SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 OF 1999

BETWEEN:

MONICA LANSIQUOT

Appellant

and

GEEST PLC

Respondent

Before:

THE HON. MR. SATROHAN SINGH	**JUSTICE OF APPEAL**
THE HON. MR. ALBERT REDHEAD	**JUSTICE OF APPEAL**
THE HON. MR. ALBERT MATTHEW	**JUSTICE OF APPEAL**

Appearances:

Mr. Kenneth Monplaisir Q.C., Mr Deale Lee with him for the Appellant.
Mr. Michael Gordon for the Respondent

2000: January 25, 26
February 7

JUDGMENT

[1] **SINGH J.A.:** On March 27, 1994, the Appellant, the then Shipping Manager of the Respondent, while performing her duties on board one of the Respondent's ships, the Geestport, was walking down the stairway when her left shoe heel got stuck in a raised and unseated chrome edge of one of the steps. This caused her to trip and fall backwards. As a result she suffered a slipped disc with associated continuing pains. She refused surgery.

[2] On December 18, 1998 **Mitchell J** in a suit brought by her against the Respondent for the injury she suffered, awarded her damages in the sum of $80,000.00 with costs. Of this sum, $30,000.00 was awarded for pain, suffering and loss of amenities, $30,000.00 for loss of pecuniary prospects and $20,000.00 to cover the cost of surgery if the Appellant opted to have surgery to her back. In his judgment, the learned judge, found that the Appellant's refusal of surgery was unreasonable and that because of this she had failed to mitigate her loss. He accordingly tailored his award under pecuniary prospects to accommodate 6 months salary, which period he opined was generous for her recuperation in the event that she underwent the surgery suggested by her doctors.

[3] The Appellant is dissatisfied and has appealed. The issues for our determination are:

(1) Whether her refusal of surgery was reasonable.

(2) If so, the determination of her future pecuniary prospects, and,

(3) The sufficiency of the award for pain, suffering and loss of amenities.

REFUSAL OF SURGERY: MITIGATION OF DAMAGES

[4] The principal argument of Counsel for the Respondent, was that the Appellant had failed to mitigate her loss when she refused surgery and therefore the respondent cannot be asked to pay for this avoidable loss. Mr. Monspaisir for the appellant contended that on the evidence before the judge, from an objective point of view, the Appellant's refusal was reasonable.

[5] The concept of mitigation of damages, contemplates that the Appellant must take all reasonable steps to mitigate the loss to her consequent upon the respondent's wrong, and, she would not be able to recover damages for

any loss which she could thus have avoided but failed, through unreasonable action or inaction, to avoid. She will not be able to recover for avoidable loss. [**See Mc Gregor on Damages 16th Edition Chapter 7, page 185].**

[6] An unreasonable refusal to undergo an operation could amount to failure to mitigate [**Mc Auley v London Transport Executive (1957) 2 Lloyds Rep. 500: C A Marcroft v Scuttons (1954) 1 Lloyds's Rep.395 CA.** However, where the medical evidence was evenly balanced as to whether a slight operation would have cleared up an injured person's aches, he would not be held to have acted unreasonably if he refused the operation, **[Savage v Wallis [1966] 1Lloyd's Rep. 357 C.A]**

[7] The Court must approach the evidence on the issue objectively. The burden of proving that the decision not to have an operation was reasonable, was on the Appellant. Though the medical advice received will almost always be a major factor for consideration, the true question is whether in all the circumstances, including particularly the medical advice received, the Appellant acted reasonably in refusing surgery. **(Selvanayagam v University of the West Indies (1983) 1 All ER 824.)**

[8] The evidence on this issue, did not show medical advice that surgery would certainly have cured the Appellant of her back pains and her sciatica, which were all derived from her slipped disc as a result of the accident. The evidence disclosed deterioration of two discs. Dr Sharr suggested laser treatment to melt the discs. If after ten days it wasn't sorted out then she needed to have an operation. Dr Amanda King who was not a surgeon but a specialist in Rheumatology, "believed" that surgery was the best option but advised physiotherapy in the meantime. Dr Seale who was asked by the Respondent to give a final report on the

Appellant, in answer to the question "**is surgery necessary**?" looked at the pros and cons and submitted in his report, the following:

> "**<u>Points in Favour of Surgery</u>**
>
> She has had all other treatment modalities, e.g., rest, physiotherapy, traction and laser disc compression. These have all failed to cure her. Since surgery is the last modality, it **may** provide the relief desired.
>
> Surgical evaluation of the disc may be combined with fusion of L4 To L5. This decision could be made at surgery.
>
> It assures the patient that all has been done to relieve her symptoms, i.e. "no stone left unturned", in pursuit of her cure.
>
> **Points against Surgery**
>
> Surgery cannot guarantee a cure for back pain. In most cases, surgery is successful in relieving the pressure form the entrapped nerve roots, and eradicate the pain down the leg. There is a percentage of patients who do not benefit from surgery.
>
> The absence of any neurological loss in the left leg e.g., loss of sensation, reflexes or muscle tone, suggest that the entrapment of the Le, 5 nerve root over the last two years has not been progressive.
>
> Mrs.Lansiquot must be involved in making the decision concerning the need for surgery. She must clearly understand the points mentioned, and the lack of any definite guarantees. If she then agrees to have surgery, I would support her decision."

[9] The acceptance of surgery is a serious decision for anyone to make. There is always a grave risk involved when the human body is invaded. The respondent's evidential burden was to show unequivocally, from the opinions expressed by the doctors, the reasonableness of the need for the operation with more certainty than not, in its success. Having done so, the Appellant would then have the corresponding evidential burden to show reasonableness on her part in rejecting the idea of surgery. Equivocal medical opinions would not be enough to shift this evidential burden to the Appellant.

[10] Assessing the evidence objectively, it did not show surgery as being more certain than not, as a relief or a cure for the backpain. It also did not tell the Appellant of the risks involved, in order to allow the Appellant to make an informed decision as was done in **Selvanayagam**. At best, it showed that the doctors, in all good faith, were seeking to cure the Appellant by trial in error.

[11] In my considered opinion, on the issue of surgery, the opinions expressed by the doctors were equivocal. I say this despite the Appellant's answer to a question from Mr. Gordon when she said "Yes Dr. Sharr advised me that surgery was guaranteed to cure the back." I do not place much weight on this answer, having regard to the medical reports. This was obviously an answer to a question cleverly phrased from the very shrewd and capable cross examiner.

[12] From the above observations, it is reasonable to conclude that the Appellant was left in a state of total uncertainty, as to whether or not she could, with more certainty than not, have been cured by surgery. Her state of mind, from the evidence referred to above, in all probability, must have been that the different doctors themselves did not know what the real cure for her problem should be. This was an injured person, who observed the doctors experimenting on possible cures for her ailment e.g. rest, physiotherapy, traction and laser disc compression and not succeeding, and who is then told that surgery "may provide" the relief desired since it was "the last modality." The doctors did not positively say, unanimously or even by a majority, that surgery was the cure "but let us first investigate these other non surgical methods in an effort at avoiding surgery." Had they done so, the matter might then have been seen in a different light. Instead, having exhausted all non surgical methods, it appeared from their reports that the most they had was a mere spes as to the success of the proposed surgery.

[13] In my judgment, a reasonable thinking individual, would in these circumstances conclude, that the doctors themselves were unsure and were in fact fishing as to what was to be the correct treatment for the appellant's ailment. With such uncertainty, how could the appellant be expected to agree to have her body invaded?

[14] Given these circumstances, I find difficulty in accepting the learned judge's opinion that the Appellant acted unreasonably in refusing surgery and therefore failed to mitigate her loss. As I mentioned earlier, the acceptance of surgery is a serious decision, and, unless the guarantees and risks are all brought home to the injured person with clarity and frankness, a court ought not to find refusal unreasonable. There is merit in this ground of appeal. Having so found, I would have to disagree with the learned judge on his findings that the Appellant failed to mitigate. I now address the issue of pecuniary prospects.

LOSS OF PECUNIARY PROSPECTS

[15] The Appellant has claimed no special damages. The issue of loss of earnings therefore did not arise. Loss of pecuniary prospects is however relevant and will have to be calculated from the date of the trial. At that date, the Appellant would have been about forty four years old.

[16] Issue is taken whether her retiring age should be 60 or 65. There is no direct evidence upon which to make such a determination**. In Alphonse v Ramnauth, Civil Appeal No. 1 of 1996 BVI,** we allowed up to 65 years as the working life of a labourer**. In Lloyd v Phillip, Civil Suit 79 of 1991 St Kitts,** the Appellant, a doctor, was given a working life by the High Court of up to 70 years. This was based on evidence led on that issue. Mr Gordon referred to the **Contracts of Service Act N: 14 of 1970**

and the National Insurance Act No:10 of 1978, both of St Lucia, and submitted that these **Acts** suggest 60 years as the accepted retiring age.

[17] I do not agree. Whereas the first **Act** apparently discriminates and provides for the retirement age of a woman to be 60 but for a man 65, the second **Act** speaks of the retiring age simpliciter as 65 if the retiree expected to receive his or her full pension.

[18] In the absence of evidence to show otherwise, I would allow 65 years in this case as the retiring age. That affords the Appellant 21 more working years. On this footing, I now have to determine the multiplier. In doing so, I am mindful of the principles as were laid down by us in **Alphonse v Ramnauth at p13.**

> "In determining the multiplier, a Court should be mindful that it is assessing general and not special damages. That it is evaluating prospects and that it is a once for all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident {see **Franklyn Lloyd v Phillip Supra}"**

[19] Applying these principles, I would fix the multiplier at 12. In **Alphonse v Ramnauth (Supra)** this Court also fixed the multiplier at 12. That case is not dissimilar to this on this aspect, as it dealt with a man of 45 years with a working life expectancy of 65 years i.e. another 20 years.

[20] Addressing the multiplicand, the gross salary of the Appellant at the time of the accident was $7000.00 per month. Her evidence was that she will

be unable now to earn more than $3,500.00. That shows a gross loss of $3,500.00 per month. It is accepted that of this sum there would be deductions for income tax, etc. Even though no evidence was led on this, I consider it an accurate representation to say that both lawyers accepted a net loss of $2,000 to $2,500. Given these circumstances, I would fix the multiplicand at $2,000.00 per month. or $24,000.00 per year.

[21] Under this head therefore the award would be $24,000.00 x 12 = $288,000.00.

PAIN, SUFFERING AND LOSS OF AMENITIES

[22] For pain, suffering and loss of amenities, the trial judge awarded a limited sum of $30,000.00. He calculated this award on the basis of the Appellant's suffering for a "reasonable period of time" because of her unreasonably "refusing to undergo recommended surgery." I have found her refusal reasonable. I would therefore have to increase this award to accommodate this new premise.

[23] The determination of this issue involves consideration of the nature and extent of injuries suffered by the Appellant, her personal awareness of pain and her capacity for suffering. The accepted evidence shows chronic pain that could continue for a long time. In her affidavit, the unchallenged evidence of the appellant was that:

> "My situation remains unchanged in that I have to wear back braces as recommend when I travel I have to eat modestly as I am not allowed to gain weight. I have to exercise regularly. I still get pain when I sit down from my hip to my toe. My right knee gets swollen, because I am advised that due to the injury I applied more

pressure on one leg to alleviate the pressure on my back. I cannot lift anything heavy I cannot bend properly and have had to acquire an orthopedic mattress and a special bed made to accommodate this mattress. I have had to place a special cushion in the car to be able to drive and to revert to an automatic transmission as it was difficult for me to change gears with a standard transmission.

I cannot live the life that I was accustomed to. I loved gardening and attending to my flowers as a recreation but I cannot do it anymore. I used to sew but I cannot do it anymore as bending over the machine affects my back and it pains. I get spasms in my legs when I sit as well as when I walk for any appreciable period."

[24] Given those circumstances, for pain and suffering I would award $40,000.00 and for loss of amenities $20,000.00.

CONCLUSION

[25] The appeal is allowed to the extent that the award of the trial judge is varied to read:

Loss of pecuniary prospects -	$ 288,000.00
Pain and suffering	40,000.00
Loss of Amenities	20,000.00

Total	$ 348,000.00
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[26] The Appellant will have her costs of this appeal to be taxed if not agreed.

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SATROHAN SINGH
JUSTICE OF APPEAL

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I concur

ALBERT REDHEAD
JUSTICE OF APPEAL

………………………….

I concur

ALBERT MATTHEW
JUSTICE OF APPEAL