JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 52/2009

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**CHANDRA SOARES**	**APPELLANT**
AND	**FRANCINE DUNCAN**	**RESPONDENT**

John Givans instructed by Givans & Co for the appellant

Leroy Equiano for the respondent

8, 18 November and 9 December 2011

MORRISON JA

[1] On 18 November 2011, the court announced that this appeal would be allowed and the judgment of Marsh J given on 19 March 2009, by which he adjudged the appellant liable to pay to the respondent the sum of $1,250,000.00 with costs to be agreed or taxed, would be varied and a judgment in favour of the respondent in the sum of $700,000.00 substituted therefor. The court also ordered that the appellant should have the costs of the appeal, to be agreed or taxed. These are my reasons for concurring in the judgment of the court.

[2] The appellant is an attorney-at-law in private practice. The respondent was at all material times employed to Industrial Gases Limited (to which I will refer in this judgment as 'the employer') as a purchasing officer.

[3] On 22 May 1999 the respondent was injured at work when a chair in which she was sitting collapsed under her, causing her to fall and injure herself. Early in 2004, she retained the appellant to act on her behalf to seek compensation for her injuries. The appellant duly made contact with the employer, through its attorneys-at-law, to whom, by letter dated 14 December 2004, she sent details of the respondent's claim. However, the record does not disclose that any response to this letter was ever received and in due course, on 22 May 2005, any claim that the respondent might have had against the employer became statute-barred.

[4] On 8 May 2006, the respondent filed suit against the appellant, claiming damages for negligence in not having filed suit within time against the employer, by reason of which, the respondent pleaded, her "right to recover against her previous employers is now lost". In her defence, the appellant accepted liability but contested the question of damages payable to the respondent, maintaining that "what the [respondent] has lost is not the right to recover [against the employer] but the opportunity of filing a claim against the said [employer]...".

[5] At the trial before Marsh J, medical reports from Drs Hope Anderson and R. Christopher Rose on the respondent's injuries, treatment and prognosis were put in evidence. Dr Anderson, who saw the respondent five days after her fall on 27 May

1999, diagnosed her as suffering from "lumbar sacral strain resulting from a fall". The x-rays ordered by Dr Anderson were unremarkable, but when the respondent continued to complain of pain she was referred to Dr Rose, who is a consultant orthopedic surgeon. In a report dated 8 June 2004, Dr Rose's diagnosis was that the respondent was suffering from a "Bulging lumbar disc" and her permanent partial disability was assessed at 8% of the whole person.

[6] In a brief oral judgment (an obviously unchecked note of which formed part of the record of appeal), Marsh J considered that the respondent "would have been able to have sued her erstwhile employer for failing to provide a safe system of work, negligence and breach of an employer's duty of care". He also considered that the respondent had proven that she was injured. After referring to the medical evidence and to some previous awards in personal injury cases, the learned judge determined that the respondent's injuries would have entitled her to an award of damages from the employer of $1,500,000.00 for pain and suffering and loss of amenities. However, in the result, on a basis that is not at all clear from the award, the judge entered judgment for the respondent against the appellant in the sum of $1,250,000.00, with costs to be taxed or agreed.

[7] Dissatisfied with this result, the appellant filed four grounds of appeal, as follows:

> "(i) The learned trial judge failed to properly evaluate the Respondent's chances in a suit against her former employer if such suit had been filed in time by the Respondent's former Attorney-at-Law, who was the Appellant.

(ii) The learned trial judge, having adjudged that the outcome of the Respondent's suit against her former employer was uncertain, failed to reflect such uncertainty in the award of damages, but made an award inconsistent with his finding of uncertainty.

(iii) The authorities on damages relied on below by the parties showing that full general damages should be in the region of $1M, the award of $1,250,000.00 is manifestly excessive.

(iv) Damages for the loss of the Respondent's opportunity to have filed suit in time against her former employer should have been mid-way between nominal damages and $500,000.00, given the uncertainty in determining the outcome of any suit against the former employer."

[8] In an admirably well-structured argument, Mr John Givans, who appeared for the appellant both here and in the court below, put the appellant's case in this way. What the respondent lost as a result of the appellant's admitted negligence in not filing suit against the employer within time was not the full damages she stood to recover, but the opportunity to have filed such a suit. If the evidence showed that her suit against the employer must have succeeded, then the respondent would be entitled to full damages against the appellant. On the other hand, if in the suit against the employer the respondent would have lost, she would be entitled to nominal damages only against the appellant. If the case fell somewhere between these two outcomes, the trial judge was required to evaluate the respondent's prospects of success and make his award of damages accordingly.

[9] In the instant case, Mr Givans pointed out, whether the respondent's claim against the employer was based purely in tort, breach of contract or occupier's liability,

liability could only be on the basis of proof of a failure to take reasonable care to prevent reasonably foreseeable damages. In other words, liability would not have been strict. The judge was therefore obliged to evaluate the respondent's prospects of success in an action against the employer, taking into account such evidence of negligence as there was, and such defences as might have been available to the employer, who was not the manufacturer of the chair which collapsed, such as, for instance, latent defect.

[10] As regards the damages awarded by the judge, Mr Givans contended that, on the basis of the authorities which had been put before him, the award of $1,250,000.00 was manifestly excessive and indeed implied that the respondent would have recovered full damages against the employer. Accordingly, Mr Givans concluded, an award mid-way between nominal damages and $500,000.00 would be reasonable in this case, "given the difficulties with which the Respondent's claim against her employer would have faced".

[11] Mr Equiano for the respondent, after initially submitting, albeit somewhat faintly, that there was some evidence that the employer had accepted liability, ultimately accepted that the learned trial judge had undertaken no proper evaluation of the respondent's chances of success in an action against the employer. However, he submitted that the damages recoverable by the respondent should not fall below $835,000.00, which was the lowest award in the cases of similar injuries to which the trial judge had been referred by the appellant in the court below.

[12] We were referred by Mr Givans to a number of authorities, all of which I have found helpful, but I will for the purposes of this judgment examine briefly only a few of them. The leading case is ***Kitchen v Royal Air Forces Association et al*** [1958] 2 All ER 241, in which the court was confronted by a situation not dissimilar to the instant case. The plaintiff's solicitor negligently omitted to file her claim under the Fatal Accidents Acts of 1846 – 1908 for the wrongful death of her husband within the time limited by statute. The trial judge awarded her £2000.00 and, in a judgment with which the other members of the court (Parker and Sellers LJJ) agreed, Lord Evershed MR said this (at page 250):

> "If, in this kind of case, it is plain that an action could have been brought, and, that if it had been brought, it must have succeeded, the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that she can get nothing save nominal damages for the solicitors' negligence. I would add, as was conceded by counsel for the plaintiff, that in such a case it is not enough for the plaintiff to say: "Though I had no claim in law, still, I had a nuisance value which I could have so utilised as to extract something from the other side, and they would have had to pay something to me in order to persuade me to go away."

[13] The learned judge then concluded as follows (at page 251):

> "After giving my best consideration to the matter and directing myself, I hope, properly to the problems which are to be solved in this case, I find it impossible to say that

> there was here no valuable right, no cause of action, which was lost by the negligence. I agree with the judge that there were difficulties. The whole case is fraught with mystery and one is almost at a loss to conceive how such a state of things ever should have arisen. The fact is that it did arise because, unfortunately, the plaintiff's husband was killed. The plaintiff has suffered many buffetings in the course of the last thirteen years but in this one respect Fortune, it may be, has smiled on her; for I think, for my part, that she has been generously treated in being awarded £2,000. The second defendants, however, are not quarrelling with the matter of quantum. There is, therefore, nothing that I need say on that matter. I think that the plaintiff established that there was a cause of action and that she had lost something of value. Therefore, I think on this matter, too, that we should not disturb the judge's finding. In the end, therefore, I would say that this appeal should be dismissed."

[14] In ***Buckley v National Union of General and Municipal Workers and Another*** [1967] 3 All ER 767, the court had to consider the basis upon which the plaintiff's damages in an action against her trade union, for negligently failing to warn her of an impending statute bar in a potential action against the employer, should be assessed. Applying ***Kitchen v RAF***, Nield J held that what was required to be shown by the plaintiff as having been lost in the claim against the union for negligence was "some prospect of success in the action" against her former employer. Applying that test, the learned judge found that the plaintiff had no prospect of success against the employer and therefore gave judgment for the defendant union.

[15] ***Mason v McLean*** (1979) 16 JLR 432, a decision of Theobalds J, falls on the other side of the line. In that case, the defendant, an attorney-at-law in private

practice, negligently failed to file the plaintiff's claim for damages arising out of a motor vehicle accident within the limitation period. There was no question that the driver of the car which had injured the plaintiff was liable, as several other persons injured in the same accident had had their claims for compensation settled by the insurers without resort to litigation. In these circumstances, also applying ***Kitchen v RAF***, Theobalds J took the view (at page 435) that it was "beyond any question that had an action been brought it must have succeeded". The plaintiff was therefore awarded the full amount of the pecuniary loss to which she would have been entitled were it not for the defendant's negligence.

[16] In my view, these cases fully support Mr Givans' submission that it is for the judge trying the case against the negligent attorney to evaluate the claimant's prospects of success against the alleged original wrongdoer, in this case the employer, and to reflect his assessment of those prospects in the quantum of the award of damages against the attorney. In making that assessment in the instant case, it would also be necessary to bear in mind that, on any theory of liability, viz., employer's liability, whether in contact or in tort, or occupier's liability, the respondent would have been obliged to prove negligence on the part of the employer. Thus, one learned authority on labour law, in a passage to which we were also referred by Mr Givans, characterised the employer's duty as dependent "on the absence of reasonable care to prevent reasonably foreseeable dangers" (Principles of Labour Law, 3rd edn, by Professor Roger Rideout, page 371).

[17] Any assessment of a claimant's prospects on issues in the action which ought to have been filed on her behalf by her attorney several years after the event, as in this case, will almost invariably be based on the evidence actually adduced in the case itself. However, in making the assessment, the judge trying the subsequent action against the attorney will also have to bear in mind, given that the employer's liability is not strict, what possible defences might be available to the employer. Thus, in ***Toronto Power Company v Paskwan*** [1915] AC 734, 738, Sir Arthur Channell observed that -

> "...the master does not warrant the plant, and if there is a latent defect which could not be detected by reasonable examination, or if in the course of working plant become defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable, and further, a master is not bound at once to adopt all the latest improvements and appliances."

[18] In the instant case, it is clear that Marsh J carried out no such evaluation or assessment of the respondent's prospects of success in the hypothetical action against the employer. While in his brief judgment the judge did note that counsel who then appeared for the respondent had submitted that the court "should be guided by the principles laid out in **Kitchen v Royal Air Force and others**", there is absolutely no indication in the judgment that Marsh J sought to give effect to those principles in his determination of the case. After rehearsing in some detail the submission that were made to him on damages, the closest the judge came to a definitive statement about

the respondent's intended action against the employer was that she "would have been able to have sued her erstwhile employer".

[19] But that, as the authorities show, was not enough, particularly as there was no evidence to suggest that this was a case in the ***Mason v McLean*** category, that is, one in which there was absolutely no prospect of an action against the original wrongdoer being defended, far less successfully. In this case, despite Mr Equiano's valiant efforts to suggest otherwise, there is no reason to suppose that the respondent's claim against the employer would not have been defended vigorously, possibly on the ground that, not being the manufacturer of the chair which collapsed causing her injury, it could not be held liable for defects which were not visible. Whether a defence along those lines, or any other, would have any chance of success would naturally turn entirely on the evidence in the case, but it seems to me that the judge was plainly wrong to leave it out of account altogether in assessing the damages that the appellant should pay to the respondent in this case.

[20] I therefore think that the appellant has made good grounds (i) and (ii) and the only question which therefore remains is what damages ought to be awarded to the respondent in the instant case. Mr Givans concedes that, and I think he was correct to do so, applying the ***Kitchen v RAF*** formulation, the respondent would clearly be entitled to more than purely nominal damages, since it is obviously not possible to say at this stage that in an action against the employer she would have been bound to fail. Taking all things into account, including the respondent's potential problems of proof of negligence, the possible defences that might have been open to the employer, as well

as all of the usual vagaries of litigation, I would assess the respondent's prospects of success in that action at somewhere between 50 - 60%.

[21] Mr Givans accepted that the authorities on damages relied on before the judge showed that "full general damages should be in the region of $1M" (see ground of appeal (iii)). On that basis, I cannot say that the judge's award of $1,250,000.00 was "manifestly excessive", given that the quantification of general damages is not a precise science. Taking the judge's award of $1,250,000.00 as a reasonably reliable assessment of the damages which the respondent would have been able to recover in a suit against the employer, therefore, I would assess the damages that the appellant should pay for her negligent failure to file that action at $700,000.00.

[22] In the result, the appeal was allowed and Marsh J's award of $1,250,000.00 was set aside. In lieu of this amount, we substituted an amount of $700,000.00. The respondent was ordered to pay the appellant's costs of the appeal, such costs to be taxed if not sooner agreed.

McINTOSH JA

[23] I have read in draft the reasons for judgment of my brother Morrison JA. I agree with his reasoning and conclusion and have nothing further to add.

HIBBERT JA (Ag.)

[24] I too agree with the reasoning and conclusion of my brother Morrison JA.