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CA456-001

A

Privy Council

*Geest plc *v* Lansiquot

[2002] UKPC 48

2002 July 10; Oct 7

B

Lord Bingham of Cornhill, Lord Steyn, Lord Hobhouse of Woodborough, Lord Millett and Lord Scott of Foscote

Damages — Mitigation — Medical treatment — Plaintiff refusing to undergo surgery on injured back — Whether refusal reasonable — Where burden of proof lying — Whether plaintiff failing to mitigate damage

The plaintiff fell and injured her back in the course of her employment with the defendant. She brought an action in the High Court of Saint Lucia for damages for personal injuries. No defence was served and judgment in default of defence was entered for damages to be assessed. At the assessment hearing the plaintiff gave evidence by affidavit and orally. The medical reports exhibited to her affidavit showed that the doctors had eventually considered that a surgical operation on her back was the only method of relieving her pain and disability, and had advised her that such surgery was successful in most cases, although it could not guarantee a cure, but no advice had been given as to the risk that an operation might worsen her condition, or what the worst outcome of an operation might be. She testified that she had decided not to undergo the operation. The defendant adduced no evidence but in his closing speech counsel for the defendant contended that by declining to undergo an operation the plaintiff had failed to mitigate the damage she had suffered as a result of her injury. The judge held that, the burden being on the plaintiff, she had failed to prove that her refusal to undergo an operation was reasonable, and he limited her general damages accordingly. The Eastern Caribbean Court of Appeal (Saint Lucia) accepted that the burden lay on the plaintiff to prove that her conduct was reasonable but reversed the judge's decision and increased the award.

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On the defendant's appeal to the Judicial Committee—

Held, dismissing the appeal, that where a plaintiff had refused medical treatment the burden lay on the defendant to prove that the refusal was unreasonable and thus constituted a failure by the plaintiff to mitigate the damage sustained; that since there was no evidence to suggest that the plaintiff had been placed in a position to decide in a rational way whether to continue to bear the pain and disability from which she suffered or to seek relief through surgery whatever the risk of that might be, or that her preference not to have an operation was unreasonable, on the limited evidence before him the judge could not properly have held that the plaintiff's decision not to undergo surgery was unreasonable; and that, accordingly, the Court of Appeal had correctly reversed the judge's decision and had properly awarded the plaintiff damages on the basis that she had not failed to mitigate her damage (post, paras 13–15, 18).

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Dicta of Sir John Donaldson MR in *Sotiros Shipping Inc v Sameiet Solholt* [1983] 1 Lloyd's Rep 605, 608, CA applied.

Selvanayagam v University of the West Indies [1983] 1 WLR 585, PC not followed.

Per curiam. If a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter (post, para 16).

H

Decision of the Court of Appeal of Saint Lucia affirmed.

The following cases are referred to in the judgment of their Lordships:

Richardson v Redpath Brown & Co Ltd [1944] AC 62; [1944] 1 All ER 110, HL(E)

CA456-002

Selvanayagam v University of the West Indies [1983] 1 WLR 585; [1983] 1 All ER 824, PC
Sotiros Shipping Inc v Sameiet Solholt [1983] 1 Lloyd's Rep 605, CA
Steele v Robert George & Co (1937) Ltd [1942] AC 497; [1942] 1 All ER 447, HL(NI)

No additional cases were cited in argument.

APPEAL from the Eastern Caribbean Court of Appeal (Saint Lucia)

The defendant, Geest plc, appealed with leave from the judgment of the Eastern Caribbean Court of Appeal (Saint Lucia) (Singh, Redhead and Matthew JJA) given on 7 February 2000 allowing an appeal by the plaintiff, Monica Lansiquot, from the judgment of Mitchell J (Ag) delivered in the High Court of Saint Lucia on 18 December 1998, whereby he had awarded the plaintiff a total of EC$80,000, and increasing the award to EC$348,000.

At the close of the hearing Lord Bingham of Cornhill announced that their Lordships would advise that the appeal should be dismissed for reasons to be given later.

The facts are stated in the judgment of their Lordships.

James Bell (who did not appear below) for the defendant.

James Dingemans QC and *Simon Davenport* (neither of whom appeared below) for the plaintiff.

Cur adv vult

7 October. The judgment of their Lordships was delivered by LORD BINGHAM OF CORNHILL

1 At the conclusion of the argument the Board announced that it would humbly advise Her Majesty that this appeal should be dismissed with costs. The Board now gives its reasons for that decision.

2 The issue in the appeal is whether the damages which the plaintiff, Mrs Lansiquot, would otherwise have received should have been reduced because she had failed to mitigate the damage she had suffered by undergoing a surgical operation on her back.

3 The plaintiff, employed by Geest plc as the company's shipping manager, was visiting a vessel on 27 March 1994 when she caught her foot and fell and hurt her back. She issued a writ against the company claiming damages for personal injuries on 14 March 1996. Particulars of her claim were pleaded in conventional form in a statement of claim dated 13 March 1996. The writ was duly served on the company out of the jurisdiction and it entered an appearance on 12 April. No defence was served and judgment was entered in default of defence for damages to be assessed. At a pre-trial hearing in chambers on 20 September 1998 directions were given by consent for the conduct of this assessment. The plaintiff was directed to file and serve a summons for the assessment of damages; affidavits in support and in opposition were to be filed and served by 10 November 1998; a current medical report was to be exhibited by the plaintiff; evidence in chief was to be by affidavit only; the plaintiff was to make herself available for cross-examination. The assessment was fixed for 1 December 1998 in the

A afternoon, and after one adjournment came on for hearing on 9 December before Mitchell J (Acting) in chambers.

4 The evidence before the judge consisted of an affidavit of the plaintiff to which a number of medical reports and some other documents were exhibited. The company adduced no evidence. The plaintiff was represented at the hearing by leading counsel and was cross-examined by B counsel for the company. In his closing speech for the company, after the plaintiff's counsel had made his submissions, counsel advanced the argument that the plaintiff had failed to mitigate the damage she had suffered as a result of her injury by declining to undergo a surgical operation. In a written judgment delivered on 18 December 1998, the judge accepted that argument and limited the general damages recoverable by the plaintiff to "damages for pain, suffering and loss of amenities for a reasonable period C of time beyond which it is unreasonable for her to have continued to have subjected herself by refusing to undergo the recommended surgery". The judge made a total award of EC$80,000.

5 The plaintiff appealed to the Court of Appeal (Singh, Redhead and Matthew JJA) which, in a unanimous written judgment given on 7 February 2000, reversed the trial judge's decision on mitigation of damage and D applied a somewhat higher multiplier than the trial judge would have done. It increased the award to the plaintiff to a total of EC$348,000. Before the Board the company challenges the Court of Appeal's decision on the issue of mitigation and also on one aspect of its approach to the quantification of damages.

6 Following her accident on 27 March 1994 the plaintiff consulted her general practitioner in early April 1994 complaining of waist pains radiating E to her thighs. A CAT scan showed a central prolapse of her L4/L5 disc space, more marked on the left side and compressing both L5 roots. There was a mild bulge noted at the L5/S1 level. Conservative treatment was advised. Pain and discomfort to her lower back persisted and on 21 April 1994 the plaintiff consulted Mr Seale, an orthopaedic surgeon in Barbados. He diagnosed a prolapsed disc at the L4/L5 level and made arrangements for a F myelogram to be carried out, which showed a small disc protrusion at that level but did not appear to show compression of the nerve roots. He advised that conservative treatment be continued but that she should undergo a magnetic resonance scan of the spine and discs if her back problems persisted. At consultations with her general practitioner on 3 June and 25 June 1994 the plaintiff's condition was found to have improved G somewhat, although painful episodes persisted.

7 A further CAT scan on 14 July 1994 showed no change. Moderate pain continued and an MRI scan of her lumbar spine carried out in London on 1 February 1995 showed a central L4/L5 discal protrusion without evidence of neural compression. During her visit to England the plaintiff was examined by Mr Sharr, a consultant neurosurgeon. In a report dated 8 February 1995 he advised that he should initially carry out a percutaneous H laser disc decompression, but he was not hopeful that this procedure would alleviate the plaintiff's symptoms and suggested that, if it did not, the plaintiff would need to have an open discectomy, probably about two weeks later. He made clear that he could not guarantee a good result even with surgery.

8 The decompression procedure was carried out on 15 February 1995 and led to some improvement over the next few months. In the summer of 1995 however the plaintiff suffered a relapse. A further MRI scan was carried out which still showed residual bulging of a degenerate L4/L5 disc but without clear evidence of neural compression. In a report dated 9 August 1995 Mr Sharr advised:

"I had a full discussion with you and I pointed out that, although there was still a chance of spontaneous remission and improvement etc, it did seem that an open operation was now beginning to appear on the horizon; removal of a significant volume of disc tissue would therefore have to be carried out, although it may also be necessary to consider an additional variety of a fusion. There was mutual agreement that you would return home to St Lucia to consider the situation and you might also consider seeking non-surgical advice from an expert such as a consultant in rheumatology and physical medicine or even one in chronic pain relief."

9 Following the advice of Mr Sharr, the plaintiff consulted Dr Amanda King, a consultant physician and rheumatologist. She considered that surgery was the best option but noted that the plaintiff was "not keen on surgery" and advised further conservative treatment. The plaintiff's condition did not improve and in March 1996 she again consulted Mr Seale, the orthopaedic surgeon who had previously examined her in April 1994. In a detailed report dated 22 April 1996 he confirmed the previous findings and advised in these terms:

"*Recommendations*

"Is surgery necessary? In answering this question, I would like to look at the pros and cons, in attempting to reach a conclusion.

"*Points in favour of surgery.* She has had all other treatment modalities, e g rest, physiotherapy, traction and laser disc decompression. 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 from 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 L4/L5 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."

10 Dr King reviewed the plaintiff's condition on 3 November 1998, just before the damages hearing, and found that it had not changed since she had previously examined her in early 1996. She thought it unlikely that the plaintiff's condition would improve.

A 11 In her affidavit sworn for the hearing the plaintiff summarised her medical history since the accident, exhibiting the reports from which the foregoing history is extracted and describing her continuing symptoms. The Board has only a very much abbreviated note of the evidence given at the hearing, but from this it appears that when cross-examined the plaintiff was taken through some of the reports summarised. She confirmed that she had not been keen on surgery and had decided not to undergo it. She suffered B from no illness that would make surgery dangerous for her and, according to the note, said that Mr Sharr had "advised me that surgery was guaranteed to cure the back". She confirmed that it had been her deliberate choice not to have an operation, a decision she had taken (as she said in re-examination) "because of what the doctors told me". From her answers as noted, it does not appear to have been put to the plaintiff that her decision not to undergo C surgery was unreasonable. Nor does she appear to have been asked what it was that the doctors had told her which had prompted her decision not to have an operation. No consideration appears to have been given in any of the medical reports or in the course of the evidence to any possibility that an operation might not only fail to improve the plaintiff's condition but might result in a worsening of it.

D 12 Directing himself in accordance with the ruling of the Board in *Selvanayagam v University of the West Indies* [1983] 1 WLR 585, 589 the trial judge held that it fell to the plaintiff to prove on a balance of probabilities that her refusal to undergo surgery was reasonable. He held that on the medical evidence before him (summarised above) she had failed to do so. The Court of Appeal similarly applied the rule laid down by the Board in *Selvanayagam's* case, but it reached a different conclusion. It E opined that there is always a grave risk when the human body is invaded, and in his leading judgment Singh JA referred to the uncertain medical prognosis and concluded on this point, in para 14:

> "Given these circumstances, I find difficulty in accepting the judge's opinion that the [plaintiff] acted unreasonably in refusing surgery and therefore failed to mitigate her loss. As I mentioned earlier, the F 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."

13 The ruling of the Board in *Selvanayagam's* case that the burden lies on a plaintiff who has refused medical treatment to prove that his refusal was reasonable provoked immediate criticism: see "Mitigation and Refusal G of Medical Treatment: Reasonableness and Onus of Proof" (1983) 46 MLR 754, 757–758 (Hudson), 758–759 (McGregor); "Mitigation of Damage—Plaintiff's Refusal to Undergo Operation—Onus of Proof" (1983) 99 LQR 497–499 (Kemp). The ruling was said to be inconsistent with two decisions of the House of Lords (*Steele v Robert George & Co (1937) Ltd* [1942] AC 497 and *Richardson v Redpath Brown & Co Ltd* [1944] AC 62), H unsupported by the decisions cited in the judgment and contrary to long-settled law. It is not a decision which has since earned the approval of text book writers: see *Clerk & Lindsell on Torts*, 18th ed (2000), p 1562; *Fleming, The Law of Torts*, 9th ed (1998), p 286; *Winfield & Jolowicz on Tort*, 15th ed (1998), p 223, n 82; *Markesinis & Deakin, Tort Law*, 4th ed (1999), p 750 and n 374; *Kemp & Kemp, The Quantum of Damages*

(September 2000), vol 1, pp 13004–13008. In *McGregor on Damages*, 16th ed (1999), p 190 it is stated that the onus of proof on the issue of mitigation is on the defendant, and approval is given, at p 191, to the statement of Sir John Donaldson MR in *Sotiros Shipping Inc v Sameiet Solholt* [1983] 1 Lloyd's Rep 605, 608, where he said: A

> "A plaintiff is a under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free B to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendants' breach of duty."

14 The Board's decision in *Selvanayagam's* case [1983] 1 WLR 585 was C of course binding on the trial judge and the Court of Appeal, but in arguing this appeal both sides have been content to accept, unsurprisingly in view of the weight of criticism to which it has been subjected, that the decision cannot be relied on as an accurate statement of the law on this point. The Board regards that approach as soundly based, although satisfied that the outcome of this appeal would be the same even if, as the lower courts held, the burden lay on the plaintiff to prove that her conduct was reasonable D rather than on the company to prove that it was unreasonable.

15 In the absence of any evidence adduced by the company, the mitigation issue had to be resolved on the basis of the plaintiff's evidence in cross-examination and the medical reports which she exhibited. The trial judge's crucial finding was that: "The medical evidence in this case establishes that a surgical procedure is likely to succeed in relieving the E plaintiff's pain and disabilities." This is probably a fair, if somewhat over-simplified, reflection of the evidence. Plainly, a stage was reached when the doctors did not think further improvement could be achieved by conservative means and so regarded operative intervention as the only means of relieving the plaintiff's pain and disability. She was advised that surgery was successful in most cases in relieving the pressure from entrapped nerve roots and eradicating pain down the leg. But it was made plain that F surgery could not guarantee a cure for back pain and that there was a percentage of patients who did not benefit. (The guaranteed cure which the plaintiff in evidence attributed to Mr Sharr was not borne out by his written report and is so improbable that the accuracy of the note of evidence must be suspect. Significantly, the trial judge did not rely on this reported answer.) None of the doctors attempted to quantify the chances of success and none G of them advised what relief the plaintiff could reasonably hope for if an operation were successful. None of the doctors appears to have advised her on the risk, however small, that an operation might lead to a worsening of her condition or on what the worst outcome of an operation might be. As Mr Seale correctly recognised, the decision was one which the plaintiff herself had to make. She had to decide whether to continue to bear the pain H and disability from which she suffered or to seek relief through surgery at whatever risk that might entail. There is nothing in the evidence to suggest that she was put in a position to make so momentous a personal decision in a rational way, still less that it was unreasonable of her to prefer to bear the ills she had than fly to others that she knew not of. While Mr Seale was

A prepared to support her decision if she decided to have surgery, he was plainly ready to respect her decision if she decided against. On the limited material before the judge it could not properly be held that the plaintiff's decision was unreasonable, as the Court of Appeal correctly ruled.

16 The evidence need not have been so limited. This assessment proceeded without any pleading and without any evidence beyond the B plaintiff's affidavit and oral evidence. This is not unusual. Many such assessments proceed in a relatively informal manner. The object is to ascertain the plaintiff's medical history since the accident and to assess the plaintiff's continuing symptoms and long-term prospects, with a view to putting a money value on the plaintiff's pain and suffering, loss of amenity and financial loss. Had there been pleadings, however, it would have been the clear duty of the company to plead in its defence that the plaintiff had C failed to mitigate her damage and to give appropriate particulars sufficient to alert the plaintiff to the nature of the company's case, enable the plaintiff to direct her evidence to the real areas of dispute and avoid surprise: see *Bullen & Leake & Jacob's Precedents of Pleadings*, 14th ed (2001), vol 2, p 1103, para 71–13; RSC Ord 18, r 12(1)(c), Ord 18, r 8(1)(b); *The Supreme Court Practice 1999*, vol 1, paras 18/7/4, 18/7/11, 18/8/2, 18/12/2, 18/12/13. In D this instance, no complaint was made by the plaintiff's leading counsel when counsel for the company advanced this argument, perhaps because he had been warned in advance, and no point was taken in the Court of Appeal or before the Board on the procedure adopted. It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to E enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter.

17 Before the trial judge it was contended that the plaintiff would, but for the accident, have continued to work until she reached the age of 60. The Court of Appeal thought it right to take 65 as the plaintiff's prospective retiring age but for her accident, and adjusted its multiplier accordingly. The basis of the Court of Appeal's decision is not entirely clear, but no point of F law is raised and it may well be that the judge's decision was based on a statutory pensionable age which was thought by the Court of Appeal to be inappropriate in the plaintiff's case. The Board would not readily interfere with a detail of calculation in an award which is not excessive overall.

18 For all these reasons the Board is of opinion that the decision of the Court of Appeal should be upheld, essentially for the reasons it gave, and G that this appeal should be dismissed with costs.

Solicitors: Hardwick Stallards; Charles Russell.

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