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JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 1950 OF 2004

BETWEEN	CASWELL RODNEY	CLAIMANT
AND	AUDREY BINNIE-PALMER	1ST DEFENDANT
AND	NORMAN SPAULDING	2ND DEFENDANT

Mr. Charles Campbell for the Claimant. Miss Debbie-Ann Robinson for the 1st Defendant.

Heard: 25th February and 3rd March 2005.

Mangatal J:

1. This case concerns an assessment of damages against the First Defendant. The First Defendant has conceded liability to the Claimant in respect of a motor vehicle accident which occurred on the 26th March 2003 involving the First Defendant's motor vehicle and the Claimant's motor vehicle. The Claimant sustained injury as a result of the accident.

2. Special damages were agreed in the sum of $79,813.00. The main area of disagreement was as to the appropriate award for general damages in respect of pain and suffering and loss of amenities. The pivotal issue was whether the Claimant had failed in his duty to mitigate, or, in other words, whether the Claimant had taken all reasonable steps to mitigate the loss to himself consequent on the First Defendant's wrongdoing.

3. The Claimant's witness statement dated 16th February 2005 stood as his examination in chief and he was cross-examined briefly. Two medical reports were admitted in evidence by consent. Exhibit 1 was the medical report from Kingston Public

Hospital "K.P.H" 's Department of Orthopaedics dated March 29 2004. Exhibit 2 was the medical report from Dr. Emran Ali, Consultant Orthopaedic Surgeon dated July 19 2004.

4. Since the issues of contention centred on the contents of these medical reports, I have set out the relevant parts of these reports extensively.

5. The medical report from K.P.H., which was under the signature of Resident Dr. Akil Baker, refers to the Claimant as being aged forty-one, and states:

Physical examination and x-rays done on March 28 2003 confirmed the diagnosis(of a fracture to the medial malleolus of the right ankle). *Mr. Rodney was well assessed as being a candidate for surgical repair of the fracture and was placed in plaster as temporary management. The patient however declined surgery and as such was managed definitively in plaster for eight weeks with instructions for strict non weight-bearing on the affected ankle.*

Mr. Rodney was graduated to partial weight-bearing after eight weeks and full weight bearing after three months.

One year post injury Mr. Rodney has fully recovered, both on physical and x-ray examination; he presently has painless range of motion at the right ankle. Long-term prognosis is good, although development of early arthritis is a definite possibility.

Dr Ali's report states:

This patient was seen... on June 23 2004 for the purpose of medical certification. He gave a history of being involved in a motor vehicle accident.....

On examination the ankle was slightly swollen and tender over the medial aspect of the joint. He has full range of movements at the ankle joint with pain at the extremes of movement. He walks with a slight limp.

X-rays confirmed a healed oblique fracture of the medial malleolus with irregularity of the joint margin.

This patient has reached maximum recovery. X-rays confirm the early onset of osteoarthritis, which in view of his being overweight is causing him pain when walking or driving for long periods. In my opinion he suffers a permanent partial disability of ten percent... of the function of the right lower limb.

6. Both Counsel relied upon the Privy Council decision of Selvanayagam v. University Hospital of the West Indies , reported at(1983) 34 W.I.R. 267. Miss

Robinson on behalf of the First Defendant relied upon the decision to say that where a physically injured Claimant had refused to undergo surgical management, the burden was on the Claimant to prove that he had in all the circumstances, including but not limited to the medical advice, acted reasonably in refusing surgery. Miss Robinson goes on to point out, correctly, that there is nothing in the Claimant's evidence that speaks to the reason why he declined to undergo surgery. There is therefore nothing, she continues, to provide the grounds upon which the Court could infer that he acted reasonably in refusing the surgery.

7. At page 272 of the Judgment Lord Scarman, delivering the Board's opinion, stated:

> *Their Lordships do not doubt that the burden of proving reasonableness was on the appellant*(the Claimant). *It always is, in a case in which it is suggested that, had a plaintiff made a different decision, his loss would have been less than it actually was. ....*
>
> *Their Lordships would add a further comment on the law, well established though it is. 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 as to mitigate his damage. Their Lordships respectfully agree with the opinion expressed on the point by the High Court of Australia in Fazlic v. Milingimbi Community Inc. (1981) 38 A.L.R.. 424 at page 430.... The question is one of fact and as already mentioned, the burden of proof is on the plaintiff. In Richardson v. Redpath Brown &Co. Ltd. [1944]A.C. 62 at 68 Viscount Simon LC said that the material question is "whether the workman [i.e. the plaintiff] who refuses to be operated upon is acting reasonably in view of the advice he has received". Their Lordships would, with respect, put the question in more general terms. Although the 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 plaintiff acted reasonably in refusing surgery.*

8. Mr. Campbell on behalf of the Claimant also referred me to the local decision of Cooke J., as he then was, in Elton Morris v. Isaiah Gutzmore, Suit No. C.L. No. 1990/ M 131, judgment delivered July 10, 1992. Extracts of the judgment are set out at pages 341-349 of Justice Karl Harrison and son Marc Harrison's work "Assessment of Damages for

Personal Injuries" (Revised Edition of Casenote No. 2). At pages 346-347 of Harrisons' Work, Justice Cooke is reported as stating:

> *In his evidence, Sir John Golding was of the view that the operation he did could have been done one year earlier. Counsel now latches on to this opinion and proceeded to argue that the defendant ought not to bear any damages which accrued after the time when the operation ought to have been done. The Plaintiff had disregarded his obligation to mitigate. The law in this area, as I understand it, is that for this submission to succeed, the defendant must demonstrate that the plaintiff had unreasonably refused to undergo the operation. Whether this is so or not is a question of fact to be decided on the evidence bearing in mind that the onus of proof is on the defendant(*my emphasis)*.... In this case there is no evidence that the plaintiff's medical advisers suggested that he(the plaintiff) should have undergone any operation. Therefore, the issue of refusal does not arise. ....It cannot be said that the onus placed on the defendant to show that the plaintiff has failed to mitigate his damages has been discharged.*

9. In the 1997 sixteenth edition of the well-known textbook Mc Gregor on Damages, in Chapter 7, Mitigation of Damage, paragraph 299, page 190, the authors criticize the Selvanayagam decision severely. Under the sub-head "the question of onus", they state:

> *The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure will apply. This has long been settled, ever since the decision in Roper v. Johnson... and was confirmed by the House of Lords in Garnac Grain C. v. Faure & Fairclough...Yet in Selvanayagam v. University of the West Indies... the Judicial Committee of the Privy Council held that, where a physically injured plaintiff had refused to undergo medical treatment to alleviate his injury, the burden was on him to prove that he had acted reasonably, a burden which he was found to have discharged. Any suggestion that personal injury may differ from the commercial context which gave the rule as to onus its genesis comes up against the two authoritative decisions of the House of Lords in which it was laid down that the burden of proof remains with the defendant in the particular case of the refusal of medical treatment, namely Steele v. Robert George &Co. and Redpath, Brown & Co. The latter case was indeed cited by their Lordships in Selvanayagam but without any appreciation of what it had to say on the burden of proof, and their suggestion that the Australian case of Fazlic v. Milingimbi Community Inc. places the burden of proof on the plaintiff does not survive an examination of that decision. The Guildford, the remaining authority cited by their Lordships, was more explicitly misrepresented.*

> *While a passage from Lord Merriman's judgment there was prayed in aid in support of their Lordships confident assertion that "they had no doubt" that the plaintiff had the burden of proof and that this was "well established", Lord Merriman was dealing not with mitigation at all but with remoteness, where there has been a substantial degree of controversy on burden of proof with the better view favouring a plaintiff's burden. One can only conclude that the decision of the Privy Council, being against the entire weight of authority, was arrived at* per incuriam. *Certainly, its conclusion appears to have been sensibly ignored in subsequent cases, as by the Court of Appeal in London and South of England Building Soiciety v. Stone and again in Metalmann & Co. v. N.B.R.(London).*

10. I observe as a matter of interest that in Selvanayagam the Privy Council qualified the statement that the burden of proving reasonableness is on the Plaintiff by saying that it always is, in a case in which it is suggested that, had a plaintiff made a different decision, his loss would have been less than it actually was.(my emphasis). In the Selvayanagam case one of the Claimant's own medical experts gave evidence that he had recommended surgery to the plaintiff's neck . He was of the opinion that surgical therapy to the neck would help, and that if there were no operation the neck would get worse. He further expressed the view that had the operation been performed, some six months later the appellant would have been fit to resume his professional work. In Selvayanagam the suggestion therefore arose on the Claimant's own case, and not on the Defendant's, and perhaps this accounts for the burden of proof being discussed in the manner in which it was.

11. In the present case the Defendant did not file a defence nor call any evidence, and the Claimant's witness statement does not address the issue of mitigation at all. This explains why the issue of who has the burden of proof assumes such crucial importance in this case.

12. In Morris v. Gutzmore Justice Cooke referred to a number of cases, but not to Selvanayagam. I therefore do not know whether the Privy Council decision was cited to him. However, in my view, Justice Cooke's judgment represents a correct statement of the law in Jamaica and that is the law which I shall apply to the facts of this case..

13. The burden is on the defendant to prove that the Claimant failed to take certain mitigating steps. In the case before me, although the Doctor at K.P.H indicated that the Claimant was a good candidate for surgery, (and I am prepared to treat that as a recommendation for surgery) there is no evidence to suggest that had the Claimant agreed to the surgery his loss would have been less than it actually was. In other words, there was no evidence to suggest that the surgical intervention as opposed to the treatment he received by way of plaster and non-weight bearing or reduced weight bearing would have been superior, or that if he had undergone the surgery he would have been less likely to have any permanent disability or to develop early ostoearthritis. Indeed, the medical report from K.P.H. indicated that the patient being managed in plaster as opposed to surgery resulted in, in their opinion, full recovery, with a good long term prognosis, albeit development of early arthritis was seen as a definite possibility.

14. When Dr. Ali saw the Claimant approximately three months after he was last reviewed at K.P.H. X-rays confirmed the early onset of osteoarthritis and Dr. Ali expressed the view that the Claimant suffers from a 10 percent permanent partial disability of the right lower limb. I accept the definition of osteoarthritis provided at page 329 of Volume 5 of Mrs. Ursula Khan's work "Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica" as being a chronic inflammation affecting one or more joints and the parts of the bone adjacent. In my judgment, the Claimant either already had early onset of osteoarthritis when he was seen at K.P.H. which was not seen by the non-specialist Doctor who signed the report, or he developed the onset by the time he saw Specialist Dr. Ali. Either way, I accept that this osteoarthritis and the permanent partial disability are a direct result of the injuries received in the motor vehicle accident in respect of which the 1st Defendant is liable in negligence.

15. The burden lies on the defendant, as I have said, and there is no discharge of that burden to show that it is any failure on the part of the Claimant to take mitigating steps that has caused the early osteoarthritis or the permanent disability.

16. Further, in the instant case, unlike the facts in the Selvanayagam case, there is no suggestion arising on the Claimant's own case that had he decided to undergo surgery his loss would have been less than it actually was.

17. There is no evidence to the effect that the recovery time for surgery as opposed to plaster management would have been quicker, or less painful and there is no evidence that had the surgery been done, early osteoarthritis would not have set in or that the permanent disability would not have resulted . I cannot speculate as to what medical evidence there might have been.

18. Miss Robinson further submitted that it is the fact that the Claimant is overweight which is causing him pain, as opposed to any effects of the injury. In my view the osteoarthritis is on a balance of probabilities a direct result of the injury sustained in the motor vehicle accident. The osteoarthritis is operating in the circumstance of the Claimant's overweight state. It is trite that the Defendant takes the victim as he finds him under the "egg-shell skull" principle.

19. A number of cases were cited to me with regard to the amount for pain and suffering and loss of amenities. Mr. Campbell referred to Cecil Gentles v. Artwell's Transport Co. Ltd. referred to at page 60 of Volume 5 of Mrs. Ursula Khan's Work "Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica".

20. Miss Robinson referred to the following cases:

(a) Roy Douglas v. Reid's Diversified Ltd. referred to at page 61of Volume 4 of Mrs. Khan's Work.

(b) Egbert Campbell v. Parkes referred to at page 374 of the Harrisons' Revised Edition of Casenote No. 2.

(c) Sharon Barnett v. Rosemarie McLeod referred to at page 33 of Volume 3 of Mrs. Khan's Work.

21. In all the circumstances, I think it appropriate to award $650,000.00 for pain and suffering and loss of amenities.

22. I therefore assess damages against the 1st Defendant as follows:

Special Damages in the agreed sum of $79,813.00, with interest thereon at the rate of 6 percent per annum from the 26th March 2003 to the 3rd March 2005.

General Damages for Pain and Suffering and Loss of Amenities in the sum of $650,000.00 with interest thereon at the rate of 6 percent per annum from the 29th August 2004 to the 3rd March 2005. Costs to the Claimant summarily assessed in the sum of $52,000.00