

JERSEY / JUDGMENT

CI Knitwear v Hotchkiss

[2001] JCA 93 (03 May 2001)

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COURT OF APPEAL Judgment reserved: 22nd March, 2001 Reserved Judgment delivered: 3rd May, Before: R. C. Southwell , Esq., Q. C., President; P. D. Smith, Esq., Q. C., and; de V. G. Carey, Bailiff of Guernsey. Between Channel Islands Knitwear Company, Limited Appellant And Iona Nicola MacKay Hotchkiss Respondent Appeal by the Appellant against so much of the Order of the Royal Court of 8th May, 2000, as entered Judgment for the Respondent in the sum of £538,577.28 (plus interest on special damages). Appeal by the Respondent, by way of Respondent's Notice, against so much of the Judgment of the Royal Court of 8th May, 2000, as relates to the relevance of the finding of a pre-existing condition and the exacerbation of that pre-existing condition. Advocate C. J . Dorey for the Appellant; Advocate N. M. Santos Costa for the Respondent.

judgment

SMITH, JA (delivering the Judgment of the Court): 1. In this case the Respondent, Miss Iona Nicola MacKay Hotchkiss, a textile designer, claimed damages against her former employer Channel Islands Knitwear Company Limited, the Appellant, a manufacturer of knitwear, for injuries alleged to have been sustained in the course of her employment. 2. By her Order of Justice dated 29 November 1996 the Respondent claimed, among other things, that she had sustained a prolapsed cervical disc, that this had been caused by the negligence and breach of statutory duty of the Appellant and that, as a consequence, the Respondent had been unable to work since February 1995. In essence, the Order of Justice complained of the repetitive nature of the Respondent's work, the ergonomics of her workstation, the speed at which she was required to work, its excessive duration and of the Respondent's excessive workload. Specifically, paragraph 4(10) alleged that the Respondent's workstation " ... was so constructed that her head had to be always forward flexed and to the right hand side at all times." 3. In its Answer dated 13 February 1997 the Appellant asserted that it had not been guilty of negligence or breach of statutory duty and that, even if it had been, these were not causative of the Respondent's alleged injuries. 4. On 9 August 1999 the Respondent amended her Order of Justice to add breach of contract and omit breach of statutory duty and to make some amendments to the quantum aspect of the claim. On 13 September 1999 the trial in the Royal Court commenced, Sir Peter Crill KBE, Commissioner, presiding, with two Jurats . 5. Briefly the history of the Respondent's employment with the Appellant was as follows. When a student the Respondent worked for the

Appellant during her summer holidays from college and the Appellant sponsored her during the final year of her degree course. The Respondent graduated with an honours degree in textile design in the summer of 1987 and in September 1987 began working for the Appellant in Jersey as an assistant designer. She was made redundant at the end of 1989 but was re-employed early in 1992. In April 1994 the Respondent was promoted to senior designer and remained in that post until she resigned in February 1995. 6. By June 1994 the Respondent was suffering from severe pain in her neck and her head. On 13 June 1994 her general practitioner diagnosed viral encephalitis, a diagnosis which may or may not have been correct. The Respondent was certified as unfit for work and then took a holiday and she returned to work on 15 August 1994. However, the Respondent continued to suffer pain in her neck and in January 1995 she was again certified as unfit for work by her general practitioner. As we have said, her resignation followed in February 1995. 7. As regards her working conditions with the Appellant, the evidence showed that the Respondent was provided with two narrow tables put together in an L-shape. The tables were too narrow to accommodate the design computer straight on and it had to be placed diagonally at the corner where the two desks met. Because of the table legs, the Respondent had to sit squarely to one of the tables and then turn to the right to operate the design computer. She had a chair with only three legs, no castors on the legs, inadequate support, and no means of raising or lowering the chair back. To complete her work she had to sit in this awkward position for long hours day after day. 8. The first witness at the trial was the Respondent, but on the second day the Respondent's case was interrupted by the interposition of the evidence of Mr. Oliver Ransford, FRCS, a retired consultant orthopaedic surgeon who described his speciality as "spinal surgery - children and adults Neck/Scoliosis/Lumbar Spine", and who had been engaged to appear as an expert on behalf of the Appellant. 9. Mr. Ransford told the court that the Respondent has a condition described as reverse cervical lordosis. Viewed from the side a person with a normal spine has lordosis, or hollowing, of the cervical spine; kyphosis, or convex curving of the thoracic spine; and lordosis of the lumbar spine. The Respondent has an abnormality producing reverse lordosis or kyphosis of her cervical spine. According to Mr. Ransford this means that the Respondent's head does not balance properly and that, for example, sitting at a computer would give her neck ache. It was common case that the Respondent's work with the Appellant as a knitwear designer, and her likely work elsewhere as a designer, involved and would involve the use of a computer programmed for such design work. 10. When asked about the relationship between the Respondent's neck condition and her work Mr. Ransford stated that her work would not have caused her reverse cervical lordosis but would have exacerbated it. His evidence on this point was clarified by an exchange between the Commissioner and Mr. Ransford in the following terms: "Her pain would be much worse, but her pathology would not change, is that what you are saying? A. Correct, sir." 11. In the course of his evidence Mr. Ransford was asked to comment on the opinion of the Respondent's medical expert, Dr. Jeffrey Alan Reardon, MRCP, a consultant rheumatologist in Croydon. Although Dr. Reardon did not give evidence until the day after Mr. Ransford gave his, Dr. Reardon's diagnosis was available in medical reports which were before the Royal Court. 12. In Dr. Reardon's view the Respondent's neck symptoms had been caused by her work. Sitting in a position for long periods with her head turned to one side had weakened muscles which had caused joints on the right side

of the Respondent's neck and upper thoracic spine to become partly dislocated. This caused tearing of ligaments resulting in bleeding into the muscles and scar tissue producing pain. Dr. Reardon thought that the reverse cervical lordosis had been caused by compensatory strain but that it was not causing significant symptoms. 13. The first phase of the trial continued until 17 September 1999. It was then adjourned until the week beginning 25 October 1999 when it was resumed for a further five days. In the interim the Respondent re-amended her Order of Justice by consent. By this amendment she substituted particulars of injuries based on Dr. Reardon's evidence for those originally pleaded. 14. In this amendment the Respondent did not seek to adopt, even in the alternative, Mr Ransford's exacerbation proposition. However, in her written closing submission dated 9 November 1999 reference was made to exacerbation and it was argued that " ... the issue as to whether the work caused the injury or simply made the injury worse would go to damages and not liability." 15. On 21 January 2000 the Commissioner informed the parties in chambers that the Court was not satisfied on the medical evidence that the Respondent's injury was caused by her work but was satisfied that her injury had been exacerbated by her work. 16. The full significance of this conclusion does not appear to have been appreciated by the Royal Court either at the time it was disclosed or thereafter. The parties were faced with a finding that had not been pleaded by the Respondent, but which had been raised by the expert instructed for the Appellant in oral evidence, though exacerbation had not been developed by Mr. Ransford in his written report which was before the Royal Court. It had not been explored in any depth either by counsel or the Court in the course of the trial. 17. In our judgment before reaching a firm conclusion on exacerbation the Royal Court ought to have given the parties an intimation of the direction in which its collective mind was moving and an opportunity to develop and deal with the issue whether by calling or recalling witnesses or however. In our view it was most unsatisfactory for the Court to have moved straight to a firm decision on the point. However, once having done so it was incumbent on the Royal Court to give the parties a fair opportunity to explore, in terms of evidence and submissions, what exacerbation may have meant for their respective cases. In failing to take these courses the Royal Court effectively precluded itself from giving an adequate decision in the case. 18. Though the Royal Court appears to have failed to appreciate the significance of its intimation, this was not lost on counsel. The Appellant made further submissions setting out in detail the consequences for it of the Royal Court's finding and the Respondent issued a summons for leave to amend further her Order of Justice to plead, in the alternative, that she had suffered an exacerbation of a pre-existing condition. 19. The Respondent's summons came on for hearing on 4 May 2000 but the Court refused to hear the summons. On 20 June 2000 the judgment of the Royal Court was delivered. The Court held that the Appellant was in breach of its common law duties as an employer to provide safe working conditions, that the Respondent's working conditions contributed to and exacerbated an existing condition, and the Court awarded the Respondent in total £538,577.28 (plus interest on the special damages) a figure which was subsequently reduced to £491,891.55 because of an element of double counting. 20. Before us, Advocate Dorey for the Appellant criticised the Royal Court's judgment and its conclusions on thirty-one grounds. The first two were based on *Coleman-v-Dunlop Limited*

- [1998] PIQR 398 in which the English Court of Appeal reiterated the duty of a court at first instance to make clear findings of primary fact and of the inferences of secondary fact drawn from them, explaining why such inferences had been drawn. Furthermore, the parties are entitled to have their submissions considered so that they may leave court knowing why they won or lost. The giving of full reasons also ensures that an appellate court can properly consider any appeal. 21. These propositions are unexceptionable in themselves. In the instant case the Royal Court did not comply with them and should have done so - a problem to which we shall return in due course. However, we do not accept that a trial court is obliged to set out every finding it makes in laborious detail nor is a trial court required to address comprehensively every submission irrespective of its significance - on this basis we do not intend to deal with all thirty-one of Miss Dorey's contentions seriatim. Furthermore, although retrial was considered to be the appropriate remedy in *Coleman-v-Dunlop Limited* this does not mean that this should be the remedy ordered by an appellate court in every case of this sort. 22. Before dealing with the defects in the judgment we should make it clear that insofar as this appeal involves the liability issue we do not accept that the Royal Court's decision on this point is not tolerably clear both in relation to what it decided and also why. The Royal Court was fully entitled to conclude on the evidence (as it did) that the plaintiff's working circumstances, particularly her workstation and the requirement that she hold her head flexed to the right when using her computer over prolonged periods, gave rise to a foreseeable risk of injury in respect of which the Appellant failed to take reasonable or any precautions. 23. The major defect in the judgment relates to the Royal Court's finding of exacerbation. Miss Dorey submitted that the Royal Court ought to have dismissed the Respondent's claim and entered judgment for the Appellant, because the Respondent had not pleaded exacerbation and her application to amend to plead this was made only after the evidence and closing submissions had been concluded. Miss Dorey referred us to *Pickford -v-ICI plc*
- [1998] 2 All E. R. 462, a decision of the House of Lords. 24. We do not consider that *Pickford's* case requires that in the unusual circumstances of the instant case we must substitute a verdict for the Appellant. We have already commented on how the Royal Court should properly have acted to avoid injustice once it had tentatively concluded that it was attracted to Mr. Ransford's exacerbation thesis. But we are not persuaded that it accords with any modern notion of justice for a claimant who proves that she has suffered injury as a result of her employer's negligence to be sent away empty-handed simply because the court of trial failed to ensure that its own perception of the case was dealt with fairly to both parties. 25. Miss Dorey was, however, correct to point out that in assessing damages the Royal Court was obliged to consider what the Respondent's position would have been but for the exacerbation of her condition. At paragraph 78 of the judgment (under the heading "Loss of earnings") the Royal Court stated that: "We must also take into account our finding that, whilst the conditions of work did not cause the plaintiff's condition, it exacerbated it" but it is apparent that the damages calculation in the judgment does not take any account of this finding. Therefore, even applying one of the Royal Court's own criteria it is obvious

that the Royal Court's damages calculations, and therefore the damages awarded, are fundamentally flawed. 26. An issue to which the Appellant attached great significance was the evidence of Mr. Philip Sykes. Mr. Sykes practised as a chiropractor in 1995 and on 28 March 1995 the Respondent consulted him. In the course of the consultation he recorded on a pro forma document, under the heading "Symptoms" and after listing complaints about her neck, head, upper back, shoulders etc., "Started approx. 15 months ago (after prev. car shunt)". He also recorded "N. B. recent further car bump caused Rt shoulder pain due to seatbelt" and (under the heading "Accidents") "WHIPLASH 2 yrs ago in car accident." The significance of what Mr. Sykes wrote was that there was evidence that the Respondent developed symptoms early in 1994 (according to p.4 of Mr. Ransford's report: "From February to May 1994 she began to get pain in the medial region of her right eye and occipital headaches.") and (again according to Mr. Ransford) reverse cervical lordosis "... is a very typical feature of whiplash injury." 27. The Royal Court's judgment records that "Mr Sykes was not called" whereas in fact he gave evidence on commission before the Judicial Greffier on 7 October 1999. However, the judgment does record that the note that Mr. Sykes made at the time of the Respondent's visit was put in evidence and that it " ... mentioned two minor crashes involving the plaintiff and containing the word 'whiplash' ". Later in the judgment the Royal Court said: "As regards the note of Mr. Sykes the chiropractor, we discount it entirely. The accidents were minor and the plaintiff did not consult a doctor at the time. After the medical evidence from Mr. Ransford the matter should not have been pursued." 28. It is unfortunate that the Royal Court overlooked the fact that Mr. Sykes had given evidence. However, we are not persuaded that his oral evidence added materially to his note. The Royal Court's reasons for discounting his evidence, although stated laconically, were firmly based on the evidence. Furthermore, there was no contemporaneous evidence of the plaintiff suffering a whiplash injury around the end of 1993/the beginning of 1994. The delphic reference to Mr. Ransford's evidence is, we assume, to two answers recorded in the judgment: "Pain from whiplash injuries usually comes on within twenty-four hours" and "It was very unusual for a whiplash injury not to get better after five years." The Respondent told the Royal Court (and there was no evidence to refute this) that after the two minor car accidents she did not consult a doctor. The evidence showed clearly that if she had suffered any material whiplash injury this would have become apparent almost immediately, and certainly not fifteen months later. 29. It was common case before us that, assuming we would find the decision of the Royal Court to have been flawed (as we have found), there would be three possible courses open to us: (i) to reverse the decision of the Royal Court on all issues and find for the Appellant; (ii) to order a new trial; and (iii) (if we upheld the Royal Court on liability) to make our own assessment of damages. 30. We have already explained why we are not disposed to order that judgment be entered for the Appellant. A new trial would be expensive and impracticable. If limited to exacerbation it would involve the Respondent in either attempting to rely on Mr. Ransford or trying to find another medical expert prepared to espouse the exacerbation cause. If we were to order the retrial of the whole medical issue this could prove unjust to one or other of the parties: to the Appellant which

has already secured a finding from the Royal Court limiting its liability to exacerbation; to the Respondent who has already secured a finding from the Royal Court linking at least her symptoms, if not her pathology, to her working conditions. As, in our judgment, neither of these findings ought to be disturbed the potential injustice of this form of retrial is apparent. 31. As already stated, we are satisfied that the Appellant was in breach of its common law duties, and therefore liability is established. The only issue is as to the correct measure of damages. In our judgment the only way to deal justly with the difficulties that have arisen in this case is for us to make the best attempt we can to assess damages on an exacerbation basis. This we now proceed to do. 32. It is implicit in the Royal Court's finding of exacerbation that it must also have accepted Mr. Ransford's view that the Respondent's neck was "going to start hurting at some stage" even if the Appellant had not been guilty of breach of its duty of care. It is difficult to make any assessment of when this might otherwise have occurred, but on the totality of the evidence we take halfway through the unexpired period of the Respondent's working life calculated from February 1995 when she was forced to give up her job as a designer with the Appellant. The Respondent was born on 7 December 1964 so that at that time she was just over thirty years of age. Thus, our estimate is that she would have experienced the pain, suffering and loss of amenity she has suffered and currently suffers from the age of forty-five and from that age she would have been unable to work as a textile designer. At that stage she would have had a residual capacity to work consistent with her current capacity. 33. The general damages figure of £25,000 chosen by the Royal Court appears to have been derived from the Respondent's written submissions dated 9 November 1999. These canvassed a range between £18,000 and £30,000 derived from one source and referred to a figure of £25,200 calculated from another. 34. However, the Respondent's figures were put forward on the basis that the Appellant was responsible for all of the Respondent's pain, suffering and loss of amenity, past and future, and it is clear from the other figures adopted by the Royal Court that the award of £25,000 was not reduced - as it should have been - to reflect the fact that the Appellant had not caused, but only exacerbated, the Respondent's condition. Accordingly, we reduce the Royal Court's award for general damages for pain, suffering and loss of amenity to £15,000. 35. Turning to the other elements of the Respondent's claim we generally adopt the Royal Court's headings. Nevertheless, we have found it impossible to understand fully the basis of calculation of all of the Royal Court's figures and, therefore, we have made our own estimates wherever necessary. 36. We accept the Royal Court's approach to past loss of earnings insofar as it assumed that the Respondent would have had to relocate to the United Kingdom as the Appellant has closed its design operation in Jersey. We allow the Respondent two-and-a-half-years' complete earnings loss from February 1995 (when she resigned from her employment with the Appellant) until August 1997, when the Respondent declined the opportunity to be signed off work further, presumably on the basis that at that stage she felt able to take some form of employment. We take £30,000 per annum, gross, £22,160 net for this period, giving an approximate total of £55,400. 37. For the period August 1997 to September 2000 we reduce the figure of £22,160 per annum by £5,962. This latter figure is £6,500 net of deductions. The Royal

Court took this figure as the mean of the plaintiff's earnings potential prior to her commencing teacher training ("around £4,000 if her health did not improve as a part-time employee, or if it did and she was able, then at a salary around £9,000.") Multiplying about £16,200 by three years and one month produces a total of £50,000. 38. Our reference to September 2000 is derived from the Royal Court's conclusion, which we consider to have been reasonable, that the Respondent would have been fit to commence training in a suitable alternative career at that time. For the purpose of its calculations the Royal Court took teaching as a suitable alternative career irrespective of whether or not the Respondent chose to pursue it. We accept this approach. 39. As far as the future is concerned the net difference between £30,000 gross per annum (as a designer) and £20,796 gross per annum (as a teacher) is £6,410. The Respondent is now thirty-six years of age and, as we have said, we have determined that by the age of forty-five she would no longer have been fit to work as a designer even if her condition had not been exacerbated by the Appellant. We have looked at Table 24 of the Ogden Tables and applying a 3% discount rate and .95 for contingencies we consider a multiplier of 7.5 to be appropriate. Applied to £6,410 this produces £48,075. 40. We are conscious of the fact that these calculations are to some extent approximate. There are elements that favour one side or the other. It could be argued on behalf of the Respondent that £30,000 per annum gross under-estimates the Respondent's earning potential. On the other hand, she is obviously a capable young woman who may turn out to have the capacity to earn more than we have assumed. Again, investigation of her condition may indicate treatment which may be beneficial. It may be said that we have erred in ignoring the Respondent's loss during her training year. However, we contemplate that at about the age of forty-five she would have had to retrain anyway and the effect of the events that have occurred may be that the Respondent will soon be launched on and advancing in a career which she would not otherwise have attempted until her mid-forties. This factor may turn out to her advantage. 41. The Appellant argued that in this type of case where there are many uncertainties and imponderables we ought simply to award a lump sum rather than utilising the multiplier/multiplicand method we have employed. We were referred to *Blamire -v-South Cumbria Health Authority*

[1993] PIQR Q1 in which the English Court of Appeal endorsed the lump sum approach in the particular circumstances of that case. In our opinion the factors to be taken into account in the instant case are such that to award a lump sum of relatively modest proportions would not be right. While acknowledging that not all the data we would like to have available are before us we believe that fairness requires us to do our best to estimate the missing factors. This we have done. 42. The Royal Court allowed the Respondent £25,000 for medical expenses. This sum was not formally proven before that court, but we consider it reasonable to allow the Respondent an amount to cover private medical expenses to enable her to have her condition investigated and, if possible, treated. Again, it is an estimate but taking everything into account we consider that £15,000 would be fair. 43. In her Order of Justice the Respondent claimed a miscellany of expenses none of

which were formally proven before the Royal Court. The Appellant has indicated that it does not seek to challenge some of these figures if we see fit to allow them. Those figures total £661 and we add this sum to our award. 44. We summarise our award of damages as follows: General damages for pain, suffering and loss of amenity: £15,000 Past loss of earning: £105,400 Future loss of earnings: £48,075 Medical expenses: £15,000 Other expenses: £661 TOTAL: £184,136. We order that interest on general damages for pain, suffering and loss of amenity be paid by the Appellant at 2% from 29th November, 1996, until the date of this Judgment and that special damages bear interest from 1st January, 1998, to the date hereof, based on a rate of 2% above Barclays Bank short term money rate. 45. We would indeed be remiss if we did not express our appreciation to counsel - Advocate Dorey for the Appellant and Advocate Santos-Costa for the Respondent - for their careful and detailed submissions in this difficult appeal. Authorities *Coleman v Dunlop Ltd* (1998) PIQR 398 *Kemp & Kemp Volume 1 Chapter 11 Stokes-v-Guest, Keen and Nettleford (Bolts and Nuts) Limited* (1968) 1 WLR 1776 *Draper-v- Hodder*

- (1972) 2 QB556. 1972 2 All ER 210 *McSherry -v-British Telecom* (1993) Med LR Vol 3 129 *Pickford -v- ICI*
- (1998) 3 All ER 462 *Wells-v-Wells*
- (1998) 3 All ER 481 *Blamire -v-South Cumbria Health Authority*
- (1993) PIQR Q1 *Rainy-v-Bravo* (1872) LR4PC287 *Edevain-v-Cohen*
- (1890) 43 Ch. D *James-v-Smith* (1891) 1 Ch.384 *Soar-v-National Coal Board* (1965) 2 All ER 318 *CA Lufti -v-C Czamikow Ltd* (1952) 2 All ER 823 *Rawding -v-London Brick Co* (1971) 4 KIR 207 *CA King's Quality Ltd-v-A J Paints Ltd* (1997) 3 All ER 267 *Rolled Steel Products (Holdings) Ltd-v-British Steel Corporation* (1985) 2WLR 908 *Munkman on Employer's Liability* (12th Edition) p. 108 *Henderson-v-The Wakefield Shirt Company Limited* (1997) PIQR p.413 *Grant-v-Australian Knitting Mills Ltd*
- (1963) AC85 *Withers-v-Perry Chain Co Ltd*
- (1961) 1 WLR 1314 *Industrial Diseases Litigation, McDonald & Georges* (Sweet & Maxwell 1998) *Taylor & Ors-v- Kitchin and Hope-Smith & Ors* (1985-86) JLR N.4 *Clyde Smith & Ors-v-Ann Street Brewery Company Limited* (1994) JLR 255 *Smith-v-Baron* (1991) TLR *Page-v-Smith*
- (1995) 2 All ER 736 *Smith-v-Leech Brain & Co Limited*
- (1962) 2QB 40 *Bryce-v-Swan Hunter Group Plc & Ors* (1988) 1 All ER 659 *Bonnington Castings Limited-v- Wardlaw*
- (1956) AC 613 *Banaskiewiez-v-Mulholland*
- (1998) TLR *Johnstone -v-Bloomsbury Health Authority* (1991) 2 All ER 293 *Paris-v-Stepney Borough Council*

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