

FULL COURT

WILLIAMS J

AMBROSE J

COOPER J

KYM MAREE ROGERS

(Plaintiff) Respondent

and

GREGORY HEANEY

(First Defendant)

and

FAI GENERAL INSURANCE COMPANY
LIMITED

(Defendant by Election)
Appellant

BRISBANE

..DATE 18/10/91

JUDGMENT

MR JUSTICE WILLIAMS: In this matter the Full Court comprised Mr Justice Ambrose, Mr Justice Cooper and myself. In my opinion the appeal should be dismissed with costs. I publish my reasons.

"APPEAL DISMISSED WITH COSTS."

IN THE SUPREME COURT OF QUEENSLAND

No. 222 of 1991

FULL COURT

Before the Full Court

Mr. Justice G.N. Williams

Mr. Justice Ambrose

Mr. Justice Cooper

BETWEEN:

KYM MAREE ROGERS

(Plaintiff) Respondent

AND:

GREGORY HEANEY

(First Defendant)

AND:

F.A.I. GENERAL INSURANCE
COMPANY LTD.

(Defendant by Election)
Appellant

JUDGMENT - G.N. WILLIAMS J.

Delivered the 18th day of October, 1991.

CATCHWORDS:

Damages - back injury - plaintiff's decision not to undergo special fusion at this stage - whether failure to mitigate - Lorca v. Holts' Corrosion Control Pty. Ltd. (1981) Qd. R. 261 applied - on facts not failure to mitigate.

Counsel: Mr. S. Williams Q.C. and Lane for Appellant.

Mr. R. Trotter for Respondent.

Solicitors: Bradley & Co. for Appellant.

B.S. Dulley t/a for N.C. Richardson, McGhie
& Associates for Respondent.

Hearing date: 1st October, 1991.

date:

IN THE SUPREME COURT OF QUEENSLAND

No. 222 of 1991

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JUDGMENT - G.N. WILLIAMS, J.

Delivered the 18th day of October, 1991.

The respondent received personal injuries in a motor vehicle accident which occurred on 27th August, 1982. The appellant admitted liability for the injuries she sustained therein and the matter went to trial on the issue of quantum only. The Master awarded damages as follows:-

Pain and suffering, loss of amenities	\$35,000.00
Future domestic help	\$87,756.00
Future pain killers	\$ 9,000.00
Past pain killers	\$ 5,000.00
Future psychiatric treatment, counselling	\$15,000.00
Future economic loss	\$195,830.00
Past economic loss	\$21,000.00
<u>Griffiths v. Kerkemeyer</u>	\$20,000.00
Interest	\$16,500.00
Agreed special damages and interest	<u>\$ 2,614.30</u>
Total	<u>\$409,700.30</u>

At the time of the accident the respondent was a single woman aged 25, who was employed by Telecom as a

draftswoman. She was aged 33 and married at the date of trial. By then she had had three children, aged six, five and two.

From about the time of the accident the respondent complained of pain in her lower back radiating into her legs. In broad terms, as the Master found, the pain has been constant since the accident. She was initially told by a number of doctors that the pain would settle within 12 months and she would be left with no permanent disability. It was not until about four years after the accident that a proper diagnosis of her condition was made. There is no doubt on the medical evidence that she is suffering from (as a result of the accident) a lumbo-sacral disc protrusion and that in consequence she is totally and permanently disabled. The Master's findings support the following broad resume of her condition as at the date of trial:

- (i) She has a standing tolerance of about five minutes;
- (ii) She has a sitting tolerance of about 15 minutes;
- (iii) She has constant pain in the left buttock which radiates into the groin and left leg;
- (iv) She is unable to work;
- (v) She is unable to participate in any sports or recreation;
- (vi) She is able to do very limited housework;
- (vii) She is only able to do limited shopping;
- (viii) She has a very limited capacity to provide physical care for her children;
- (ix) She has constantly been taking medication;

- (x) She has been unable to participate in sexual intercourse with her husband for a number of years, and indeed the last child was conceived by artificial insemination.

No attack was made on the Master's finding as to her condition as at the date of trial, nor on his assessment of quantum on the assumption that she did not have, and ought not to be regarded as having had, in the immediate future, an operation designed to effect spinal fusion at the L5/S1 level. The only argument advanced by counsel for the appellant was that the respondent had failed to mitigate her loss in not having that spinal fusion operation, and that in consequence the award should be significantly reduced.

In his reasons the Master referred to the leading Queensland authority on the topic, namely Lorca v. Holts' Corrosion Control Pty. Ltd. (1981) Qd.R. 261. He correctly directed himself on the law by reference to that decision. He acknowledged that the burden of proof on the issue whether the respondent had failed to mitigate damages was on the appellant. He addressed the question of whether or not the respondent had acted unreasonably, by posing the question as formulated by the Full Court at 270:

"Having regard to all the circumstances of the case, including matters subjective to the plaintiff, is it reasonable to hold the plaintiff responsible for the consequences of his refusing treatment which might improve his situation?"

Lorca is also authority for the proposition that, in assessing damages to be awarded to a plaintiff who has not failed to mitigate damages by refusing treatment, it should not be assumed that the plaintiff will never undergo the treatment because he may change his mind. The Master did specifically take into account the "chance" that this respondent "might modify her attitude to spinal fusion and undergo that surgery". He went on to observe that "would probably not result in her returning to employment with

Telecom but might enable her to undertake some form of part-time employment and live a more comfortable existence".

Evidence as to the operation in question, and its chances of success, was primarily given by Drs. Fraser and Curtis, though it was also dealt with by other medical witnesses. The Master noted in his reasons some differences between the evidence of Drs. Fraser and Curtis, but regarded much of that as "more semantic than real". He did not specifically accept the evidence of one in preference to that of the other. In consequence it is necessary to set out in a summary way the relevant evidence of each of those doctors.

Dr. Fraser's evidence with respect to the operation, its prospects of success, and its risks can be summarised as follows:

- (i) A single level spinal fusion is required;
- (ii) A fusion of L5/S1 is one of the better levels at which to achieve fusion;
- (iii) The operation has a 70 to 85 per cent chance of success;
- (iv) There is a 65 per cent chance of the respondent being symptom free after the operation;
- (v) There is a 75 per cent chance of the respondent returning to work after a successful operation;
- (vi) With successful fusion there would be no significant loss of movement in the respondent's back but she would be left with a 10 per cent disability;
- (vii) There would be the general complications associated with an operation of this nature, namely, clotting, pneumonia, infection, or damage to nerves and blood vessels;

- (viii) If the operation was not successful there would be a need for a second attempt;
- (ix) Even after a successful fusion there is a possibility of disc damage developing either above or below the fusion which would produce symptoms and may require surgery.

The evidence of Dr. Curtis as to those matters can be summarised as follows:

- (i) The preferred procedure would be a single level fusion at L5/S1.
- (ii) The operation would have a 70 to 85 per cent chance of success;
- (iii) There would be a five per cent risk of complications developing as a result of the operation, which would include a one-half per cent chance of the respondent dying on the operating table;
- (iv) There would be a two to three per cent chance of there being increased symptoms after the operation;
- (v) There is a five to ten per cent chance of there being no improvement as a result of the operation;
- (vi) There is a five to ten per cent risk of the disc above that fused becoming symptomatic;
- (vii) A successful operation is unlikely to enable the respondent to return to work;
- (viii) A successful operation would reduce pain to a tolerable level but the respondent would not be asymptomatic;

(ix) The post-operative disability if the operation was successful would be of the order of 15 to 20 per cent.

Dr. McPhee expressed the opinion that the operation in question provided a good prospect of rendering the respondent asymptomatic. In his view if the respondent did not undergo such an operation her pain would in the future increase in intensity.

A report was tendered from L.K. Salzman, a clinical neuro-psychologist. It was noted in his report that since the accident in which her back was injured the respondent has had surgery on two occasions to repair bowel fissures. She has also undergone a skin graft to repair some injuries to her arm. He noted in his report that the respondent was "quite frightened about the prospect of an operation on her back and is therefore delaying her decision to have this procedure". It was his view that she needed some "form of counselling and pain management before she is ready for surgery". He also concluded that she was "experiencing significant psychological problems".

I turn now to the relevant evidence of the respondent; the Master quoted the first two answers verbatim in his reasons;

"Q. And what is your attitude to surgery of that nature?--

A. I personally am very, very scared of the operation. I am not happy that the results of the operation would fully soothe my pain. I have not been fully guaranteed I will come out of the operation free of pain. No doctor has guaranteed the operation will free me of my pain whatsoever, and I am too scared to go through with the operation and suffer, if any, consequences afterwards if it's not successful.

Q. What do you mean by 'consequences'? Have you been alerted to possible consequences?--

A. I have been told that if the operation is unsuccessful, I could be in a worse position than what I already am, plus having to go back for more series of operations, plus the recovery after the operation, I have been told, can be very painful as well - up to 3 to 6 months.

(Cross-examination)

- Q. You would agree the doctors have told you that it could reduce the pain considerably?--
- A. That's right, if the operation was successful.
- Q. But they haven't been able to say - of course, they can't guarantee you are going to be free of pain whatsoever?--
- A. That's right, they can't guarantee I would lose the pain altogether.
- Q. You initially said to the doctors that you initially said that you would think about having the operation?--
- A. I have said I would think about it.
- Q. And the doctors did say there was a good chance of success, and you said you would think about?--
- A. Well, I don't know if it's actually been in that text, but they have said that. An operation always go through your mind, but when it comes downs to the final decision, I am not prepared to have an operation at all.
- Q. Amongst other things, on your own evidence, you say there is no guarantee you will be free of pain whatsoever?--
- A. That's right."

Doctor Curtis did give evidence that the respondent "would be temporarily, totally incapacitated for some three to six months post-operatively". He also gave evidence as to the cost of the operation as follows:

- (i) Hospital in-patient 15 days @ \$375.0 per day;
- (ii) Surgeon's fees \$1,500.00;
- (iii) Anaesthetist's fees \$400.00;
- (iv) Assistant's fees \$400.00;
- (v) Theatre fees \$400.00;
- (vi) Incidental expenditure \$400.00.

It is in those circumstances that the Lorca test must be applied. Has the appellant discharged the onus of proof that the respondent has failed to mitigate her damages.

That involved a consideration of all the circumstances including matters subjective to the respondent, and deciding whether it was reasonable to hold the respondent responsible for the consequences of her refusing treatment which might improve her situation.

At the outset I should say that, given the evidence in this case, the Master was in a far better position than an appellate court to answer the question. One of the reasons given by the respondent for declining to have the operation at this stage was that she was frightened or scared of undergoing the particular procedure. That was evidence given by a person who, in the opinion of a psychologist, was "experiencing significant psychological problems". Evaluating the reasonableness of the respondent's conduct in declining to have the operation at this stage must involve an assessment of her whilst in the witness box giving evidence. That is an advantage that only the Master had.

The respondent had already had some experience with doctors being wrong in expressing an opinion. In particular, for some years after the accident the consensus of medical opinion appeared to be that she would recover completely and have no long-term symptoms. The doctors were wrong in that. It may well be that the failure to arrive at a correct diagnosis earlier was explicable in all the circumstances, but the relevance of the point here is that it affects the patient's faith in doctors when they express opinions about a potentially risky operation. One has only to have regard to the summary of the evidence of Drs. Fraser and Curtis I have set out above in order to see that there are very significant risks associated with this operation. The respondent may go through the operation, be totally incapacitated as a result for up to six months, with (on the view of Dr. Curtis) no increased likelihood of her being able to return to work, and with an approximate 30 per cent chance that there will be no reduction in pain. That leaves aside altogether the smaller percentage risks

of there being more significant complications arising from the operative procedure.

Counsel for the appellant directed his attack at the passages quoted above from the plaintiff's evidence on the ground that she was seeking an absolute guarantee of success before she would undergo the operation. Though the respondent did use the term "guarantee" her answers must, in my view, be read as a whole and in context. The Master appears to have regarded those answers as intimating that she was scared of the operation, particularly given the risk factors to which the doctors had referred, and that in those circumstances she could not bring herself to make a decision to undergo the procedure. Particularly as he had the advantage of making an assessment of the respondent while she was in the witness box, this Court cannot say that the Master was wrong in concluding that the appellant had not discharged the onus of establishing that the respondent was unreasonable in declining to have the operation at this stage.

As I have already noted the Master referred to the chance of her modifying her attitude in the future, a matter made relevant by the decision in Lorca. That chance is a matter which must be taken into account in the assessment of quantum, and the degree of probability of the respondent changing her mind would require an adjustment in the assessment of damages in accordance with the approach approved of by the High Court in Malec v. J.C. Hutton Pty. Ltd. (1990) 169 C.L.R. 638.

It seems to me that the Master did reflect those considerations in his assessment. For example, he only allowed her 70 per cent of the future economic loss to which she was theoretically entitled, and the award under the head pain, suffering and loss of amenities was, given the respondent's condition outlined above, on the low side. One has also to bear in mind that one would have to offset against the reduction in damages which would be occasioned by a change of mind leading to a successful operation, the

costs of the operation (approximately \$10,000.00) and damages for total incapacity during the period of up to six months immediately following the surgery.

I am unable to conclude that a consideration of the issues to which I have referred calls for an interference by this Court in the overall award. Given all the matters to which I have adverted I am not of the view that the total award was manifestly excessive.

The appeal should therefore be dismissed with costs.