SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1998

SUIT NO: 222 of 1996

BETWEEN

MONICA LANSIQUOT

PLAINTIFF

AND

GEEST PLC

DEFENDANT

Appearances:

K Monplaisir QC for the Plaintiff
M Gordon Esq for the Defendants

1998: December 9, 18

DECISION

Mitchell J

The Plaintiff had been the Shipping Manager of the Defendant shipping company at the time of the accident complained of, in March 1994. While performing her duties on board the Geestport on 27 March she was leaving a conference from the Captain's Cabin and was walking down the stairway when her left shoe heel got stuck in a raised and unseated chrome edge of one of the steps causing her to trip and fall backwards. As a result, she suffered a slipped disc, and associated continuing pain. The Defendant was by a Writ issued on 14 March 1996 sued for breach of its duty to provide a safe place in which the Plaintiff was required to carry out her work. The Defendant entered an appearance to the writ, but did not serve and file a

Defence. Accordingly, the Plaintiff entered judgment that the Defendant do pay the Plaintiff damages to be assessed.

At a pre-trial hearing in Chambers on 20 September 1998, directions were given by consent for the conduct of the assessment of damages. The Plaintiff was directed to file and serve a Summons for Assessment of Damages; all Affidavits in support or in opposition were to be filed and served by 10 November 1998; a current medical report was to be exhibited by the Plaintiff; examination in chief would be by affidavit evidence only, the Plaintiff making herself available for crossexamination; and the matter was fixed for hearing on 1 December at 2 pm. After one adjournment, the assessment came up for hearing on 9 December 1998.

The evidence of the Plaintiff was that at the time of the fall on 27 March 1994 she experienced only minor pain which persisted and got worse. By 30 March she was unable to get out of bed, and was in excruciating pain. She saw several doctors and specialists in St Lucia, England, and Barbados, whose reports she exhibited. The crux of the reports was that she had suffered a prolapse of the left C4-C5 disc space, or a slipped disc. She suffered discal protrusions. She subsequently underwent percutaneous laser disc decompression in London paid for by the Defendant company and the group insurance organized by the company and in which she was a participant. In May 1995, having returned to St Lucia from England where she had been treated, she began working half day. Her pain continued and her movements were restricted, and she returned to England in June 1995. She has to wear back braces when she travels. She has to eat modestly, as she is not allowed to gain weight. She has to exercise

regularly. Sometimes, she has to lie flat on her back. She has pain from her hip to her toe when she sits. She cannot bend properly, and has had to acquire an orthopaedic mattress and a special bed to accommodate it. She cannot attend to her garden as she used to before, nor sew, as bending over the machine causes pain. When the company was reorganised in 1996, she was not offered a similar post with the new company. Her net salary before the accident was $5,000.00 per month. She is presently looking after a sick relative in the United States, and is not gainfully employed. She estimates that the lighter work that she can presently do would entitle her to not more than $3,000.00, a net loss of $2,000.00 per month.

The evidence revealed that the Plaintiff has been recommended to undergo surgery. Non surgical treatment for her type of injury does not have a good chance of success at this point. It was recommended to her in February 1995 by Dr Sharr, the consultant neurosurgeon in London to whom she had been referred, that if the percutaneous laser disc decompression was not successful, she should have an open discectomy. The consultant admitted that he could not guarantee a good result with treatment. On 6 July 1995 Dr Sharr's report indicated that the Plaintiff was much better, though with some lumbar discomfort which, at times, would merge into frank pain. By 9 August his report indicates a setback has occurred. The remission that had occurred for some months after the laser disc decompression had come to an end. A further scan showed residual bulging of a degenerate L45 disc. His advice to the Plaintiff was that an operation was now required. Removal of a significant volume of disc tissue would have to be carried out. Eighteen months after the fall she saw Dr King, a specialist rheumatologist, to obtain a further opinion. Dr King in her report of 13 February 1996 confirmed Dr Sharr's diagnosis

that the continuing lower back pain and left sciatica with morning stiffness were due to the injury suffered in the fall. In her opinion surgery was the best option, but the Plaintiff was not keen on it.

On 28 March 1996, at the request of the Defendant, Dr Seale of Barbados examined the Plaintiff. In his report of 22 April 1996 he found her to suffer persistent pain in her lower back radiating down the left leg, pain in both knees, increased pain associated with travelling, causing her to avoid travel with heavy luggage. She avoided lifting, sitting or standing for long periods. In his recommendations he pointed out that the Plaintiff had had all other treatment modalities, e.g., rest, physiotherapy, traction, and laser disc decompression. They had all failed to cure her. Since surgery was the last modality, it might provide the relief desired. Surgical evaluation of the disc might be combined with fusion of the two vertebra L4 and L5. The problem was that as he pointed out, surgery cannot guarantee a cure for back pain. In most cases, he reported, surgery was successful in relieving the pressure from the entrapped nerve roots, and eradicated the pain down the leg. There was a percentage of patients who did not benefit from surgery. Another point against surgery was that the injury did not appear in this case to be progressive. If she undertook such surgery she would be unlikely to return to work in less than 8-12 weeks. He would support the Plaintiff if she opted for surgery. He recommended that the operation could be performed at either the Queen Elizabeth Hospital in Barbados or at the Le Meynard Hospital in Martinique, or at Hospitals in Trinidad. The cost, if the surgery were done in Barbados, would be about US$2,500.00. In 1995 the cost of such surgery if done in the UK was about US$5,680.00. There was no evidence of the cost of the surgery if performed elsewhere.

On 4 November 1998 Dr King reported on the present condition of the Plaintiff. Her condition remains unchanged. She has chronic low back pain and left sided sciatica. The right knee becomes painful and swollen after standing, due to the extra weight bearing as compensation for her left sided pain. She is unable to carry weights more than that of a handbag, and has difficulty bending. This hampers her daily activities significantly. Given that her condition has not improved over two and a half years, it was in Dr King's opinion unlikely that she will show improvement in the future.

The Plaintiff relied on the cases of

Cornilleac v St Louis [1964] 7 WIR 491

Auguste v Neptune, unreported (CA 6/1996 St Lucia)

Sarju v Walker [1973] 21 WIR 86

Lloyd v Phillip, unreported, St Kitts

The Defendant relied on the following case:

Selvanayagam v UWI [1983] 1 AER 824

In this case, liability is not an issue. The only issue is quantum. The Plaintiff claims to be entitled to general damages under the following main heads: (a) pain and suffering; (b) loss of amenities; (c) loss of pecuniary prospects; and (d) further medical attention.

Under pain and suffering and loss of amenities, the Plaintiff's counsel submits she should be awarded the sum of $85,000.00. Under loss of pecuniary prospects, the amount of $2,294.00 x 12 x 15 to a total of

$412,920.00 is claimed. Counsel submits that the Plaintiff bases a multiplier of 15 on the judgment of Persad JA in the case of Sarju v Walker supra. Additionally, Counsel submits that she is entitled to a further sum of $37,500.00 for surgery should that be ultimately necessary. This figure, he claims, is based on the cost of medical attention in Martinique, which is higher than that of Barbados. There is no evidence, however, before the Court of the cost of surgery in Martinique.

Counsel for the Defendant argued for the damages to be significantly decreased from that urged on behalf of the Plaintiff on two main grounds. The first was the principle of mitigation of damages. The second was a disagreement with the multiplier and multiplicand used by the Plaintiff.

Counsel for the Defendant emphasized that all of the doctors in this case have recommended that the Plaintiff have an operation. While Dr Seale stated that surgery could not guarantee a cure, he did state that, in most cases, surgery is successful. While Dr Sharr had not opined on the likelihood of success, it was unlikely that a consultant neurosurgeon would recommend surgery for a non-life threatening complaint if it were unlikely to be successful.

The principle of mitigation of damages is set out in McGregor on Damages, 15th edition page 168 at para 275.

> "(1) The first and most important rule is that the Plaintiff must take all reasonable steps to mitigate the loss to him consequent on the Defendant's wrong and cannot recover damages for any loss which he could thus have avoided but has failed, through

unreasonable action or inaction, to avoid. Put shortly, the Plaintiff cannot recover for avoidable loss."

At page 187 the case of McAuley v London Transport Executive [1957] 2 Lloyd's Rep 500 (CA) it was held that the injured Plaintiff's refusal to undergo an operation was unreasonable, so that the Defendant was only liable for loss of wages up to the time when he would have returned to work had he had the operation.

In the case of Selvanayagam v UWI (supra) at page 827 para (d), Lord Scarman states,

> "Their Lordships do not doubt that the burden of proving reasonableness [of his decision not to have the operation] was on the appellant. It always is, in a case it which it is suggested, that had a Plaintiff made a different decision, his loss would have been less than it actually was... The rule that a Plaintiff who rejects a medical recommendation in favour of surgery must show that he acted reasonably is based on the principle that a Plaintiff is under a duty to act reasonably so to mitigate his damage."

The medical evidence in this case establishes that a surgical procedure is likely to succeed in relieving the Plaintiff's pain and disabilities. It falls to the Plaintiff to prove, on a balance of probabilities, that a refusal to have the operation is reasonable. The Plaintiff has failed to do so in this case. The Court is obliged to find that she has failed to mitigate her damages.

If the Court were satisfied that the Plaintiff had suffered a permanent

incapacity in considering a slipped disc, which the Court does not find is the case, then the question of the multiplier and the multiplicand would arise. But given the above finding the question is of theoretical interest only. Suffice it to say that the Court would have accepted that at the time of the accident in March 1994 the Plaintiff was 39 years old. Her working life would extend to 60 years of age, or a span of 21 years. Lost earning before the issue of the Writ are Special Damages, and in this case no Special Damages have been pleaded. Using the reasoning found in Auguste v Neptune (supra) a proper ratio would be 45%.

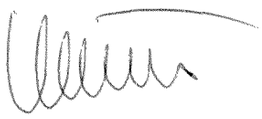
The Plaintiff has lost her job with the Defendant company. The principal reason why she lost her job is that her back injury made her not suitable for any position with the new company. The continuing problem with her back was due to her reluctance to mitigate her loss as the law required her to. The Plaintiff's salary appears to have been paid up to the date of the issue of the Writ and afterwards. In any event, she has claimed no Special Damages. There is no evidence as to when she stopped being paid, but it appears to have been sometime during the year 1996.

On the question of further medical attention, from the report of Dr Seales, the evidence is that the cost in Barbados was Bdos$5,000.00 or EC$6,750.00 in 1996. The Defendant concedes an additional cost of $5,000.00 to meet the expense of staying in Barbados. If the Plaintiff were to accept the medical attention that her doctors have recommended as being most likely to return her to a state of health, the cost would be some $12,150.00 at 1996 figures. The alternative is for her to remain in a certain state of continuous back pain and discomfort. One must take into consideration the medical opinions

that there is no guarantee that surgery will completely free the Plaintiff of further back pain. In any event, she will have suffered the slipped disc, the necessary and irreducible minimum of pain, suffering and discomfort that she would have suffered even if she had undergone the recommended operation immediately it was suggested to her. An amount of $20,000.00 would at 1998 values be a fair compensation to cover this contingent expense, if the Plaintiff decides to follow the medical advice, and she is awarded this amount.

The Plaintiff is entitled to general damages for pain, suffering and loss of amenities for a reasonable period of time beyond which it is unreasonable for her to have continued to have subjected herself by refusing to undergo the recommended surgery. Taking into account the authorities shown to me, particularly those in Stephanie Daly's "Supplement to Damages for Personal Injuries 1995", adjusted to 1998 values, an amount of EC$30,000.00 appears reasonable. Under loss of pecuniary prospects, I am not satisfied that the Plaintiff has suffered any long term loss of pecuniary prospects that can be laid at the feet of the Defendant. She appears to have received her salary monthly after the accident throughout 1994, 1995 and until some point in 1996. She claimed no special damages for loss of salary between the accident and the issue of the Writ. The only evidence of the Plaintiff's emoluments is the sum of $5,000.00 claimed by the Plaintiff during re-examination. However, in the event that she follows her doctors' recommendations and does undergo surgery she is unlikely to be able to work during the recuperation period, which will be a minimum of 3 months. A generous award under this head would cover the period of 6 months at full salary to a total of $30,000.00

I therefore give judgment for the Plaintiff in the sum of EC$80,000.00, plus her costs to be taxed if not agreed.



I D Mitchell
High Court Judge (Ag)