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Royal Court (Inferior Number)

112.

Judgment reserved: 31 May, 1991;
Delivered: 30 June, 1992.

Before: Mr. V. A. Tomes, Deputy Bailiff
Jurat J. H. Vint
Jurat G. H. Hamon

Raymond Brown **Plaintiff**

- v -

Collas & Le Sueur (Electrical Contractors) Limited
and
Higgs & Hill Limited **Defendants**

Advocate Mrs. M. E. Whittaker for plaintiff
Advocate C. M. B. Thacker for both Defendants

THE DEPUTY BAILIFF: The plaintiff was an employee of the first defendant; during the summer months of 1986 he was employed at the construction site at the General Hospital where the first defendant was an electrical sub-contractor to the second defendant, the main contractor. Part of the work which the plaintiff was required to do entailed working in a treble lift shaft, fixing conduit for the lift shaft lighting. The lift shaft had been scaffolded at some stage prior to the employment of the plaintiff on the site. In or about the week ending 21st June, 1986, the plaintiff was required to work in the lift shaft at fourth floor level. In order to return to the fourth floor after completing the task the plaintiff was obliged to sit on the scaffold poles, then swing into the fourth floor doorway, because there was no ladder available. In doing so, the plaintiff lost his balance and was obliged to seize hold of the scaffold to avoid falling down the lift shaft. In taking this action the plaintiff suffered a non-bony injury to his right shoulder, leading to severe capsulitis of the right shoulder and nervo praxia of the radial plexus.

It was alleged by the plaintiff that the accident occurred as a result of the negligence, imprudence and lack of care and breach of statutory duty on the part of the defendants. Particulars of the negligence, imprudence and lack of care and breach of statutory duty were fully pleaded in the plaintiff's Order of Justice. The plaintiff claimed special damages and general damages for pain, suffering and loss of amenity, future handicap in employment and loss of future earnings, interest and costs.

Although in their Answers the defendants denied the allegations of the plaintiff, shortly before the hearing as to liability, listed to be heard in November, 1990, both defendants conceded the issue and, accordingly, the matter heard before us was only as to quantum.

The issues were complicated however by the fact that on the 22nd September, 1988, the plaintiff had suffered a second accident in which the acromio-clavicular joint of the plaintiff's right shoulder was dislocated. In his Reply the plaintiff averred that the injuries suffered in the first accident were added to by the injuries sustained in the subsequent fall in September, 1988, and that it was as a result of the first injuries that further injury was sustained upon his fall. The plaintiff denied contributory negligence in relation to the second accident.

The plaintiff's explanation of the second accident was that he was leaving work at the Guernsey prison site, which was gravelled, when he tripped and fell by the contractors' hut; he put his injured arm out to save himself but instantaneously realized that he could lose it and let himself go; had he fallen onto his left arm nothing would have happened; he fell onto his right shoulder and "felt the bone go"; he attended the Princess Elizabeth Hospital. The plaintiff was seen in the Receiving Room of the Princess Elizabeth Hospital soon after his fall by Dr. John Razzak. A clinical diagnosis of dislocation of the right acromio-clavicular joint was made and this was confirmed by subsequent x-rays. He was referred to the outpatient clinic of Mr. John Ferguson, M.D., F.R.C.S., at the Princess Elizabeth Hospital who saw him on the 29th September, 1988.

Mr. Ferguson's report dated 29th September, 1988, addressed to a Doctor Watkins at the Jersey General Hospital, confirmed that the plaintiff suffered a dislocation of the right acromio-clavicular joint. On examination, the plaintiff had minimal pain in his shoulder area but all movements of the shoulder joint were limited and there was fairly marked bruising of the anterior aspect of his right deltoid area. Mr. Ferguson advised that the plaintiff should be seen by Mr. R. Paul Clifford F.R.C.S., Consultant Orthopaedic Surgeon at the General Hospital and asked Dr. Watkins to make an early appointment.

The plaintiff said that he returned to work after "only days". In fact this was almost two weeks. The dislocation was not operated upon. He was to see Mr. Clifford but kept on working in the meanwhile. There was no additional pain.

The case for the plaintiff, which the Court accepts, is that the dislocation was not due to the original injury but without the original injury he would not have suffered the dislocation. Thorough cross-examination of the plaintiff did not cause the Court to alter that view. The Court was left in no doubt that the plaintiff suffered constant nagging pain before the second accident.

In the opinion of the Court the preponderance of the medical evidence favoured the plaintiff. The Court is firmly of the opinion that the plaintiff suffered serious injury in the first accident and that this continued until and after the time of the second injury.

The evidence of other electricians showed the plaintiff to be a capable, competent, experienced elecrician. When Mr. Peter James Hopkins had some work for the Guernsey Housing Authority, he sought out the plaintiff to assist him and they "worked together as a team". The Court was particularly impressed by the evidence of Mr. Alan Bradley, foreman electrican with F. W. Rihoy & Son Limited (Rihoy's Electrics) of Guernsey who had employed the plaintiff on three occasions on important contract work and was employing him at the time of the second accident. Mr. Bradley said that when the plaintiff returned to work after the second accident he was doing the same kind of work and to the same level as previously. He described the plaintiff as a "fairly decent" worker who got on with his job and did as much as he could all the time which was why he, Mr. Bradley, took him back on.

Evidence adduced by the defendants failed to persuade the Court that the plaintiff's case was in any way weakened. Mr. Robert Le Maistre, a director of the first defendant was less than completely frank about deductions made from employees' wages and did not persuade the Court that the plaintiff was capable of eye-level and ceiling work after the original accident or that his work generally before the original accident as well as subsequently was of a lower standard than that of fellow employees.

The Court was not impressed by the action of the insurers of the defendants who procured the services of a private detective effectively to 'spy' on the plaintiff's domestic conduct and who in his turn by a "trick" on his assistant's part persuaded Mrs. Pamela Violet Breton to travel to Jersey whereupon a witness summons was immediately served upon her. In the event her evidence did nothing to assist the defendants.

We were addressed at some length on the question of foreseeability. It is not necessary for us to discuss the authorities in any detail. The duty of care expected in cases of this sort is confined to reasonably foreseeable dangers, but it does not necessarily follow that liability is escaped because the danger actually materialising is not identical with the danger reasonably foreseen. Each case must depend on its own particular facts. The defendants are liable for all the foreseeable consequences of their neglect in relation to the first accident. In the judgment of the Court these include the injury suffered in the second accident. The plaintiff was going about his lawful business of earning a living. Indeed, in so doing he was actively mitigating the damages to which he would otherwise be entitled for loss of earnings. In leaving the work-site he stumbled or tripped on a gravelled surface and because of

his natural attempt to avoid aggravation of the first injury he suffered the second injury. In the judgment of the Court the chain of causation had not been broken. There was no *novus actus interveniens*. As Lord Wright said in Lord and another v. Pacific Steam Navigation Co. Ltd., The Oropesa (1943) 1 All E.R. 211 C.A. at p213:-

> ***"These somewhat august phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one could be treated as flowing directly from the other."***

Mr. Thacker sought to rely on Knightley v. Johns and others (1982) 1 All ER 851 C.A. However, the Court is able to distinguish that case because the damage was not natural and probable and therefore reasonably foreseeable. There was, in that case, a novus actus interveniens in that there was a new cause which disturbed and interrupted the sequence of events between (in that case) the first defendant's accident caused by his negligence and the plaintiff's accident (caused by another's negligence). In other words there was a supervening tortious act not present in the instant case.

Stephen L.J. at p.865 said this:-

> ***"It is plain from that clear and persuasive expression of the judge's reasoned opinion that he was asking himself the right question and applying the right law. He was, I think, rightly taking the law to be that, in considering the effects of carelessness, as in considering the duty to take care, the test is reasonable foreseeability, which I understand to mean foreseeability of something of the same sort being likely to happen, as against its being a mere possibility which would never occur to the mind of a reasonable man or, if it did, would be neglected as too remote to require precautions or to impose responsibility: cf Lord Dunedin's judgment in Fardon v Harcourt-Rivington (1932) 146 LT 391 at 392, [1932] All ER 81 at 82. The question to be asked is accordingly whether that whole sequence of events is a natural and probable consequence of Mr. Johns's negligence and a reasonably foreseeable result of it. In answering the question it is helpful but not decisive to consider which of these events were deliberate choices to do positive acts and which were mere omissions or failures to act; which acts and omissions were innocent mistakes or miscalculations and which were negligent having regard to the pressures and the gravity of the emergency and the need to act quickly. Negligent conduct is more likely to break the chain of causation than conduct which is not; positive acts will more easily constitute new causes than inaction. Mistakes and mischances are to be expected when human beings, however well trained, have to cope with a crisis; what***

exactly they will be cannot be predicted, but if those which occur are natural the wrongdoer cannot, I think, escape responsibility for them and their consequences simply by calling them improbable or unforeseeable. He must accept the risk of some unexpected mischances: see Ward v T. E. Hopkins & Son Ltd [1959] 3 All ER 225 at 244, [1959] 1 WLR 966 at 984 per Willmer LJ and Chadwick's case [1967] 2 All ER 945 at 952, [1967] 1 WLR 912 at 921 per Waller J. But what mischances?

The answer to this difficult question must be dictated by common sense rather than logic on the facts and circumstances of each case."

The Court agrees entirely and applying common sense finds in favour of the plaintiff with regard to the second accident.

Mr. Thacker also sought to rely on Jobling v. Associated Dairies Ltd. (1981) 2 All ER 752 HL. The Court is not persuaded that the case has any direct application to the circumstances of the instant case. Jobling v. Associated Dairies Ltd. concerns a supervening disease totally unconnected with the original injury. The Court there decided that damages awarded to the appellant for loss of earnings were to be assessed according to the principles that the vicissitudes of life were to be allowed for and taken into account when assessing damages so that the plaintiff was not over-compensated, and that a supervening illness apparent and known of before the trial was, whether it was latent or not at the time of the prior injury, at the time of the trial a known vicissitude about which the Court ought not to speculate when it in fact knew.

Jobling v. Associated Dairies Ltd. deals with the case where a plaintiff has suffered disabling injuries from two or more successive and independent tortious acts or a tortious act followed by a supervening disease.

The second paragraph of the speech of Lord Wilberforce (p.753), is very interesting:

" The chronology is as follows. In January 1973 the appellant slipped at his place of work and sustained injury to his back. The respondents were held liable in damages in respect of his injury. In 1975 the appellant had a fall which aggravated his condition which the judge held was referrable to the injury of 1973. (Emphasis added) ***He has not worked since this event. By 1976 his condition was such that by reason of his back injury he was only fit for sedentary work. In 1976, however, there supervened spondylotic myelopathy, which affected the appellant's neck. By the end of 1976 this had rendered him totally unfit for work."***

This paragraph makes it absolutely clear that the case revolved around a supervening disease resulting in total incapacity. But the judge had decided that an accident (a fall) suffered by the appellant at least two years after the original accident and which had aggravated the appellant's condition was referrable to the injury of at least two years earlier. The judge's finding was not challenged in any way and accords exactly with the view taken by the Court in the instant case. The plaintiff suffered a fall more than two years after the original accident; there was no unreasonable act on his part; there was no supervening tortious act by any third party; there was no supervening disease; the fall aggravated the plaintiff's condition and was referrable to the injury of more than two years earlier.

Mrs. Whittaker cited Wieland v. Cyril Lord Carpets Ltd. (1969) 3 All E.R. 1006. In that case the plaintiff suffered an injury caused by the admitted negligence of the defendants. After attending the hospital she felt shaken and the movement of her head was constricted by a collar which had been fitted to her neck. In consequence she was unable to use her bi-focal spectacles with her usual skill and she fell while descending stairs, sustaining further injuries. The Queen's Bench Division (Eveleigh J.) held that the injury and damage suffered because of the second fall were attributable to the original negligence of the defendants so as to attract compensation from them.

At p. 1010, Eveleigh J said this:-

> " ***In the present case I am concerned with the extent of the harm suffered by the plaintiff as a result of actionable injury. In my view the injury and damage suffered because of the second fall are attributable to the original negligence of the defendants so as to attract compensation. If necessary I think the plaintiff's case can also be put against the defendant in another way. It can be said that it is foreseeable that one injury may affect a person's ability to cope with the vicissitudes of life and thereby be a cause of another injury and if foreseeability is required, that is to say, if foreseeability is the right word in this context, foreseeability of this general nature will, in my view suffice.***"

As we have inferred already, every case turns upon its particular facts. But the decision and words of Eveleigh J. apply by direct analogy in the instant case.

McKew v. Holland & Hannen & Cubitts (Scotland) Ltd. (1969) 3 All E.R. 1621 H.L. was also cited to us. But this case also is to be distinguished because the plaintiff acted unreasonably. The facts are contained in the headnote:-

" The appellant sustained injury in the course of his employment for which the respondents were liable. As a result, on occasions, he unexpectedly lost control of his left leg which gave way beneath him. He would have recovered within a week or two but for a second injury which he suffered. On leaving a flat, accompanied by his wife and child and brother-in-law his leg collapsed as he made to descend some steep stairs where there was no handrail (his wife and brother-in-law were at the time securing the door). The appellant pushed his daughter aside to avoid pulling her down the stairs and himself tried to jump so that he would land in a standing position rather than falling over down the stairs. On landing he suffered a severe fracture of the ankle. On the question whether the respondents were liable for the injuries caused by the second accident,

Held: the act of the appellant in attempting to descend a steep staircase without a handrail in the normal manner and without adult assistance when his leg had previously given way on occasions was unreasonable; accordingly the chain of causation was broken and the respondents were not liable in damages for his second injury."

At page 1623 Lord Reid said this:-

" The appellant's case is that this second accident was caused by the weakness of his left leg which in turn had been caused by the first accident. The main argument for the respondents is that the second accident was not the direct or natural and probable or foreseeable result of their fault in causing the first accident.

In my view the law is clear. If a man is injured in such a way that his leg may give way at any moment he must act reasonably and carefully. It is quite possible that in spite of all reasonable care his leg may give way in circumstances such that as a result he sustains further injury. Then that second injury was caused by his disability which in turn was caused by the defender's fault. But if the injured man acts unreasonably he cannot hold the defender liable for injury caused by his own unreasonable conduct. His unreasonable conduct is novus actus interveniens."

And at page 1624 Lord Reid said this:-

" But I think it right to say a word about the argument that the fact that the appellant made to jump when he felt himself falling is conclusive against him. When his leg gave way the appellant was in a very difficult situation. He had to decide what to do in a fraction of a second. He may have come to a wrong decision; he probably did. But if the chain

of causation had not been broken before this by his putting himself in a position where he might be confronted with an emergency, I do not think that he would put himself out of court by acting wrongly in the emergency unless his action was so utterly unreasonable that even on the spur of the moment no ordinary man would have been so foolish as to do what he did. In an emergency it is natural to try to do something to save oneself and I do not think that his trying to jump in this emergency was so wrong that it could be said to be no more than an error of judgment."

The Court has to apply Lord Reid's judgment to the facts of the present case. The plaintiff stumbled or tripped on the gravelled surface. He instinctively put out his injured arm to save himself, realised instantly that he could cause further harm, and let himself go, falling heavily on his right arm or shoulder, causing a dislocation. The Court is quite unable to find, in those circumstances, that the plaintiff acted unreasonably. Because there was no unreasonable conduct there was no novus actus interveniens. The plaintiff was in a very difficult situation. He had to decide what to do in a fraction of a second. Even if he acted wrongly in an emergency his action was not so utterly unreasonable that even on the spur of the moment no ordinary man would have been so foolish as to do what he did. Trying to save his right arm and shoulder in the circumstances could be no more, at worst, which we doubt, than an error of judgment.

In the Court's judgment the second injury was caused by the plaintiff's disability which in turn was caused by the defendant's fault.

For all the reasons which we have given, the Court decided that there should be no abatement of the damages to be awarded in respect of the original injury and the Court now proceeds to deal with each of the heads of damage under which compensation can be awarded to the plaintiff.

HEADS OF CLAIM

Damages are sought under the following heads:-

(a) Special Damages

Schedule 1: itemised medical expenses totalling £383

Schedule 2: itemised travelling expenses totalling £123.50

Schedule 3: itemised loss of earnings totalling £23,620.65

(b) General Damages

(i) Pain, suffering and loss of amenities of life

(ii) future handicap in employment

(iii) loss of future earnings

(c) Interest

At such rate and for such period as the Court may deem fit on the sums claimed in (a) and (b) above.

(d) Costs

We now deal with the quantum of our awards.

(a) **SPECIAL DAMAGES**

Schedule 1: the itemised medical expenses

We reduced item 3 for doctor's visits and prescriptions to £35 but allowed items 1, 2 and 4.

Schedule 2: the itemised travelling expenses

We allowed the five items.

Schedule 3: the itemised loss of earnings

We decided that Social Security contributions had to be taken into account. Contributions were 9½% of wages, 5½% paid by the employer, 4% paid by the employee.

Items 1(a) and (b) and 2(a) were agreed by the parties and are therefore allowed.

Item 2(b). We reduced the claim of 27 weeks' loss of earnings due to medical appointments but allowed 13 weeks. We decided that 6½ hours was a reasonable estimate of hours not worked each week and there was no evidence produced that the plaintiff had worked on other sites.

Items 2(c), (d) (e) and (f) we allowed.

Item 3(a) - We reduced the claim of 33 weeks but allowed 30 weeks.

Item 3(b) - We reduced the claim of 52 weeks by 10%.

The special damages totalling £22,246.26 that we award are made up as follows:-

Schedule 1:		374.00
Schedule 2:		123.50
Schedule 3:	1(a)	1,873.04
	(b)	406.84
	2(a)	164.00
	(b)	323.23
	(c)	1,330.37
	(d)	1,865.76
	(e)	287.04
	(f)	322.92
	3(a)	6,687.36
	(b)	8,488.20
		£22,246.26

(b) **GENERAL DAMAGES**

The plaintiff, who is single, was born in Scotland on the 11th of May, 1951. Thus he was thirty-five years of age at the date of the original accident. On leaving school at age 15, without qualifications, he was apprenticed an electrician, which trade he pursued and in which he became skilled.

He suffered a great deal of pain from his original injury. His symptoms did not improve in spite of a course of anti-inflammatory tablets and injections. He suffered tenderness to the posterior part of the shoulder capsule and the lateral border of the scapula. The injury was diagnosed as a soft tissue injury and referred for a course of physiotherapy which failed to alleviate his symptoms. He had to continue with anti-inflammatory tablets, this some three months after the original accident.

By April, 1987, the plaintiff was still suffering considerable pain in the upper right shoulder region, radiating to the right arm. The plaintiff is right handed. The right arm occasionally went numb, disturbing his sleep at night. Doctor Bernard Watkin, a specialist of Wimpole Street, London, certified that there was a severe capsulitis of the right shoulder. The scapulo-humeral range was down by 30% and internal rotation was down by 20%. There was an audible clicking on adduction of the joint.

The injury severely incapacitated the plaintiff both in his work ability and in the non-working capacity by causing him considerable pain in normal everyday activities and interfering with his sleep considerably.

At the time of the second accident, the plaintiff's right shoulder had never been normal since the first injury. He had had persistent pain and found manual movements with his right shoulder extremely difficult.

As a result of the second accident the acromio-clavicular joint was dislocated.

Subsequently, the plaintiff was referred to Mr. Clifford who was of the opinion that at the time of the first accident the plaintiff tore the rotator cuff tendon of the right shoulder. This explained the plaintiff's continuing symptoms as these injuries take a long time to settle down. Pain on elevation of the shoulder through a painful arc is a typical symptom of such an injury. As at December, 1988, Mr. Clifford advised the plaintiff to await developments.

Mr. Clifford examined the plaintiff again on the 22nd August, 1989. He continued to suffer with fairly severe symptoms resulting in a functional loss of the shoulder. He had been made redundant four weeks earlier and prior to this had been restricted to light work at waist level and below. He could not climb ladders or scaffolding. Mr. Clifford arranged for a surgical exploration of the right shoulder and rotator cuff. This took place on the 2nd November, 1989. Mr. Clifford found a grossly unstable acromio-clavicular joint with abundant surrounding inflamed granulation tissue. The tendon of the rotator cuff lying deep to this joint was worn with marked impingement on the acromial process of the scapula. The unstable joint and part of the bony acromium were excised to decompress the tendon of the rotator cuff. It was too early to make an accurate prognosis.

Three months after the operation there was still a considerable amount of pain and tenderness. Mr. Clifford was hopeful that the plaintiff's symptoms would settle with time.

Seven months after the operation Mr. Clifford reported the result as disappointing. The plaintiff had been unable to return to work as an electrician. He suffered pain in the shoulder wher he lay on the affected side and when he attempted to use the arm above shoulder level he frequently suffered from a painful click in the shoulder. The symptoms resulted in a considerable disability. He had difficulty in dressing, in particular pulling on a sweater. He could not get his hand up to a shelf. He would not be able to work as an electrician. Mr. Clifford did not expect any further improvement and the plaintiff was likely to remain permanently disabled. The plaintiff was, however, suitable for retraining at Highlands College in electronics which would involve using his hands only at bench level.

Mr. Clifford's final report is dated the 6th June, 1990 in which he expressed his belief that the plaintiff suffered an injury to the tendon of the rotator cuff in the original (first) accident. He steadfastly maintained that opinion during his evidence in the course of the trial and on this point, we prefer his evidence to that of Mr. Francis Moynihan, M.B., F.R.C.S., who did not have the advantage of being present when the surgery was performed by Mr. Clifford.

In broad terms, the opinions on the degree of pain, suffering and loss of amenity of the plaintiff and his prognosis as expressed to us in evidence by Mr. Clifford were supported in evidence by Mr. Moynihan, whose detailed report dated 10th October, 1990, was also before the Court and was as carefully considered as was his evidence. Mr. Moynihan conceded that the differences between his evidence and that of Mr. Clifford on a number of aspects were differences in degrees of emphasis, rather than direct disagreement.

The preponderance of medical evidence is that the plaintiff will suffer some persistent aching pain in the long term; there is residual weakness and loss of movement and this will remain. The plaintiff is permanently disabled insofar as work as an elecrician is concerned. He will be able to work with his hands only at bench level.

The plaintiff cannot take part in any sporting activities. Pre-accident he played occasional golf and swam, although he was not a real sportsman. He used to help about the house and did painting and decorating; he can no longer do so. When he cannot sleep as the result of pain he gets up and watches television. There can be no doubt that his amenities of life have been adversely affected.

(i) Pain and suffering and loss of amenities of life

We were referred to and considered the facts and awards (when inflated according to Kemp's Inflation Table released 23-IV-90) in the following cases:- Hunt v. Greater London Council [1977] C.A. No. 136; March 8, 1977, Kemp 9-019; Calder v. Lummus Crest Ltd. [1989] S.L.T. 689 - Kemp 9-020; Raeside v. Birmingham City Council [1982] Q.B.D. October 8, 1982 - Kemp 9-021; Burton v. Roberts [1987] Q.B.D. 2nd February, 1987 unreported. B.P.I.L.S. [497]; Lally v. Chiltern District Council [1984] Q.B.D. 21st June, 1984, unreported. B.P.I.L.S. [499]; Higham v. Dr. S. Argarwal [1987] Q.B.D. 19th November, 1987, unreported. B.P.I.L.S. [511] - [512]; Tcharaiwskij v. Dudley Health Authority [1985] Q.B.D.5th March,1985, unreported. B.P.I.L.S. [514] and Mumford v. Standton [1986] Q.B.D. 30th June, 1986, unreported. B.P.I.L.S. [556].

Finally we considered Carrington v. Heinz [1988] case number 1110 Current Law Year Book, to which we were referred by Mrs. Whittaker. Here the initial injury was some rupture of the rotator cuff of the right shoulder and the award for pain, suffering and loss of amenity was £17,500, which when inflated would be £20,650. Whilst the Court agreed with Mr. Thacker that that case was worse because the victim of that accident had suffered childhood polio to his left arm and was very much more dependent than a normal person upon his right arm and in addition there was a 15% risk of a shoulder replacement being required within 10 years (a factor not mentioned in the plaintiff's case) it was nevertheless very interesting in that it was a 'second and subsequent' injury case where an operation of attempted repair to the rotator cuff was unsuccessful. The Court considered that Carrington v. Heinz was a case which enabled it to be more generous to the plaintiff than might otherwise have been the case.

The Court came to the conclusion that there has been a considerable degree of pain and suffering and a significant loss of amenity by the plaintiff and the right award is £10,000.

(ii) Future handicap in employment

Mrs. Whittaker referred us to pages 5029-5032 and to page 5032/1 and to pages 5033-5035 of Kemp on the subject of handicap in the labour market at some future date or simply Smith v. Manchester damages, a piece of jargon which (it is said) to the practitioners in this field more precisely defines the scope of this particular (English) hea of damage. She said that the decision in Smith v. Manchester Corporation had not previously been applied by this Court but submitted that we should follow the same principles.

She asked us to award Smith v. Manchester damages to the plaintiff and drew a number of English case to our attention submitting that the plaintiff's case would fall into a bracket of say £9,000 to £25,000.

Mr. Thacker submitted that it was for the plaintiff to satisfy the Court that it is a head of damage that the Court should award according to Jersey Law and further submitted that all the heads of damage available to this Court were as set out by the Court in Richardson v. Genée [1967] JJ 777 at the top of page 778.

The Court is satisfied that it was not the intention of the learned Court in that case to impose a finite list of all the heads of damage under which compensation can be claimed and awarded by the Royal Court. To do so would be to stultify the development of our common law in personal injury cases which cannot be in the public interest. This is not exclusively a matter for legislation as Mr. Thacker submitted and we hold that it is a head of damage that the Court has the power to award.

Having so decided, there are two questions: first, is there a real possibility that the plaintiff will be on the labour market before retirement? In our judgment, that question can only be answered in the affirmative. Secondly, is there a real likelihood that he will suffer loss if he does go back onto the labour market? In our judgment that question too has to be answered in the affirmative.

The plaintiff is now some 41 years of age. He continues to have trouble with his shoulder. His shoulder is likely to cause him problems. On the labour market the shoulder injury puts him at a real disadvantage for the kind of work he can do. In our judgment the right award here is £5,000.

As a matter of interest, the Court finds that a Smith v. Manchester damages award has been made, albeit by agreement, in Jersey between the date of trial and the date of judgment in the instant case. F. C. Hamon, Esq., Commissioner, sitting with Jurats Vint and Le Ruez gave judgment in White v. Ommaroo Hotel Limited (20th March, 1992) Jersey Unreported. The case was unusual in that it concerned only the question of liability, damages having been already agreed between Counsel. The Court found in favour of the plaintiff on the question of liability. The relevant part of the judgment reads thus:-

"Mr. Fielding by his wise counsel has limited the financial loss, and we confirm the agreed order. The defendant shall pay to the plaintiff general damages of £4,500, with interest at 2% from the Order of Justice. There will be a Smith v. Manchester award of £500. Special damages are awarded ...".

(iii) Loss of future earnings

The Court accepted Mrs. Whittaker's minimum figure and decided on £5,200 per annum.

At the date of trial the plaintiff was aged 40. He would ordinarily have a working life of 25 years. The Court decided initially that in the circumstances the right discount or multiplier was one of 12 and on a multiplicand of £5,200 a year, the figure for this loss would be £62,400.

However, the Court accepted the submission of Mr. Thacker, that, notwithstanding Richardson v. Genée, where that Court had taken no account of the incidence of taxation, future tax liability should, in this case, be taken into account. Having done so, the Court decided that after taking into account the allowances and reliefs due to an individual with earned income, an average rate of income tax of 10% should be deducted from the gross loss of earnings. The Court therefore decided to award £57,000, being £56,160 rounded up.

(c) **INTEREST**

In accordance with the wide discretionary powers conferred upon us by article 1 of the Interest on Debts and Damages (Jersey) Law, 1971, and applying those English authorities which were cited to us, we decided to award interest from the 21st June, 1986 (the approximate date of the first accident) to 31st May, 1991, the closing date of the trial at 6% on the total amount of £22,246.26 awarded for special damages and this on the authority of Dexter v. Courtaulds Ltd. [1984] 1 All ER 70 cited in the Supreme Court Practice [1991] Vol. 1 Rule 6/2/16 paragraph 3(5) at page 43: and from the 8th May, 1989 (the date of the Order of Justice) to the date of judgment at 2% on the £10,000 awarded for pain, suffering and loss of amenity and this on the authority of Wright v. British Railways Board [1983] 2 All ER 698 H.L., in which case Lord Diplock said ***"I will call this head of damages (scottice solatium) non-economic loss."***. These awards amount to £6,600.73 and £629.86 respectively.

TOTAL AWARD

There will therefore be damages for the plaintiff under all the various headings for a total figure, inclusive of interest of **£101,476.85.**

(d) **COSTS**

Because neither Counsel addressed the Court on the issue of costs the question is left open. Because in pursuance of Article 13(1) of the Royal Court (Jersey) Law, 1948, the Bailiff (or Deputy Bailiff) alone shall award the costs, and because no decision as to costs should be made without hearing Counsel's submissions, if any, both Counsel are invited to make submissions forthwith to the Deputy Bailiff.

AUTHORITIES

Lord & Anor-v-Pacific Steam Navigation Company, Ltd., The Oropesa. (1943) 1 AllER 211 C.A.

Knightley-v-Johns & Ors. (1982) 1 AllER 851 C.A.

Jobling-v-Associated Dairies Ltd. (1981) 2 AllER 752 HL.

Wieland-v-Cyril Lord Carpets, Ltd. (1969) 3 AllER 1006.

McKew-v-Holland & Hannen & Cubitts (Scotland) Ltd. (1969) 3 AllER 1621 HL.

Kemp's Inflation Table (released 23 APR'90):

Hunt-v-Greater London Council [1977] C.A. 136; 8th March, 1977, Kemp 9-019.

Calder-v-Lummus Crest Ltd. [1989] SLT 689; Kemp 9-020.

Raeside-v-Birmingham City Council [1982] QBD; 8th October, 1982: Kemp 9-021.

Burton-v-Roberts [1987] QBD; 2nd February, 1987 unreported BPILS [497]

Lally-v-Chiltern District Council [1984] QBD; 21st June, 1984 unreported BPILS [499].

Higham-v-Dr. S. Argarwal [1987] QBD; 19th November, 1987 unreported BPILS [511] [512].

Tcharaiwskij-v-Dudley Health Authority [1985] QBD; 5th March, 1985 unreported BPILS [514].

Mumford-v-Standton [1986] QBD; 30th June, 1986 unreported BPILS [556].

Carrington-v-Heinz [1988] Current Law Year Book Case No. 1110.

Richardson-v-Genée (1967) JJ 777.

White-v-Ommaroo Hotel Ltd. (20th March, 1992) Jersey Unreported.

R.S.C. (1991 Ed'n): r.6/2/16: para 3(5): p.43: Dexter-v-Courtaulds, Ltd. [1984] 1 AllER 70.

Wright-v-British Railways Board [1983] 2 AllER 698 HL.

Smith-v-Manchester Corporation (Kemp 5029-32; 5032-1; 5033-35.)