The Educator

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Duty to Mitigate Revisited

In the recent Saint Vincent And The Grenadines High Court case of Claire ***Oliver Gilkes v. St. Clair Thomas and Joseph Rajkumar*** [2016], Master Fidela Corbin Lincoln presided over a case where the claimant Mrs. Claire Gilkes commenced her claim against Dr. St. Clair Thomas and Dr. Joseph Rajkumar for damages for personal injuries sustained as a result of their alleged negligent medical treatment.

After several visits to Dr. Thomas' office for soreness of her throat, the claimant was told that she was suffering from a thyroid condition and had a goiter on her neck. Dr. Thomas repeatedly told her that she should consider undergoing surgery to remove the goiter but she never bothered because it was never a source of bother to her.

In or around June 1993 she went to Dr. Thomas' office accompanied by her husband because she was suffering from a sore throat and hoarseness. Dr. Thomas again raised the issue of having the goiter surgically removed and informed them that he had performed the procedure on numerous occasions both in St. Vincent and Barbados and that it was a simple operation. He informed her that she would loose her voice for a short time after the operation but would regain it fully.

At no time during any of the consultations did Dr. Thomas tell her:

(1) that there was a risk of permanent damage to the nerves surrounding her voice box and if that happened her voice box could be paralysed;

(2) of any other risks associated with thyroid surgery or advise her of alternative forms of treatment that were available; or

(3) that there was a risk of vocal paralysis which could result in difficulty breathing and if that happened she would possibly have to have a tracheotomy.

Mrs. Gilkes contends that if Dr. Thomas had provided her with any information regarding the risks associated with the operation she would not have considered the operation. She decided to proceed with the operation and was admitted to hospital on 27th July 1993.

The surgery

In the evening after the surgery the Claimant started wheezing and vomiting and felt like she could not breathe. On 30th July 1993 Dr. Thomas performed an emergency tracheostomy

whereby she was only able to breathe through a tube. She was discharged from the hospital on 6th August 1993 with a hole in her neck which she had to have dressed at a clinic.

Consequently, she was forced to consider having a permanent tracheotomy which Dr. Bailey performed on 21st March 1995. The result of the permanent tracheotomy is that she has to breathe through a tube in the throat area.

Consent

The Claimant signed a consent form which stated that she was consenting to undergo a thyroidectomy. She was assured that Dr. Thomas would perform the operation. The operation was performed on 29th July 1993 but Dr. Thomas later informed her that the operation was in fact performed by Dr. Rajkumar with Dr. Thomas acting as his assistant.

The claimant obtained judgment against Dr. Rajkumar in an amount to be decided by the court. She also obtained a consent judgment against Dr. Thomas for the personal injury resulting from his failure to fully inform her of the risks associated with the surgical procedure and failing to inform her that the operation would be conducted by Dr. Rajkumar and for payment by him to the Claimant of an amount to be decided by the Court and prescribed costs to be assessed.

Multiplier and multiplicand

The Claimant was approximately 28 years old when the thyroidectomy and emergency tracheostomy were performed, 30 years old when the permanent tracheostomy was performed, 47 at the time of the consent judgment on liability and 51 years old at the time of the trial. On the premise that she would have had a working life of up to 65 years of age and taking into consideration "*the many contingencies, vicissitudes and imponderables of life*" the Court found that a multiplier of 9 would be reasonable and used $9000.00 per annum as the multiplicand based on a monthly income of $750.00.

The Court used a multiplicand of $9000.00 and a multiplier of 9 and determined that the Claimant would have been entitled to $81,000.00 if she was unable to engage in any employment in the future as a result of her injury.

Claimant's Duty to Mitigate Loss

The claimant must take all reasonable steps to mitigate the loss which she has sustained consequent upon the defendant's wrong. It is trite law that a personal injury claimant must mitigate her loss by obtaining proper medical treatment and not acting so as to retard her recovery, and she is not entitled to damages in respect of any pain, suffering, loss of amenities or loss of earnings consequent upon her failing to do so. Furthermore, even if disabled from continuing her present employment, she should be prepared to accept reasonable alternative work.

In our jurisdiction, despite the habitual use by attorneys of the phrase 'duty to mitigate', a claimant is a under no duty to mitigate her loss. She is completely free to act as she judges to be in her 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.

The law of mitigation may exceptionally operate in favour of the claimant. If, in taking reasonable steps to mitigate, she incurs expenses or further loss, she may recover such expenses

or loss from the defendant, even if the resulting damage is greater than it would have been had the mitigating steps not been taken at all.

Consistent with the Guyanese case of ***Heeralall v Hack Brothers Constructing Co. Ltd and another*** (1977), the claimant also sought damages for future loss of earnings is the amount which she has been prevented by the injury from earning in the future.

Master Corbin Lincoln noted that in the Trinidad and Tobago Court of Appeal case of ***Seudath Parahoo v S.M. Jaleel & Company Ltd.*** [2003], Hamel-Smith JA noted that a claimant who claims loss of pecuniary prospects must show that the injury was of such a nature that it rendered her incapable of performing her pre-accident job or any other form of work whatsoever. Where she is rendered incapable of performing the prior job but is not prevented from doing other work, it was necessary to show that in order to mitigate the loss.

In considering the discount that should be applied for the Claimant's duty to mitigate Master Corbin Lincoln, followed ***Parahoo*** and took into consideration all the circumstances including that the Claimant cannot engage in employment requiring heavy lifting or too much exertion, her ability to speak and give clear oral evidence at the hearing, and the minimum wage in St. Vincent and the Grenadines.

Master Corbin Lincoln noted that the minimum wage for jobs such as an accounts clerk, search clerks, cashiers or typists is between $600-$800.00 per month. She stated:

> If Mrs. Gilkes had retrained and/or sought employment in any of these or a similar field there is a real likelihood that she would have been able to earn at least an income within the range of the minimum wage or slightly less if she was unable to work full time.

Students may also be aware of the Court of Appeal case of ***Dennis Peter Edward v. Namalco Construction Services Limited and Guardian General Insurance Company Limited*** [2013], where Rajendra Narine JA stated:

> In the absence of the job letters and any other medical evidence indicating that the Appellant was in fact unable to work as a result of his injuries, the court was constrained to rely on the Appellant's testimony with regard to his alleged inability to work.

In the end, Master Corbin Lincoln found that a discount of 75% is reasonable to take into account that the Claimant failed to mitigate her loss by making any effort to retrain or find any kind of alternative employment whatsoever. She awarded the Claimant $20,250.00 for loss of future earnings.

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Strange but true

A sign on a beach on Malaysia's Perhentian islands.
Pic: Joanne Lane, www.visitedplanet.com

In 2010, while preparing for the visit of President Obama to the Mumbai's Gandhi Museum, the Indian government removed several dried coconut and coconut trees for fear that the coconuts would fall on the head of President Obama.

Did the Indian government officials read the study ***Injuries Due to Falling Coconuts*** by Dr Peter Barss, which was published in the November 1984 issue of Journal of Trauma-Injury Infection & Critical Care? Or did they read the study ***Coconut palm-related injuries in the Pacific Islands*** by Jonathan Mulford which was done in January 2001? Or did they read Ben Westwood's article ***Trees must go as Queensland guards against death by coconut*** in the travel section of the Telegraph (UK) of 23rd February 2002?

Professor Barss of Montreal's McGill University, noted that falling coconuts can cause injury to the head, back, and shoulders. A 4-year review of trauma admissions to the Provincial Hospital, Alotau, Milne Bay Province, Papua New Guinea, revealed that 2.5% of such admissions were due to being struck by falling coconuts. Since mature coconut palms may have a height of 24 up to 35 meters and an unhusked coconut may weigh 1 to 4 kg, blows to the head of a force exceeding one (1) metric ton are possible. Of four patients with head injuries due to falling coconuts, two required craniotomy; two others died instantly in the village after being struck by dropping nuts.

According to the Telegraph, coconut trees were uprooted from beaches in Northern Queensland, Australia because local councils fear legal action from tourists injured by falling fruit.

The Telegraph reported that the chief executive of the Queensland Tourism Industry Council, said: "Public liability claims and payouts have risen dramatically in Australia. There have been reported injuries caused by coconuts, although I'm not aware of fatalities." The official said: "We've been removing the nuts from the trees for years, but now we have begun cutting them down and replacing them with palm trees, as it is actually cheaper." He added: "We are talking about a few trees at this stage, and a few hundred in the future."

Closer to home, on 15th December 2004, a couple was having breakfast under a heavily laden coconut tree at a resort in the Dominican Republic, when a coconut fell from the tree above and killed the male guest. The surviving spouse sued her tour company for failing to warn her of the danger that a coconut tree might pose and that the resort and/or the travel company were negligent in seating them under the coconut tree. Despite the resort's plea of ***act of God***, the widow was awarded $55 million. Shortly thereafter, the resort filed for bankruptcy.

But wait, there is insurance. A British travel agency Club Direct issued policies to cover injuries caused by falling coconuts. While in Sri Lanka, a Club Direct customer was calmly sitting under a coconut tree reading a book when a coconut fell on her head, knocking her out cold. She was duly hospitalized. The insurance company paid the claim.

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