NMCS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 102/98

BEFORE: **THE HON. MR. JUSTICE RATTRAY, P.**
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (AG.)

BETWEEN	**JAMAICA FOLLY RESORTS LIMITED**	**APPELLANT/ DEFENDANT**
AND	**THOMAS CRANDALL**	**RESPONDENT/ PLAINTIFF**

David Henry & Edward Brightly instructed by **Nunes, Scholefield, DeLeon & Co.,** for Appellant

Dennis Goffe, Q.C. & Dave Garcia instructed by **Myers, Fletcher & Gordon** for Respondent

22nd April, 26th May & 30th July, 1999

RATTRAY, P

This appeal is from the judgment of Ellis, J delivered on 25th June, 1998 in an action for damages for negligence brought by the respondent/plaintiff Thomas Crandall, against the appellant/defendant Jamaica Folly Resorts Limited in which the trial judge found in favour of Mr. Crandall against the appellant/defendant the owners of Silver Seas Hotel situated in Ocho Rios, Jamaica and awarded damages. Mr. Crandall was a guest in the hotel on vacation from the United States of America at the time of the incident which was the origin of the action. He claimed that on the 13th December, 1985 he was sitting in the bar area of the hotel on a wrought iron chair provided by the hotel for the use of its guests when one of the legs suddenly broke off causing him to be thrown to the floor. Consequently, he suffered the injuries in respect of which he

gave evidence at the trial. The action was founded in negligence and/or breach of statutory duty under the provisions of the Occupiers Liability Act.

The defence was that Mr. Crandall was seated on the chair at the bar in a position which had the chair tilted back on its rear legs whilst at the same time rocking backwards and forwards. Despite several warnings by the hotel staff he continued in this risky exercise. Eventually, one of the rear legs of the chair broke causing him to fall to the ground and suffer injury. In other words, Mr. Crandall was the author of his own downfall.

The award on damages was likewise challenged. Ellis, J not only found liability but awarded as follows:

> 1. Special damages J$95.00 plus the equivalent of US$23,220.20 to date of judgment with interest thereon at 3% from the 13th of December, 1985.
> 2. General damages of $1,750,000.00 with interest thereon at 3% as at the 9th of June, 1989

with the consequential orders for costs.

The appeal challenged both liability and quantum. The facts adduced at the trial with respect to how the accident occurred, as is not infrequent in these matters, were diametrically in conflict.

The plaintiff gave evidence and called a witness who was at the hotel as a visitor at the time of the incident to support his account that he was sitting at the bar on the chair when as he pushed back the chair one of the legs broke and he fell backwards. He grabbed the rail of the bar whilst falling and felt something "popped" in his right arm. He weighed at the time 250 pounds. He denied tipping back the chair. All four legs of the chair were on the ground when the rear leg on the right side broke.

A co-worker Gordon Krohn, also on holiday was present at the time of the incident. He gave evidence that Mr. Crandall was sitting in a normal fashion when the chair leg broke.

For the defendant the manager of the hotel gave evidence that on that evening he saw Mr. Crandall sitting at the bar and rocking the chair backwards and forwards on its rear legs. He spoke to the bar tender twice who went and spoke to Mr. Crandall. The accident happened after he had left the bar for his office.

The chair was a cast iron chair manufactured by Castings and Holdings Ltd and its Managing Director, Mr. Glen McDonnough gave evidence as to the manufacture of the chair which he sold to the defendant company some five years before the accident. He admitted that he had complaints of chair legs which he had manufactured breaking on two or three occasions. However, he thought it highly unlikely that the chair leg would snap if a person was sitting normally on it. It was more probable that rocking back and forth would cause the leg to break. He was not involved in the maintenance of the chairs.

This substantially was evidence on which Ellis, J found liability in the defendant. There was abundant evidence on which he could have so properly found. It was a question of fact for the judge to determine and the challenge on appeal to the finding of liability must therefore fail.

DAMAGES

The quantum of damages awarded is also challenged on appeal. Consequent on an order by Theobalds, J on the 23rd of November, 1993 the evidence of Dr. Robert L. Hausserman, an orthopedic surgeon of Appleton, Wisconsin USA was taken by a special examiner and formed part of the record. Dr. Hausserman examined the plaintiff/respondent on the 16th of December, 1985. Mr. Crandall was suffering from a rupture of his biceps tendon resulting in swelling and discoloration from bleeding in the area for which surgery was performed. Dr. Hausserman performed

surgery and repaired the damage. Mr. Crandall was hospitalised from the 18th to the 23rd of December, 1985. The arm was placed in a plaster cast.

He was again hospitalised on the 5th of January 1986 because of severe pain in the area. This was in relation to the surgery. From January 5 to 9, 1986 whilst in hospital he was treated for this development. He was seen next on the 13th January and 25th January and although improved he was still in pain. Rehabilitation commenced including physical therapy which involved specific exercises. As calcification developed he was seen through March to the 9th of April when surgery was performed. Again, he was hospitalised and this time until the 18th of April. Following surgery he developed chest pain and was referred to a cardiologist.

A diagnosis of myocardial infarction was made, that is, a heart attack. His case was then taken over by two cardiologists.

Dr. Hausserman gave as his opinion that the surgery was a substantial contributing factor to the heart attack. Mr. Crandall then underwent a course of radiation therapy as well as physical therapy. He was afterwards seen by the doctor on the 25th of April, 9th of May, 23rd of May and was still being troubled by the arm which was still painful. On July 7 he still had limitation of movement of his left forearm. No further treatment was given but he was checked again in January 1987 when he was slightly better as regards his range of motion and rotation. He was then discharged to an "as needed" follow-up.

In January 1991 he was still having restriction of rotation of the arm. The symptoms of supernation (palm up) of 25° and pronotation (palm down) of 25°-30° led the doctor to the following conclusion:

> "... in view of those symptoms being present for over five years post injury, that they will in all probability be permanent with associated discomfort and limitation of activities."

Dr. Hausserman last saw him in October, 1996 when the symptoms were the same. Finally, in respect of future prognosis the doctor stated:

> "He could lose some further rotation, although he doesn't have much to lose. He may have some mild progression of degeneration changes, but the appearance on x-ray and the ability to maintain his flexion and extension suggests that the problem would not be so much progressive deterioration or progressive degeneration and degenerative arthritis but rather this persistent restriction of rotation and the persistent limitation based on the rotation."

Ellis, J on the question of general damages stated:

> "I have not been directed to any award of damages on all fours with this case. In the circumstances I would award an amount of $1,750,000 to cover pain and suffering and loss of amenities. This amount of $1,750,000 to bear interest of 3% as of 9th June, 1989."

It has been submitted on behalf of the appellant that the award of $1.75m for general damages is manifestly excessive.

In ***Ward v. James*** [1965] 1 All E.R. 563 at page 573 Lord Denning, L.J. wrestled with the principles of an assessment of damages "for grave injuries at any rate in those cases where a man is greatly reduced in his activities. He is deprived of much that makes life worth while. No money can compensate for the loss. Yet compensation has to be given in money. The problem is insoluble. To meet it, the judges have evolved a conventional measure. They go by their experience in comparable cases."

The problem for judges, of course, arises in making the comparison. In Jamaica we find that comparisons in terms of quantum of damages with cases from other jurisdictions do not fully assist as the value of the specific award of money may vary in different jurisdictions since monetary value must be weighed in the scale of what the payment can achieve in the particular countries. Added to this is the varying value of different currencies. We have therefore sought to make comparisons with past awards from our own jurisdictions. Our limitations, however lie in the fact that the admirable compilations of Khan on "Recent Personal Injury Awards made in the

Supreme Court of Judicature of Jamaica" and more recently Harrison on "The Assessment of Damages for Personal Injuries" are rather terse and often do not ensure the exposition of the fullest facts and the rationale upon which the award is made. It is in this situation very difficult to identify uniformity in general damages awards for pain and suffering and loss of amenities. Yet judges must do the best they can. It is only when an award is so out of line with former awards for similar injuries and their effect that a Court will disturb the award of a trial judge and make its own assessment.

The dictum of Greer, L.J. in ***Flint v. Lovell*** [1934] All E.R. Rep. 200 at page 202 is the well established approach:

> "To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled."

The injury in this case was painful, the consequent effect limited the enjoyment of the life of the respondent. The period over which its effect lasted and still lasts was extended. Dr. Hausserman described the effect as - (1) limitation of the rotation of the arm; (2) restriction of his activities including "difficulty in holding a bow for hunting, a pleasurable activity which he formerly enjoyed. He had now to consider applying for a cross-bow permit; (3) difficulty with rotational activity for example turning a door knob or handling a wrench or screw driver.

His report dated 4th March, 1991 concluded -

> "... in view of the persistent limitation of forearm rotation at over 5 years post-injury, this restriction in all probability will be permanent with associated discomfort and limitation of activities and would indicate a 20 percent permanent partial disability as compared to an amputation."

If we add to this, as we must, the heart attack which the doctor maintained was contributed to by the trauma of the injury I would not consider the award of general damages of $1.75m as excessive.

In ***Hinds v. Edwards*** "Recent Personal Injury Awards in the Supreme Court of Jamaica" Volume 4 page 100 compiled by Ursula Khan, the injury was to the right hand and the permanent partial disability was 10%. No specific loss of amenities was stated and the award for pain and loss of amenities was $674,414.12 which applying the relevant consumer price indices would produce the equivalent of $713,016.95 at the time of trial. Taking into consideration the continuing trauma in this case and the limitation on the respondent with respect to recreational activities enjoyed by him prior to the accident, and with the additional complication of the heart attack, I would not consider the award of Ellis, J on general damages so out of line as to require a downward adjustment.

Consequently, I would dismiss the appeal with costs to the respondent.

DOWNER, J.A.:

I agree.

PANTON, J.A. (Ag.):

I agree and have nothing to add.