

Ms. Hunnigan sought to make a claim on her insurance policy and requested a statement of disability from Dr. McDowell. She was not satisfied as to his report and sought a second opinion. She was examined by Dr. Denton Barnes who presented an alternative reason for her post-surgery symptoms. She is convinced that her current medical condition is due to the negligence of Dr. McDowell.

Issues

- [2]** a) Whether Dr. McDowell owed a duty of care to Ms. Hunnigan.
- b) Whether there was a breach of that duty.

Evidence of Ms. Hunnigan

- [3]** Ms. Hunnigan gave a witness statement on the 16th of June 2021. She outlined the circumstances which led her to seek medical assistance at the St. Ann's Bay Hospital. It was her evidence that on the 12th of May 2014 she was involved in a slip and fall accident. As a result, she suffered from bilateral fractures of the radius and ulnar in both arms. On the recommendation of Dr. Derrick McDowell and Dr. Ivor O'Connor (both Orthopaedic Surgeons at the hospital) she underwent surgery to repair the fractures.
- [4]** The surgery was performed by Dr. McDowell on the 21st of May 2014. Subsequent to the surgery Ms. Hunnigan noticed that she had a loss of sensation in her right hand. She was unable to straighten her fingers or to grip objects. She was also unable to bend her right hand and she experienced weakness and pain in both arms with the pain in the right arm being worse than that in the left. These symptoms arose following the surgery and continued even after she attended recommended physiotherapy sessions.
- [5]** Ms. Hunnigan avers that she advised Dr. McDowell of her concerns during her regular post-surgery visits. She indicates that as a result of her continued complaints Dr. McDowell recommended a second surgery, and this was performed on the 14th of July 2014. In the months following that surgery her symptoms, as

previously described, worsened and she experienced a further reduction in the sensation in her fingers and she suffered from increased pain, weakness and difficulty with the movement of her hand and wrist, which rendered her right hand almost useless.

- [6] Ms. Hunnigan wished to make a claim on her insurance policy but she required an Attending Physician's Statement of Disability. As Dr. McDowell was her attending physician at the time, she requested that he complete the form. Dr. McDowell indicated on the form that she had suffered a 35% disability of the right upper limb and a 20% disability of the left upper limb.
- [7] She was not satisfied with that assessment and she sought a second opinion from Dr. Denton Barnes. The medical report of Dr. Denton Barnes was admitted and entered into evidence as Exhibit 1.
- [8] She contends that the medical report of Dr. Barnes concluded that she suffered nerve damage and the malunion of the fractures in her right arm due to poor reduction and fixation. Based on his report she was convinced that the present condition of her arms was due to or contributed to by the negligence of Dr. McDowell.
- [9] She also avers that Dr. McDowell did not explain to her prior to the surgery that a possible consequence of the surgery was damage to the median nerve. As a result, she was not afforded the opportunity to make an informed decision as to whether the proposed surgery was the best treatment for her injuries.

Analysis and Discussion

Whether Dr. McDowell owed a duty of care to Ms. Hunnigan.

- [10] It is the accepted evidence before this court that Dr. McDowell was the attending physician at the time the two surgeries were performed on Ms. Hunnigan. There is also no dispute that he was employed to the St. Ann's Bay Hospital and was therefore a servant of the Crown.

[11] Mr. Maddan conceded that Dr. McDowell owed Ms. Hunnigan a duty of care. This he said was not in dispute. In fact, it is considered to be a trite principle of law which was applied in the case of **Howard Genas v. The Attorney General of Jamaica, The Black River Hospital Board of Management and Dr. K. D. Mshana**¹ . The judgment of Anderson, J quoted the English case of **Sidaway v. Governors of Bethlem Royal Hospital and ors.**² which held as follows:

“the doctor’s relationship with his patient which gives rise to the normal duty of care to exercise his skill and judgment, to improve the patients’ health in any particular respect in which the patient has sought his aid, has hitherto been treated as a single comprehensive duty covering all the ways in which a doctor is called on to exercise his skill and judgment, in the improvement of the physical and mental condition of the patient, for which his services either as a general practitioner or as a specialist has been engaged.”

[12] Counsel also accepted that an individual who holds himself out as a specialist has a duty to exercise skill and caution in administering treatment to the patient. In the case of the **R. v. Bateman**³ it was stated in this way;

“If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, he owes a duty to that patient to use caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering treatment.”

[13] It is therefore accepted as a fact, that Dr. McDowell owed a duty of care to Ms. Hunnigan.

¹ Suit No. C.L. 1996 unreported, delivered October 6, 2006.

² (1985) 1 AC 871

³ (1925) 94 L.J.K.B. 791

Whether there was a breach of that duty

[14] Ms. Hunnigan has the burden of satisfying this court on a balance of probabilities that Dr. McDowell breached his duty of care to her. She has asked the court to find that he did so in two ways. Firstly, she contends that he failed to perform the surgeries in accordance with accepted medical standards and procedures. It is alleged that he was negligent in the use of surgical equipment which resulted in deformity due to poor fixation and reduction of her fractures. Secondly, she states, that he failed to explain to her the possible consequences of the surgery.

[15] In proof of her first contention Ms. Hunnigan relied on the medical report of Dr. Barnes as well as a medical report from Dr. Christopher Rose, which was admitted as Exhibit 3.

[16] There is no evidence from Dr. McDowell. He did not provide a witness statement in this matter and his medical reports and or notes did not form a part of the evidence on behalf of the Defendant. Instead the Defendant tendered and admitted a single medical report of Dr. Warren Blake. The report was admitted into evidence as Exhibit 2.

[17] As this matter depends on the view which is to be taken of expert evidence I am reminded that the evidence of the experts is for the sole purpose of assisting the court in determining the issues in contention. In this case the issue before the court can be summarized in a simple sentence. What is the cause of the current medical condition of Ms. Hunnigan?

Were the surgeries performed in accordance with accepted medical standards and procedures

[18] Dr. Barnes is a Medical Practitioner who practiced Orthopaedics at St. Ann's Bay Hospital from 2002 to September 2013. His report was dated August 10, 2015 and he saw Ms. Hunnigan on the 22nd of May 2015. At the time she reported an inability to grip objects with the right hand, pain in the wrist, numbness in the right

hand, deformity of the fingers of the right hand, pain in the right elbow and pain in the right wrist easy fatigability of the right upper limbs. She reported that she had no other injuries to limbs since having the surgery and that she had undergone a long course of physiotherapy and rehabilitation that did not prove to be successful.

[19] He assessed her as having a bilateral healed fracture, distal radius and ulnar with malunion of both fractures along with neurological injury to the right upper limb suggestive of a global injury which might be a tourniquet palsy or a complete laceration of the right ulnar nerve at the distal aspect of the forearm near the wrist. He recommended that she do a nerve conduction study to ascertain the extent of the nerve injury.

[20] The test was conducted on the 13th of July 2015. The results concluded that there was evidence of a) an entrapment / compression neuropathy of the right median nerve at the wrist b) an ulnar neuropathy at the right wrist and c) a right radial motor neuropathy.

[21] Ms. Hunnigan was advised that she had a neuropathy of all three major nerves in the right upper limb. Dr. Barnes also indicated that the fact that this was present for approximately one (1) year, meant that her ability to regain function in the area supplied by these nerves was limited. He diagnosed her as having 70% impairment in the right dominant hand and 37% impairment in the left hand.

[22] It was also indicated in his report that,

“the most likely cause of a radial nerve neuropathy in the region would be from a tourniquet injury and this would only be revealed if it is known whether or not a tourniquet was inflated on the right arm prior to the surgical procedure. If the tourniquet was inflated and the tourniquet time exceeded two hours, then it is likely there would have been injury to the radial nerve since it is a very sensitive nerve.”

He went further to say,

“this is an injury due to poor use of equipment as this is a surgery related injury. The tourniquet should have been deflated at approximately two hours or the pressure at which the tourniquet inflated should have been monitored so that there would be no chance of a radial neuropathy.”

[23] Dr. Warren Blake held a different view. He has practiced as a consultant in Orthopaedics since 1986 and his report was dated March 19, 2018. At the beginning of the report Dr. Blake indicated that he had not seen the patient and that his report was based on the copies of her medical records from St. Ann’s Bay Hospital, a copy of the pleadings in the matter, a copy of the medical report of Dr. McDowell dated September 10, 2016, a copy of the medical report of Dr. Barnes and copies of the x-rays taken at the St. Ann’s Bay Hospital.

[24] He reported that based on his review of the documents he was able to determine the total tourniquet times. For the left tourniquet the total time was 1 hour and 12 minutes. For the right the total time was 1 hour and 47 minutes.

[25] He opined in answer to questions raised in a letter on behalf of the Defendant that,

“nerve damage because of tourniquet use is a combination of the length of time that the tourniquet is applied and the occluding pressure. It can occur at a time less than the accepted standard if the occluding pressure is grossly excessive. Minimizing the risk is done by keeping the effective pressure and time as low as possible. There is no commonly used clinical method to recognize that damage is occurring...the docket does not reveal that the accepted medical standard was not met. In fact, the docket points to the fact that the time frames were well within the accepted norms.”

[26] Having reviewed the notes from the surgery Dr. Blake stated that it was clear that the acceptable time for the inflation of the tourniquet during the surgery was not exceeded. What he could not speak to from the notes was the occluding pressure. However, he indicated that there is no clinical way to monitor this during the surgery as no such method has yet been developed.

- [27]** It was his opinion that the timing of the onset of her symptoms after surgery is important. He indicated that symptoms due to tourniquet induced neuropathy commences in the immediate post-operative period. Her history as per the notes he observed did not point to any complaints in the post-operative period. It was his opinion that the symptoms developed sometime after she was discharged. Dr. Blake suggested that further investigations should be carried out to determine other possible causes of Ms. Hunnigan's problems. He suggested two possible causes as cervical ribs or reflex sympathetic dystrophy.
- [28]** The final report which was admitted into evidence was that of Dr. Rose. His report was dated February 14, 2022. He is a Consultant Orthopaedic Surgeon with 38 years of experience in orthopaedics. Dr. Rose saw Ms. Hunnigan on the 7th of February 2022 and he had the benefit of examining the following documents:
- a) particulars of claim dated May 26, 2017
 - b) attending physician's statement of disability dated June 2, 2015 provided by Dr. McDowell.
 - c) medical report dated August 10, 2015 provided by Dr. Denton Barnes
 - d) medical report dated March 19, 2018 provided by Dr. Warren Blake.
- [29]** It is accepted that the ulnar nerve palsy in the right hand developed post internal fixation of the right distal radius. The disparity he found was in relation to the date when the symptoms of this began. Dr. Blake's report suggested that this was in December 2014. Ms. Hunnigan and Dr. Barnes indicate that the symptoms started as early as June or July 2014.
- [30]** Dr. Rose also examined the possible causes suggested by Dr. Blake (cervical rib and Complex Regional Pain Syndrome) and dismissed them. He indicated that Ms. Hunnigan does not fit the diagnosis of Complex Regional Pain Syndrome nor does she fit the criteria for Thoracic Outlet Syndrome.

[31] In the final analysis he found that Ms. Hunnigan suffered from the following:

- a) claw-hand deformity right hand secondary to ulnar nerve injury.
- b) stiffness of all the fingers of the right hand due to loss of active function of the fingers.
- c) malunion of the distal left radius with stiffness of the wrist and fingers.

[32] In respect of the tourniquet he indicated that they should generally remain inflated less than two hours, with most authors suggesting a maximal time of one and a half hour to two hours. He made no other comments on whether there was anything which would cause him to find that Dr. McDowell did not follow accepted medical standards and procedures.

[33] Mr. Haisley has submitted that Dr. Blake's evidence should be rejected as he did not personally examine Ms. Hunnigan. He also argued that since the documents used by Dr. Blake were never presented to the court that the weight to be given to it should be little or none. I cannot agree. Counsel for the Claimant had ample time following the presentation of the report to seek specific disclosure of the medical records in order to determine if there was any discrepancy with the Doctor's report, this was never done. In the circumstances the admission of the Doctor's evidence must be taken in that context. Although the medical records are hearsay he has given an opinion as to the likely cause of symptoms experienced by Ms. Hunnigan.

[34] The fact that he did not physically examine her is something which I take into account. However, the purpose of his evidence was to dispute the theory of the tourniquet injury and as such that would not require a physical examination as much as it would require a review of the records.

[35] I find that the Claimant has not proved on a balance of probabilities that the post-surgery symptoms were as a result of a tourniquet injury. This is for the same reason that I cannot find that Dr. Blake disproved the theory. The medical records did not form a part of the evidence before the court. As such Dr. Blake's evidence

is based entirely on hearsay documents of which the court has not had the benefit of examining.

[36] There is no evidence before this court to suggest that Dr. McDowell did not follow the prescribed medical standards for the maximal time to be used in the inflation of the tourniquet. There is also no evidence to speak to the pressure which was used during the procedure. The evidence of Dr. Blake on this point is also useful. He indicated that there is no instrument to test or measure the pressure during the procedure. This evidence was not contradicted by the evidence of Dr. Barnes or Dr. Rose. In the circumstances therefore the Claimant has failed to prove that Dr. McDowell was negligent in the performance of the surgeries.

[37] Mr. Haisley further submitted that Dr. Barnes made reference to the impact of poor reduction and fixation. It is noted that the report phrased it in this way;

“with regards to the healing of the fracture of the distal radius and ulnar; Ms. Hunnigan’s fracture has healed in an unsatisfactory position with poor reduction and fixation.”

The Doctor did not go further to indicate what was the cause of this. I therefore cannot agree with Counsel that this evidence is sufficient to prove at the requisite standard that Dr. McDowell was negligent in the performance of his duties.

Did Dr. McDowell explain the consequences of the surgery?

[38] The importance of the need to explain the consequences of the surgery was set out in the report of Dr. Barnes. He indicated the following in his prognosis;

“The extent of the dissection will lead to scarring in the region of the incision made for surgical repair. This median nerve injury is therefore not an iatrogenic injury however it is a complication of the surgery and if this was not fully explained prior to the surgical procedure then this would be considered a breach as she did not give informed consent as she did not

know that there is a possibility of median nerve neuropathy post operatively after fixation of a distal radius fracture.”

[39] Neither Dr. Blake nor Dr. Rose spoke to this issue in their reports. As such the evidence in this regard is unchallenged. The evidence of Ms. Hunnigan is also unchallenged. She stated that she was never advised of the consequences of the procedure. She was cross-examined and she denied that Dr. McDowell gave her any such information.

[40] In his submissions on this point Mr. Haisley relied on the case of **Annisia Marshall v. North East Regional Health Authority and the Attorney General**⁴. The judgment was delivered by Phillips JA and at paragraph 86 she said the following:

“In Sidaway v. Board of Governors of the Bethlem Hospital and Others, the court held that the question whether an omission to warn a patient of inherent risks of proposed treatment constituted a breach of a doctor’s care towards his patient was to be determined by the Bolam test. The court also held that the degree of disclosure required for a particular patient was also to be judged primarily on the basis of medical evidence.”

[41] At paragraph 87 she referred to the dicta of Lord Templeman in the judgment at pages 903 – 905;

“...it is for the court to decide, after hearing the doctor’s explanation, whether the doctor has in fact been guilty of a breach of duty with regard to information.

...the doctor is not entitled to make the final decision with regard to treatment which may have disadvantages or dangers. Where the patient’s health and future are at stake, the patient must make the final decision. The

⁴ [2015] JMCA Civ. 56

patient is free to decide whether or not to submit to treatment recommended by the doctor and therefore the doctor impliedly contracts to provide information which is adequate to enable the patient to reach a balanced judgment...The court will award damages against the doctor if the court is satisfied that the doctor blundered and that the patient was deprived of information which was necessary for the purposes ...outlined."

- [42] It is gleaned from the authorities presented that the court must first be satisfied as to whether Dr. McDowell had a duty to explain the consequences of the surgical procedures to Ms. Hunnigan. In light of the unchallenged evidence of Dr. Barnes I can answer that question in the affirmative. Dr. Barnes indicated that the consequences of the surgery ought to have been explained to Ms. Hunnigan as there was a risk of permanent injury.
- [43] There is no explanation before this court by way of evidence from Dr. McDowell indicating the circumstances surrounding the surgery. I find that that the Doctor did not explain the consequences of the procedure to Ms. Hunnigan thereby depriving her of the opportunity to give informed consent to the surgeries.
- [44] There is no dispute that prior to the surgery Ms. Hunnigan did not suffer from nerve damage. The symptoms that resulted in her present prognosis all developed subsequent to the surgical procedures.
- [45] In the circumstances I find as a fact that her present disability is connected to the surgeries performed by Dr. McDowell. His failure to explain the nature and consequences of the surgery to Ms. Hunnigan was negligent and her present medical condition has been exacerbated by the surgical procedures. I therefore find that she is entitled to an award in damages.

Special Damages

- [46] The particulars of special damages were outlined as follows:

a) Cost of consultation with Dr. Denton Barnes - \$10,000

- b) Cost of nerve conduction studies at Neurodiagnostics - \$40,000
- c) Cost of medical report from Dr. Barnes - \$75,000
- d) Cost of required surgery - \$797,500

[47] The evidence of Dr. Barnes is that surgery was recommended to release the median nerve. The report of Dr. Rose which is the most recent report was final as to the fact that no further functional recovery is expected in relation to her right hand. In the circumstances therefore the required surgery is no longer necessary. An award in the sum of \$125,000.00 is made for special damages.

General Damages

[48] The recent medical report of Dr. Rose is instructive as to the final diagnosis and prognosis for Ms. Hunnigan. He indicated his impression as follows:

- a) claw-hand deformity right hand secondary to ulnar nerve injury.
- b) stiffness of all of the fingers of the right hand due to loss of active function of the fingers.
- c) malunion of the distal left radius with stiffness of the wrist and fingers.
- d) total permanent impairment rating of the right upper limb is 40% of the whole person.
- e) total permanent impairment rating of the left upper limb is 19% of the whole person.
- f) The combined total impairment rating is 51% of the whole person.

[49] Mr. Haisley submitted that the court should consider the fact that Ms. Hunnigan's initial injuries were not caused by any act of Dr. McDowell. A reasonable award in damages therefore should set off the difference between the initial injuries and the attendant injuries suffered by her as a result of the negligence of the Doctor.

[50] He referred to two cases, **Maurice Whittingham v. Cecil Brooks**⁵ and **Samuel Durrant v. United Estates Limited**⁶ In the **Whittingham** case the claimant suffered from the following injuries:

- a) severe injuries to right arm;
- b) damage to brachial plexus;
- c) right arm deformed and useless;
- d) paralysis and loss of sensation in right arm; and
- e) permanent disability of 60% of the whole person.

An award of \$1,500,000.00 was made for general damages in April of 2001. When updated using the current Consumer Price Index that award is now \$8,282,403.67

[51] The court was asked to use the case of **Samuel Durrant** as a starting point for an award that could have been made had Ms. Hunnigan's conditions not been exacerbated by the surgeries. In that case the claimant sustained fractures to both his wrists and had to wear a cast. His wrist fractures were healed however he suffered from tenderness at the joints and an inability to make a fist. He lost 20% of movement of his wrists. He was awarded a sum of \$80,000.00 for general damages. That award updates to the sum of \$1,437,611.94.

[52] It was submitted that an award of \$12,000,000 would be appropriate and that the sum of \$1,500,000.00 should be deducted based on Ms. Hunnigan's initial injuries. The sum for general damages therefore would be \$10,500,000.00.

⁵ Harrison's Assessment of Damages 2nd Ed. at pg. 97

⁶ Harrison's Assessment of Damages 1st Ed. at pg. 259

[53] Mr. Maddan relied on the authorities of **Clovis Bryan v. Leonard Hinds**⁷ and **Hugh Mullings v. Constable Cooper and the Attorney General**⁸. In the case of **Clovis Bryan** the claimant had the following injuries:

- a) laceration to right forearm, dorsum of right hand;
- b) fracture of distal end of right radius;
- c) fracture dislocation of elbow;
- d) headaches and pain;
- e) mal-united wrist;
- f) very restricted movement at elbow; and
- g) scarring and disfiguration.

In the case of **Hugh Mullings**, the claimant sustained the following injuries:

- a) left brachial artery injury;
- b) medial ulnar and radial nerve injury to the left arm;
- c) severe soft tissue injury to involving skin, subcutaneous tissue and muscles of the left arm;
- d) fracture of the left humerus;
- e) small gunshot wound to the leg; and
- f) total whole person deficit was assessed at 54%

[54] **Clovis Bryan** was awarded the sum of \$130,000.00 for general damages which updates to \$2,920,118.67. **Hugh Mullings** was awarded the sum of \$1,800,000.00

⁷ Khan's Assessment of Damages Volume 3 at pg. 108

⁸ C.L. 1999/M003 unreported delivered on the 23rd of November 2001

when updated that award today would be in the sum of \$3,610,132.45. An award of \$3,000,000.00 was considered appropriate in the circumstances of this case.

[55] The Court in the determination of damages must seek to compensate the Claimant for the injuries suffered once and for all. An assessment of damages must take into consideration past, present and future loss and must compensate the Claimant in such a way as if the tort had not been committed. The guiding principle is that a court must not seek to rely on precedents but must instead look to former authorities as a guide as to the current range of damages.

[56] I am guided by the principle stated in **Louis Brown v Estella Walker**⁹ where the factors that are to be taken into consideration in assessing general damages were outlined. These factors are:

(i) the extent and nature of the injuries sustained;

(ii) the nature and gravity of the resulting physical disability;

(iii) the pain and suffering endured;

(iv) the duration and effect upon the person's health and

(v) the pain and suffering (including discomfort and inconvenience) which the claimant is likely to suffer after.

[57] I have also considered the case of **Richard Sinclair v Vivolyn Taylor**¹⁰ where Phillips JA, at paragraph 31, noted that;

“although one must pay attention to the specific injuries suffered and treatment administered in each case, nonetheless, the percentage

⁹ (1970) 11 JLR 561

¹⁰ [2012] JMCA Civ. 30

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 there was evidence of a percentage whole person disability.

[58] I take into account the fact that Ms. Hunnigan presented to the St. Ann’s Bay Hospital with injuries she had sustained from a slip and fall accident. I also take into account that the nerve damage as a result of the surgical procedures resulted in her being unable to use her right arm in the way that she normally would. The main injury sustained by her was the claw-hand deformity of the right hand. I find that the most relevant authority was that of **Hugh Mullings**. The injuries sustained by the claimant in that case were far more serious than those suffered by Ms. Hunnigan. However, the whole person permanent partial disability is in line with the assessment in this case. In the circumstances I am of the view that a reasonable sum for general damages should be \$4,000,000.00.

Order:

1. General Damages is awarded in the sum of \$4,000,000.00 with interest at 3% from the 27th of May 2016 to the 22nd of July 2022.
2. Special Damages in the sum of \$125,000.00 from the 21st of May 2014 to the 22nd of July 2022.
3. Costs to the Claimant to be agreed or taxed.