

[37] I now turn to consider what is Ms Lake's loss of future earnings.

[38] It is clear to me that Ms Lake was under a duty to mitigate her losses and so reduce avoidable losses. Ms Lake has not presented any evidence to the Court to prove that she sought alternative employment but was unable to obtain same. While she is unable to do the sort of job she did before which entails lifting boxes, based on the evidence before the Court I am satisfied that she is able to do other clerical work. I take cognizance of the fact that she is not a highly skilled worker and expect that she would have taken the necessary steps to mitigate her losses.

Multiplier

- [39] Ms Lake is 58 years old. I would accept that she had a working life up to 65 years. I must determine the appropriate multiplier to be applied in this matter. In addition, I must pay regard to the imponderables and vicissitudes of life and take guidance from the authorities from our jurisdiction and other jurisdictions.
- [40] In **Alphonso v Deodath Ramnath (1977) 56 WIR at page 192** Singh JA stated that the true multiplier depended on the individual facts and circumstances of each case and that there is no agreed formula. I respectfully adopt those views.
- [41] I must also pay regard to the fact that Ms Lake would be obtaining a lump sum award instead of several smaller sums spread over the years.
- [42] In **Alphonso v Deodath Ramnath** ibid p 192 Singh JA reviewed a number of cases and stated that where the plaintiff was 45 years old a multiplier of 12 was appropriate. On examining a few unreported cases show that for a person of 52 years a multiplier of 5, 40 years old a multiplier of 12.
- [43] Applying the relevant principles, I am of the view that a multiplier of 4 should be applied to Ms Lake given the fact that she is 58 years old and had a working life up to 65 had she not been injured namely 7 years which I reduce to cater for the imponderable and vicissitudes of life.

Multiplicand

- [44] There is no evidence before the Court of Ms Lake's net salary. The evidence showed Ms Lake earned \$1670.00 per month. I am of the view that in determining her future loss of earnings this figure is an appropriate basis on which to calculate the amount of money Ms Lake would have earned had she continued working without being injured. See **Cookson v Knowles [1979] AC 556**

- [45] I must discount from that sum any money that the Court finds that Ms Lake could have earned as a result of her duty to mitigate her losses. Dr Singh has not provided the court with any sufficient evidence as to the extent of Ms Lake's disability to work, even though he stated in cross examination that "she could possibly work in other capacities."
- [46] Be that as it may, I am of the view that had Ms Lake sought employment she would at least have been able to earn \$670.00 per month, this I am of the opinion is fair and reasonable sum. I therefore discount this sum from the sum of \$1670.00 and conclude that the multiplicand to be utilized is the figure of \$1000,00 per month. This gives a yearly figure of \$12,000.00.
- [47] I would therefore apply the multiplier of 4 to the multiplicand of \$12,000.00 and quantify Ms Lake's future loss of income as \$48,000.00.
- [48] Guided by the principles stated in **Alphonso v Ramnauth** ibid at page 193, I would discount this figure by 10% to cater for the contingencies of life; this leaves a figure of \$43,200.00.
- [49] Accordingly, I would award Ms Lake loss of future earnings in the sum of \$43,200.00

Interest

- [50] I now consider the amount of interest, if any, that should be awarded to Ms Lake.
- [51] The general principle is that interest is awarded to a claimant for being kept out of money which ought to have been paid to him.
- [52] In **Alphonso v Deodath** ibid at p. 195 Singh JA stated that as follows:-
- (a) **Future earnings:** no interest should be awarded before judgment on loss of future earnings.
 - (b) **Pain and Suffering:** Interest is awarded from the date of the service of the writ to the date of trial.

- (c) **Special damages:** Interest should be awarded for the period from the date of the accident to the date of trial at the rate of 21/2 per cent per annum see **Alphonso v Deodath** ibid p. 196

[53] Applying the above principles I make the following additional orders as they relate to interest in favour of Ms Lake and against the bank.

- (a) Pain and suffering on loss of amenities \$100,000.00. The general rule is applied and interest is awarded at a rate of 5 per cent per annum from the date of the service of the claim to the date of the consent judgment (9th April 1999 to June 23, 2005).
- (b) Future Medical Care \$200,000.00 No interest is awarded before judgment.
- (c) Past loss of earning \$100,200.00 Interest is awarded at the rate of 21/2 per cent per annum from the date of accident to date of consent judgment (from 15th November, 1996 to 23rd June, 2005)
- (d) Past Medical and related expenses \$360,453.19 Interest at the rate of 21/2 per cent per annum from the date of accident to the date of consent judgment (from 15th November 1996 to 23rd June 2005).

Costs

[54] I order that the Antigua Commercial Bank pays Ms Lake prescribed costs in accordance with CPR 2000 part 65.

[55] There will also be interest on the outstanding amount of damages (the future loss of earnings) at a rate of 5 percent per annum from today's date until payment in accordance with section 7 of the Judgment Act Cap 227 Laws of Antigua Revised.

[56] The Court gratefully acknowledges the assistance of both learned counsel.

Louise Esther Blenman
High Court Judge`