[2012] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 142/2008

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**RICHARD SINCLAIR**	**APPELLANT**
AND	**VIVOLYN TAYLOR**	**RESPONDENT**

Miss Peta-Gaye Manderson instructed by John Graham & Co for the appellant

Ainsworth Campbell for the respondent

14 November 2011 and 29 June 2012

HARRIS JA

[1] I have read in draft the judgment of my sister Phillips JA and agree with her reasoning and conclusion. I have nothing further to add.

PHILLIPS JA

[2] This appeal arises from an unfortunate accident which occurred on 24 December 2002, on the Old Stony Hill main road in the parish of Saint Andrew. The respondent was walking on the main road and was struck on the right shoulder by a motor vehicle owned and negligently driven by the appellant. As a result of this accident, the

respondent fell and injured her left hand, sprained her right knee and incurred expenses. The appellant did not contest liability, but challenged the quantum of damages which ought to be awarded to the respondent.

[3] Damages were duly assessed by Sinclair-Haynes J on 18 April 2008 as follows:

> "1. **GENERAL DAMAGES** in the sum of **$5,648,000.00** being
>
> **(a)** Pain & Suffering Loss of Amenities **- $4,400,000.00**
> **(b)** Future loss of earnings **$1,248,000.00**
>
> with interest on $4,400,000.00 at 6% per annum from 30/6/05 to the 14/6/06 and at 3% per annum from the 15/6/06 to the 18/4/08
>
> 2. **SPECIAL DAMAGES** in the sum of $1,513,829.00 with interest at 6% per annum from the 22/12/02 to the 14/6/06 and at 3% per annum from the 15/6/06 to the 18/4/08.
>
> 3. **COSTS** to be agreed and or taxed."

[4] This is an appeal from the judge's award of damages. In his notice and grounds of appeal dated 24 December 2008, the appellant sought an order that the damages assessed should be reduced on two grounds, namely:-

> (1) that the award for general damages as assessed by the learned trial judge is excessive having regard to the

evidence that the claimant did not follow her doctor's instructions; and

(2) that the sums awarded for loss of earnings and loss of future earnings were excessive in light of the evidence that the claimant failed to take any steps or any reasonable steps to mitigate her loss.

The evidence

[5] The evidence adduced in the assessment of damages, such as I was able to discern from the record of appeal, was fairly straightforward. The court was not provided with a transcript of the hearing below, but the respondent in her witness statement indicated that at the time of the accident she had been employed to one Mrs Rose-Marie Hamilton as a domestic helper earning $4000.00 per week when she worked on a Saturday. She said that after the accident she had suffered such extreme pain that she had been unable to work since then. She gave a detailed history of her medical treatment over the years and the several doctors who had examined and administered to her. She also indicated that she had been told after examination by one Dr Dunn of the Kingston Public Hospital that she had received a fracture of the bones in her palm which "would not be healed". She was also told that an operation would not help her as the tissue that was damaged was between the bones. She indicated that she had been sent to the pain clinic which she had attended on several occasions. On instructions, she had also seen a physiotherapist at least five times. As she was unable

to use her hand, she depended on relatives to wash and cook for her and also to clean her house. She deposed to the substantial costs incurred for her medication. She maintained that she was willing to work, wanted to work, and had it not been for the accident and the injury to her hand she would have expected to continue to work until she was 74 years old. At the trial, she was 56 years old and claimed the loss of not being able to work since the accident and into the future.

[6] Mrs Rose Hamilton, in her witness statement, confirmed that the respondent had been employed to her as a domestic helper for about five years and was paid $4000.00 per week.

[7] Mrs Tanya Ferguson, a 29 year old cashier, indicated in her witness statement that the respondent was her neighbor, who resided about 10 chains away. She said that she had seen the respondent the day after the accident and had observed that her left hand was swollen and that she was in pain. She said that she had to "tidy her, fix up her room and look about dinner for her". Since then, she had been washing, cleaning and cooking for her, for which she had been paid $1000.00 per day. In total, she said, she had been paid approximately $2000.00 to $3000.00 per week by the respondent.

The medical reports

[8] The first report of Dr Skyers given on 31 December 2002, indicated that he had examined the appellant on 24 December 2002, that she had received a posterior hand contusion, which was consistent with having been inflicted by "blunt trauma".

However, he opined that this injury was not likely to be permanent and the respondent was therefore sent home.

[9] In a second report, dated 19 June 2007, Dr Skyers noted that the respondent indicated that she had consistently complained of left wrist and hand weakness over the years, and on the day of the examination she still had stiffness of the finger joints and tenderness to the tendons if in a grasping motion. His impressions were that there was inflammation and pain to the flexor tendons, and finger joint stiffness due to inactivity. In his opinion, the condition was self-perpetuating and a direct result of the injury sustained in 2002. He stated that the respondent might experience some improvement with medication and physiotherapy, but he suspected that she would remain partially disabled in the left hand.

[10] Dr Christopher Rose, consultant orthopaedic surgeon, submitted a report dated 18 December 2006. He had first examined the respondent on 14 November 2006, and gave his report based on that examination, information received from the respondent herself and the report of Dr Rory Dixon, acting consultant orthopaedic surgeon of the Kingston Public Hospital. Dr Rose gave a history of the respondent's impairment, noting that the plain radiographs of the x-rays taken at the Apex Medical Centre had revealed no fractures to her left hand. Further, x-rays taken at the direction of Dr Dixon, also revealed no fractures. He noted Dr Dixon's diagnosis of a reflex sympathetic dystrophy (complex regional pain syndrome) secondary trauma to the left hand. Dr Rose's report also mentioned the complaints of the respondent in respect of her inability to perform simple daily chores such as cooking, washing, bathing, combing her hair and holding

utensils and the fact that her daughter had to assist her. He set out, after examination of her left hand, the limitations he found in respect of the ranges of motion. He found no swelling in the hand, but marked tenderness on palpation between the third and fourth metacarpals, with sensation intact. It was his impression that the respondent had permanent stiffness to the fingers of the left hand with secondary reflex sympathetic dystrophy as a result of the trauma to the left hand sustained in 2002.

[11] As the respondent relied heavily on the prognosis and disability rating found by Dr Rose, I will set the same out for clarity and ease of comprehension. The learned trial judge referred to these findings also.

> "**PROGNOSIS**
>
> Ms Taylor will be significantly impaired as a result of her inability to make a complete fist of the left hand due to marked restriction in ranges of motion of the joints and fingers of the left hand.
>
> **DISABILITY RATING**
>
> The permanent partial percentage disabilities as it relates to the index, middle, ring and little fingers are 30, 45, 59 and 56 respectively. The percentage disabilities of the hand with respect to the index, middle, ring and little finger are six, nine, six, and six percent respectively. The total percentage disability of the hand is twenty-seven percent which is equivalent to twenty-four percent of the upper extremity which is equivalent to fourteen percent of the whole person. This is in accordance with the American Medical Association, Guides to the Evaluation of Permanent Impairment, Fifth Edition."

[12] On 12 July 2007, Dr Rose gave a short addendum to his earlier report which has also been very instructive in respect of the damages awarded. I will set out the same also for ease of reference. It states as follows:-

> "Ms Taylor, as a result of the reflex sympathetic dystrophy which affected her left hand, would have been unable to work as a household help since the date of injury until the present time. Her inability to make a complete fist due to the permanent stiffness of the fingers of the left hand will permanently limit her ability to use her left hand to work (eg household chores)."

The decision of Sinclair-Haynes J

[13] The learned trial judge referred to certain aspects of the viva voce evidence. She stated that the respondent's evidence was that her hand was useless, and affected her ability to sleep at nights due to the severe pain radiating from her hand to her shoulder. She experienced pain, cramping, and swelling to the hand when it was held down. The pain, she said, was lessened when the arm was held or strapped up and with the use of pain killers. The learned trial judge further noted that it was the respondent's evidence that she sometimes used her right hand to hold up her injured hand or she sometimes wore a sling to do that. The respondent stated that she was forced to discontinue receiving physiotherapy, "because of the unbearable and excruciating pain she experienced as a result". The learned trial judge recorded that it was the respondent's evidence that "she is unable to work because she can no longer use her left hand and her job requires her to use both her hands".

[14] The learned judge assessed the respondent's evidence in this way. She found that there was no evidence that the respondent had held her hand down for protracted periods; however, the pain was more severe when she did that. The judge also found that the respondent did not wear the sling all the time, but the doctor had not advised that she ought to do that, nor had he instructed the use of a particular sling. In fact, the learned judge acknowledged that the respondent had used a piece of calico as a sling. The judge therefore concluded that if the respondent had used her right hand to hold up the left arm instead of using the sling, that was reasonable as both eased the pain, and the respondent should not be penalized because "embarrassment caused her to remove the sling occasionally".

[15] The learned judge also found that the respondent had discontinued the physiotherapy treatment as it caused her excruciating pain, and there was no evidence that subjecting herself to "such tortuous pain" would ultimately have ameliorated the same.

[16] With regard to the issue of the respondent's inability to work, the learned judge firstly recounted the evidence of the respondent that she commenced working at the age of 20 years, as a domestic helper, having left school at 16 years and thereafter had only attended extra lessons. The respondent had said that she was not brilliant, needed both hands to do the domestic work, which she had done all her life, or for other similar manual work, but was not qualified to do work which required other qualifications. The learned trial judge referred to the respondent's evidence stating that as she was unable to lift loads she was unable to engage in "buying and selling" and

that her children could not assist her financially and also support their children. The judge found that the respondent was a credible witness and in the circumstances it would have been unreasonable for the respondent to expect her children to abandon their jobs and to be available when she needed them to lift loads for her.

[17] After an analysis of the evidence and the cases submitted to her, the learned trial judge made an award in respect of general damages for pain and suffering and loss of amenities, for future loss of earnings, for future help, and in respect of special damages, for loss of income, all with interest respectively.

The submissions on appeal

For the appellant

Ground of appeal one

[18] Counsel submitted that the learned trial judge had referred to three cases when assessing the amount to be awarded for general damages for pain and suffering and loss of amenities, but had placed particular reliance on **Thomas Crandall v Jamaica Folly Resorts Ltd** Suit No. CL 1988, delivered 25 June 1998 which case, she argued, was not appropriate as the respondent in the instant case had not required surgery, nor had experienced a heart attack as a result of the injuries received or treatment administered in connection therewith. Counsel submitted that the other cases referred to were a better guide and the case of **Roseland Richards v K's Roofing Co Ltd and Abe Kawass** Claim No HCV 1010/2003, delivered 12 May 2006 was even more useful in the circumstances. Counsel contended that the award for pain and suffering

should therefore be reduced to $1,500,000.00, and should be further reduced to $1,050,000.00 as the respondent failed to mitigate her loss by following her doctor's instructions to wear her hand in a sling and to attend her physiotherapy sessions.

[19] Counsel complained about the respondent's resistance to following the doctor's instructions, in that, in spite of feeling pain in her hand when she held it down, she only held it up with her other hand or wore a sling "sometimes". The respondent's explanation was because she was embarrassed and "tired of answering questions" as to why her hand was in a sling. This, counsel submitted, was not a sufficient and acceptable explanation in the circumstances. Additionally, as she complained that she had more pain after the physiotherapy sessions, and therefore stopped attending the same, she was asked in cross-examination if she had told the doctor of her decision to stop attending the sessions, and her response was, "I explain and tell him I am not going back." She also stated, "….Three (3) times I go, didn't go the fourth time." Counsel submitted that she made the decision not to return. She did not give the physiotherapist enough opportunity to achieve success in respect of her pain management and or her general recovery. Having taken the decision unilaterally to discontinue the sessions, counsel argued that any amount ordered for compensation for pain and suffering should be reduced accordingly.

[20] Counsel submitted therefore that the amount awarded by the learned trial judge was excessive in comparison with other awards for similar injuries, and additionally, the respondent ought not to be compensated for the pain and suffering which she could

have avoided had she acted reasonably in mitigating her loss by trying to alleviate her pain and suffering.

Ground of appeal two

[21] Counsel for the appellant challenged the learned trial judge's award in respect of loss of income and future loss of earnings on the main basis that the respondent had admittedly made no effort to obtain alternative employment since receiving injury to her left hand, that is, over a period of five years. Counsel contended that there was no evidence that the respondent had been dismissed from her employment due to her injury, in that she could no longer perform her duties, or that she could not have obtained a different type of work with her former employer. She had not tried to gain employment from her circle of friends or acquaintances nor pursue another line of work such as that of a security guard or buying and selling goods. Counsel referred to the respondent's evidence that she was "not bright and brilliant" and that her work as a domestic helper, which was how she had always been deployed, had sent her children to school. However, counsel submitted, the respondent still had the use of her dominant hand as she was right handed. Additionally, the medical certificate did not say that she could not work at all. Nonetheless, the respondent had given evidence in cross–examination that she had never seen a one-handed person working. This encouraged counsel to submit that the respondent was clearly of the view that without the full use of her left hand she was unable to work, and therefore was prevented from seeking alternative employment. Counsel also submitted that on a perusal of the

reasons for judgment, the learned judge appeared to suggest that the respondent was not under any duty to mitigate her loss.

[22] For the above reasons, counsel submitted that the learned judge should not have awarded the sums that she did for loss of income and loss of future earnings, and the sums should be discounted, as the losses claimed could have been avoided had the respondent acted reasonably. Counsel submitted that the appeal should be allowed and the following sums substituted therefore:

(i) Pain and suffering and loss of amenities	$1,050,000.00
(ii) Loss of future earnings	$624,000.00
(iii) Loss of income	$670,000.00

For the respondent

Ground of appeal one

[23] Counsel went painstakingly through the injuries suffered and treatment given to the plaintiff in the **Thomas Crandall** case to support the submission that that case was the most appropriate, in all the circumstances, and had been so declared by way of consensus in the court below by the learned judge and both counsel for the parties. The award therefore, counsel argued, by the learned judge for pain and suffering, using the **Thomas Crandall** case as a guide, was correct and the learned judge could not be faulted in her reasoning. Counsel referred to the dictum in this court in the **Thomas**

Crandall case endorsing the wisdom of Lord Denning in **Ward v James** [1965] 1 All ER 563 at 573 where he stated:

> "[For] grave injuries, at any rate in those cases where a man is greatly reduced in his activities, he is deprived of much that makes life worthwhile. No money can compensate for the loss. Yet compensation has to be given in money. The problem is insoluble. To meet it, the judges have evolved a conventional measure. They go by their experience in comparable cases."

[24] It was counsel's contention that in the respondent's case she had suffered 27% permanent disability of the left hand, 24% of the upper extremity and 14% of the whole person as against 20% permanent disability in the function of the plaintiff's left upper limb in the **Thomas Crandall** case. Additionally, he submitted, the medical reports tendered on behalf of the respondent supported the position that these disabilities would result in continuous pain. In any event, he submitted further, this court ought not to interfere with the damages awarded unless the learned trial judge had proceeded on some wrong principle of law, and had awarded damages which were very high, which he contended was not so in the instant case. With regard to the issue of mitigation, counsel submitted that until the assessment of damages in the instant case, the respondent was simply a "woman in pain", and pain was a very subjective matter, which the trial judge had accepted.

Ground of appeal two

[25] With regard to the loss of future earnings, counsel indicated that there was credible and acceptable evidence that the respondent had been earning $4,000.00 per

week at the time of the accident, and that by way of comparison with several other cases, the use of the multiplier of six was reasonable. By way of mitigation, counsel submitted that Dr Rose had said that the respondent was unable to do any domestic work from the time of the accident and into the future, and she had been a domestic helper for over 30 years. The respondent, he said, had been in steady employment for five years and it was not too speculative to assume that her monthly stipend may have increased over the years. The weekly amount of $4,000.00, therefore, counsel maintained, had already been discounted. Additionally, it would have been very difficult for the respondent to obtain another job with the use of only one hand. She resided, he said, in rustic country, so it would have been even more difficult for her to have obtained a job as a messenger.

[26] With regard to the respondent's loss of income, counsel maintained that the court having been persuaded that "the respondent had not worked and or earned since she was injured, awarded the respondent the amount lost between injury and trial and interest on that sum". Counsel took the view that the learned judge had set out her reasons for the award, which were "plausible and logical" and "just, equitable and reasonable in all respects". The appeal, he stated forcefully, should therefore be dismissed.

Discussion and Analysis

Ground of Appeal one

[27] The principles governing an appellate court in its review of damages awarded by a lower court are well established. They were stated clearly by Greer LJ in **Flint v Lovell** [1935] 1 KB 354 at page 360 as follows:

> "... I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum.
>
> To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled."

These principles have been endorsed by this court in **Godfrey McLean v The Attorney General** SCCA No 43/1998, delivered 3 June 1999, and later in **Stephen Clarke v Olga James-Reid** SCCA No 119/2007, delivered 16 May 2008. In **Stephen Clarke,** Harrison JA, in delivering the judgment of the court stated the approach which ought to be adopted:

> "We commence with the presumption that the decision on quantum made by the trial judge is a correct one. For the Appellate Court to vary the assessment of the trial judge it must be satisfied that the judge made a 'wholly erroneous estimate of the damage'. This means that the damage has varied too widely from the maximum or minimum figures

> awarded in similar cases by the Courts and therefore the Court of Appeal must intervene to make the required adjustment to achieve a reasonable level of uniformity. The exercise of looking at decided cases with the necessary adjustments, having regard to inflation and any special features of the injury or other assessable factors of the particular case, is directed at achieving uniformity."

However, in **Attorney General v Derrick Pinnock** SCCA No 93/2004 delivered 10 November 2006, Panton JA (as he then was) also made it clear that:

> "….it goes without saying that the Court of Appeal, while giving due regard and respect to awards made by the judges of the Supreme Court, is not bound by such awards or their perceived pattern. The important point to be noted is that an award will not be disturbed by this court unless it is either inordinately high or inordinately low, or there is a breach of some other principle of law."

[28] As indicated previously, the learned judge canvassed the cases submitted to her by counsel. These were:

(i) **Trevor Clarke v Partner Foods Ltd and Marlon Scotland**, Suit No CL 1989/C 256, delivered 12 June 2000;

(ii) **Michael Jolly v Jones Paper Co Ltd and Christopher Holness**, Suit No CL 1996 J 014, delivered 26 November 1998;

(iii) **Roseland Richards v K's Roofing Co Ltd and Abe Kawass**; and

(iv) **Thomas Crandall** case.

On the basis of a comprehensive and detailed comparison of the injuries received, and the permanent partial disability (PPD) suffered in each case, as against those set out

on behalf of the respondent, she decided, having taken into consideration that the respondent had "unilaterally discontinued physiotherapy which might have diminished her disability", that an award of $4,400,000.00 for general damages in respect of pain and suffering and loss of amenities was reasonable. She considered it a weighty factor that the respondent still continued to experience pain. In fact she referred to the dictum of Lord Pearce in **West and Sons Ltd v Shepherd** [1964] AC 326, which she said was cited with approval by Cockburn CJ in **Phillips v London and South Western Railway** [1874-80] All ER (Rep) 176 that "past and prospective pain and discomfort increase the assessment". She also referred to the dictum of Smith JA in **Dalton Wilson v Raymond Reid** SCCA No 14/2005, delivered 20 December 2007 which states:

> "In my view there can be no doubt that this was an exceptionally painful experience for the respondent. The immediate post accident period was one of extreme pain, frustration and immobility. The learned judge correctly took into consideration these features. The learned judge was entitled to take account of the consequential difficulties and disabilities in making her award."

[29] In spite of the submissions on behalf of the respondent that the court should have awarded a lump sum for handicap on the labour market instead of an award for loss of future earnings, the learned trial judge made an award on the latter basis using a multiplier of six, and although vigorously contested in the court below that there should be no award in respect of future help, an award was also made using the same multiplier. (This latter award for future help was not contested on appeal.)

[30] The above four cases submitted to the learned judge by counsel, appear in the main, to be the relevant cases for consideration in this matter. I will deal with each case separately.

(a) **Trevor Clarke v Partner Foods Ltd and Marlon Scotland**: The plaintiff in this matter was a policeman, 26 years old, who was right handed and was injured in a motor vehicle accident on 26 February 1999. His damages were assessed on 12 June 2000. He sustained bruises to his ankle, right knee and right shoulder; pain and swelling of his right index finger; open injury to the right index finger and a compound fracture of the right index finger. He had to undergo two surgical procedures in respect of the right index finger as the fracture did not heal after the first procedure. His residual injuries, assessed when he had reached maximum medical recovery, indicated that he suffered from a PPD of 25% of the function of the right hand or 4% of the whole body. His index finger was his trigger finger and his use of a firearm was therefore affected. The award for general damages (pain and suffering and loss of amenities), made by consent, was $565,000.00, in 2000. At the time of the respondent's assessment that award would value $1,225,556.00.

Counsel for the appellant submitted that this case was an appropriate guide in respect of the instant case. The learned judge's comment was that although the respondent had not been subjected to two medical

procedures, she was still experiencing pain, and her PPD had been diagnosed at a higher rate.

(b) **Michael Jolly v Jones Paper Co Ltd and Christopher Holness**: The plaintiff in this matter was a young right–handed sideman, who was injured when his employer's truck that he was travelling in overturned. His specific age was unknown. He received lacerations along the dorsal ulnar aspect of the forearm and hand; severed extensor tendons of the right middle, ring and little fingers at their musculo-tendinous junction. He underwent surgery to repair the extensor tendons. Subsequent thereto, a volar plaster cast was applied. There was marked stiffness of the metacarpophalangeal (MCP) joints of the middle, ring and little fingers. Dorsal capsulotomies were performed on these fingers. He started a programme of physical therapy but could not continue the same due to financial constraints. He complained of difficulty using a knife in the right hand, and with writing, and of having pains at nights after a day's work. His PPD was assessed, as it related to the stiffness in the MCP joints of the three fingers, as 12% impairment of the hand, which translated to 11% of the upper extremity and 7% of the whole person. He received an award of $800,000.00 which was valued at $1,957,143.00 at the time of trial.

Counsel for the appellant submitted that this case was also a good guide in respect of the injuries sustained in the instant case. The learned judge's

comparative assessment was that while Mr Jolly retained some use of his hand, the respondent was unable to use her hand. In addition, his PPD was significantly lower than that of the respondent's.

(c) **Roseland Richards v K's Roofing Co Ltd and Abe Kawass**: The plaintiff, a welder, was 19 years old at the time of the incident on 1 October 2002. His injuries occurred as he was passing a zinc machine on his employer's property. The gears of the machine were uncovered and his hand was caught in the chest-level gear. As a result he suffered a partial amputation of the second, third, and fourth right fingers. He was hospitalized for two weeks, thereafter returning daily for dressing for a month. He received physiotherapy, orthopaedic and plastic surgery treatment, and was still attending the plastic surgery clinic up to 2004. He complained of being unable to weld after the incident, and he was assessed as having a 19% disability of the whole person, this being 35% impairment of the right hand. The judge relied on two cases to arrive at her award, namely **Mark Scott v Jamaica Pre-Pack Ltd** CL 1992/S279, in which a 19 year old machine operator suffered amputation of his right index finger with resulting disability of 12% of the whole person, and was awarded an amount which valued $555,512.79, in 2006, when the damages for Richards were ordered by the court. She also relied on **Icilda Lammie v George Leslie** CL 1984/L098 where Miss Lammie lost two fingers and was awarded an amount which valued $658,432.00 in

2006. The judge considered an award to Mr Richards of $750.000.00 for the partial amputation of his three fingers as being appropriate. This would have equated to $909,185.00 in April 2008, when the damages in the instant case were assessed.

Counsel for the appellant submitted that this case was also an appropriate guide for the instant case. The learned trial judge made no comment on this case.

(d) **Thomas Crandall** case: The plaintiff was an obese tourist, weighing 250lbs, who was 56 years old at the time of the accident and 69 years old at the trial. He was right–handed. He was injured when a chair on which he was sitting collapsed causing him to be violently thrown to the floor. He suffered severe pain and an acute biceps tendon avulsion from the left radius. He sustained swelling and discoloration from bleeding and tenderness along the course where the biceps tendon would normally run. There was distinct weakness with resisted supination in forearm flexion. The biceps was entirely torn from the radius bone. He had surgery and was hospitalized for five days. Subsequently, he was still unable to normally supinate his left arm; heterotropic ossification developed limiting supination, and further surgery was performed. Subsequent to the second surgery he suffered a myocardial infarction. It was diagnosed that the surgery was a substantial contributing factor to the heart attack, bearing in mind the fact that the plaintiff was obese, hypertensive, and

had a history of gout and radiation exposure for a thyroid condition. He was treated with radiation to prevent recurrence of ossification and had physical therapy to increase mobility. He continued to have persistent restriction of rotation and persistent limitation based on rotation. At the trial the plaintiff's arm had not improved, the elbow showed signs of calcification and he was unable to rotate his wrist, which conditions were inhibitive of full user of the arm for life. His PPD was assessed at 20% of the function of the left upper limb. He was awarded $1,750,000.00 with interest at 3%. This sum was confirmed on appeal. The award valued $4,391,468.00 at the time of trial, in April 2008.

Counsel for the appellant submitted that this case was not an appropriate case to be used as a guide in respect of the award to be made in the instant case, "in light of the difference in the circumstances and injuries". The learned trial judge specifically referred to the fact that the Court of Appeal had noted that the injury to Mr Crandall was painful and that the Court of Appeal had also noted its consequent limitation on his enjoyment of life, the period over which the effects of the injury lasted, and the heart attack brought on by the surgery. The learned judge once again commented on the fact that the respondent had suffered excruciating pain and still continued to suffer pain. So, even though, she added, Mr Crandall had suffered a cardiac event, which the respondent had not, and had

undergone two surgeries, which the respondent also had not, she was very influenced by the fact that the respondent continued to suffer pain.

[31] In my view, although one must pay attention to the specific injuries suffered and treatment administered in each case, nonetheless, the percentage PPD is a good guide for making an award and for making comparisons in order to arrive at some uniformity in awards. In this case, the expert opinion in respect of the percentage PPD suffered by the respondent was provided by Dr Rose, a very experienced consultant orthopaedic surgeon, whose statement with regard to the respondent's percentage PPD and any reference to her inability to use her left hand was accepted by the learned trial judge.

[32] On a comparison of the final diagnoses of the claimants in the cases referred to above, the following emerges:

- Clarke suffered a PPD of 4% of the whole person with an award valued at $1,225,556.00 in April 2008.
- Jolly suffered a PPD of 7% of the whole person with an award valued at $1,957,143.00 in April 2008.
- Richards suffered a PPD of 19% of the whole person with an award valued at $909,185.00 in April 2008.
- Crandall suffered a PPD of 20% of the function of the left upper limb with an award valued at $4,391.468.00 in April 2008.

- The respondent suffered a PPD of 14% of the whole person with an award of $4,400,000.00 given in April 2008.

[33] It is clear that the PPD suffered by the respondent was over three times of that suffered by one claimant, twice of that suffered by another and was one third of that suffered in yet another case in respect of the portion of the body affected. The award in **Roseland Richards v K's Roofing Co Ltd and Abe Kawass**, I must say, appears to be an aberration, as the earlier cases were not brought to the attention of the court and therefore the award made does appear to be out of the range of awards in respect of similar injuries and could be said to have been made per incuriam. Additionally, there was no mention of continuous pain or an inability to use the hand, although the claimant had had partial amputation of three fingers of the right hand and was diagnosed as having 35% impairment of the said hand. The learned judge in the instant case set out her analysis of the cases and it cannot be said in the circumstances that her award was excessive or inordinately high, or that she acted on a wrong principle of law. It is difficult to achieve uniformity, but judges must give an award in money and do the best that they can in all the circumstances. As indicated the severity of the pain that the respondent stated that she had had to bear over an extended period, and which was continuing, weighed heavily with the trial judge. I find that there is no good reason to interfere with the amount of the award made by the judge in respect of pain and suffering and loss of amenities. In my view, the first limb of ground one must fail.

[34] With regard to the award for general damages being excessive on the basis of the failure of the respondent to follow instructions, the law is clear, and the basic rule

of mitigation is that a plaintiff may not recover losses which he should reasonably have avoided. In fact, the principles relating to mitigation of damages have been set out clearly and applied in our courts. Langrin J (as he then was) in **Pearl Smith v Conrad Graham and Lois Graham** (1996) 33 JLR 189 said:

> "It is a general principle that a person who has been injured by the acts of another party must take reasonable steps to mitigate his loss and cannot recover for losses which he could have avoided but has failed through unreasonable inaction or action to avoid. The person who has suffered the loss therefore does not have to take any step which a reasonable and prudent man would not take in the course of his business."

[35] However, the duty to mitigate involves taking reasonable steps to avoid one's losses, and in **Erlington Nielssen and Lovetta Nielssen v Ridgeway Development Ltd** (1998) 35 JLR 675, Rattray P stated:

> "…In any event in the face of a dispute existing up to the time of litigation and indeed up to the appeal, between the plaintiff and the respondent as to the existence of structural defects which the respondent refused to remedy and which the learned trial judge found did in fact exist, it could not be reasonably expected that the plaintiff would proceed on the basis of a duty to mitigate to employ other persons to remedy these defects. A failure to mitigate could not harness the plaintiffs with any liability to the defendant/respondent."

[36] With regard to personal injury received and the effect of not following medical advice given, in **McAuley v London Transport Executive** [1957] 2 Lloyd's Rep 501, it was held that a plaintiff who had been injured in an accident for which the defendants were liable, and who had been advised by a senior surgeon attached to a

national hospital, although retained and instructed by the defendants in the case, to undergo an operation which could have returned him to his previous earning capacity, but which he refused to undergo, was only able to recover his loss of earnings up to the time when he would have recovered if he had undergone the operation. The court found that his refusal to do so was unreasonable and therefore rejected his claim for continued loss of earnings.

[37] In **Marcroft v Scruttons Ltd** [1954] Vol 1 Lloyd's Rep 395, a plaintiff, though insignificantly physically injured as a result of falling into the ship's hold due to the defendant's negligence, suffered severe anxiety neurosis following shock. His own doctors advised him to undergo treatment at a mental health hospital, which, if he had attended, could have assisted at an early stage. However, he refused to do so and full recovery was less hopeful at the trial. Lord Denning, although being sympathetic to the plaintiff's fear of mental hospitals, stated that the matter must be viewed objectively and in the result, the court found that he had been unreasonable for refusing treatment. Lord Denning said, "We should do great harm if we allowed him to go on receiving compensation for the rest of his life because of his refusal to accept medical treatment."

[38] It is important to note too that it is settled law that the onus lies on the negligent defendant to show that the claimant ought, on the facts, reasonably to have pursued some course of action, which he did not, in order to mitigate his loss. Although the claimant does not have to take the most "efficacious" course, the defendant must put forward a "concrete case" to demonstrate what the claimant might reasonably have

done but failed to do. The failure to mitigate does not of course bar any claim at all for damages under the particular head in question (per Laws LJ in **Lee James Leonard Samuels, TG Motors Ltd v Michael Benning** [2002] EWCA Civ 858). The question of mitigation of damages is, however, a question of fact not law (see **Payzu v Saunders** [1919] 2 KB 581).

[39] In the instant case, the appellant claimed that the duty to mitigate and to thereby avoid increased compensation for continuous pain, required the respondent to have used the sling always, and continued the physiotherapy sessions. In my view the rationale given by the learned trial judge in her judgment is reasonable. If there was no evidence, and there appears that there was none, that the respondent had been directed by her doctors or any medical personnel that she must use a sling and a specific type of sling all the time, then if she used her right hand to hold up the left arm, and used a sling 'sometimes', all of which in an effort to ease the pain, that would seem a reasonable approach to be taken by the respondent and to have been accepted by the judge and I would not interfere.

[40] This also applies to the physiotherapy sessions. If there was no evidence that the sessions, in spite of the respondent enduring obvious pain and extreme discomfort, would have improved her condition, then having attended four or five sessions, the respondent may well have achieved her best state of recovery through that avenue. Bearing in mind that the question of mitigation is one of fact and not law, it seems to me, and the learned judge so found, that the respondent had taken all reasonable steps

in the circumstances to avoid any further pain and suffering. In my view, the second limb of ground one has no merit.

Ground of Appeal two

[41] There were no submissions put before the court that a lump sum for handicap on the labour market ought to have been awarded in lieu of an award for loss of future earnings, but counsel for the appellant argued with much force that the learned judge should have used a multiplier of three, instead of a multiplier of six. However, the learned judge in her reasons referred to the case of **Oswald Hyde** CL H 055/1996 in respect of a 61 year old retired spray man, where the multiplier used was five, and **Dalton Wilson v Raymond Reid** where she indicated that the Court of Appeal had not disturbed the use of a multiplier of seven for a 49 year old security guard/ electrician. In the circumstances, the use of a multiplier of six in respect of a domestic helper, who was 56 years old at trial, seems more than reasonable and I would not interfere with that decision.

[42] The appellant's submissions challenging the fact that the respondent had not worked since the accident, as she was a household helper who could no longer do domestic work, were far more compelling. Dr Rose's opinion was that due to the complex regional pain syndrome, the respondent had been unable to work as a household helper since the date of the injury and, as she was unable to make a complete fist, she would be unable to do household chores into the future. The question which arises is whether there was any other work which the respondent

should have been able to do. Was there any evidence that there was other work which was available to her? The burden is on the appellant to show that the respondent ought to have pursued other employment. The question then, must also be: was there proof that the respondent had failed to act reasonably to avoid further loss?

[43] It appears to me from the evidence that although certain questions were put to the respondent that she could have made attempts to obtain alternative employment, such as a security guard, by buying and selling goods and doing other work through her friends and acquaintances and also through her former employer, there was no specific express evidence to that effect in this case, and the burden was on the appellant to show that the respondent had failed to mitigate her loss.

[44] The learned judge found that it was not reasonable for the respondent to expect her family to abandon their work so as to be able to lift loads for her. That, in my view seems to be a reasonable conclusion. The respondent was not a qualified person, and she was 56 years old. There was no evidence that any particular organization was prepared to take on as a new employee someone with her disability, at that age, endeavouring to do a different type of work with which she was entirely unfamiliar. There was no evidence that Mrs Hamilton had any other work for her. One cannot speculate that Mrs Hamilton had other work in her household to give a former domestic helper, now disabled, to perform. She had been employed as a domestic helper. Dr Rose said that she could not do that work any more. It was suggested in oral submissions that perhaps she could have obtained work as a messenger, but there was no evidence as to her literacy or ability to do any such clerical work. In my view, the

award made by the learned trial judge of $4,000.00 per week, using a multiplier of six for future loss of earnings and the said multiplicand to assess the loss of income since the accident was reasonable in the circumstances. I accept the fact that once an injured person does not do work if he/she can, and it is available, that would fall within failing to take reasonable steps to avoid further loss, and he/she should either not be compensated for such loss that could have been avoided, or whatever compensation could have been awarded should be reduced for the failure to act in a manner which could have avoided such loss. But in the instant case, I do not think that the appellant has satisfied the burden placed on him to show that the respondent has done that. In my opinion, the awards for loss of income and for loss of future earnings are reasonable and I would not disturb them. This ground must therefore fail.

Conclusion

[45] In the light of all of the above, I would dismiss the appeal with costs to the respondent, to be agreed or taxed.

HIBBERT JA (AG)

[46] I too have read the draft judgment of Phillips JA and agree with her reasoning and conclusion.

HARRIS JA

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.