ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 276 OF 1999

BETWEEN:

AUSTRA FRANKLYN

Plaintiff

and

M.A. KHARAFI & SONS WLL LTD

Defendant

Appearances:

Mr R Williams for the Plaintiff
Ms Z Horne for the Defendant

2000: March 30, April 5

JUDGMENT

[1] MITCHELL, J: This is a Summons for Assessment of Damages. The claim arises out of an industrial accident during the construction of the new cruise ship and ferry berth at Kingstown in St Vincent.

[2] The Plaintiff is a 32 year old carpenter who had been employed by the Defendant for only a few months before the accident on 7 August 1998. At that date the Plaintiff was an avid cricketer having played in the Stubbs League, for the Clare Valley team in the South Leeward Cricket League and for the St Vincent Mets Team in Canada. He had been a bowler. He admitted in cross-examination that he played Limited Overs in the 3rd Division prior to the accident. He had previously played in the 1st Division, but, as he was fully employed prior to the accident he could no longer spare the 2 days required for 1st Division Cricket. He

was also a weight lifter. He had represented St Vincent in 1997 at the OECS Body Building Championship and had been crowned the middle-weight champion. He had obtained a gold medal and a trophy for his performance.

[3] On 7 August 1998 while working at the new berth, the Plaintiff's hand was caught between a steel boat and a pile. Overnight, the hand became quite swollen. The following day, he went to see Dr Dacon-Anderson in Kingstown. Her examination showed he was unable to bend his fingers, and there was joint tenderness at the base of his 5th finger. An X-ray revealed a fracture of the distal end of his 5th metacarpal with ventral angulation. He was referred to the Kingstown General Hospital for the reduction of the fracture and further management. There, his hand was placed in a plaster, which was removed on 23 September 1998. Two months after the accident, on 8 October, concerned that his hand was still swollen and that he was still in pain and unable to bend his fingers, the Plaintiff went back to see Dr Dacon-Anderson. Another X-ray revealed that the fragment was misaligned. To regain full function of his hand, Dr Dacon-Anderson recommended open, that is, surgical, reduction and stabilization. Having spent 8 weeks without much improvement the Plaintiff was justifiably reluctant to seek further specialist care in St Vincent. In any event, the General Hospital recommended that the necessary surgical repair required a hand specialist, who was not available in St Vincent. Dr Dacon-Anderson advised that the Defendant allow the Plaintiff to seek an orthopedic opinion overseas. The Defendant arranged with the Plaintiff for him to see Dr Seale of Barbados.

[4] The Plaintiff first saw Dr Seale on 20 October 1998 when his hand was X-rayed. On 21 October Dr Seale explored the fracture under general anesthesia at the Queen Elizabeth Hospital. He found that the fracture had healed, but with significant angulation of the fracture. This was corrected through surgery and the bone straightened, fixing the fracture with a small plate and screws and reinforcing with two Kirschner wires. The Plaintiff spent the night in hospital and was discharged the same day. He was reviewed on 26 October, when the incision was

found to be clean and healing well. The Plaintiff returned to his home in St Vincent, and came back to see Dr Seale in 3 weeks as arranged. In the operating theatre, Dr Seale removed the Kirschner wires. New X-rays of the hand confirmed good alignment of the fracture. The Plaintiff was referred to Ms Bethell, a Registered Occupational Therapist, for mobilization and rehabilitation of the hand. In the three times weekly visits for therapy that followed, Ms Bethell applied Silicon pressure dressings to reduce the post-operative scarring. She started him on a number of splints to encourage his finger movement, especially at the affected knuckle. On his last visit to Dr Seale's office on 2 December 1998, the fracture was found to have healed in good alignment. But, the Plaintiff retained stiffness of the joints of the 5th digit and some associated stiffness of the 4th joint as well. The 4th MCP was found to flex to 70/90, and the 5th to 60/90. Passive flexion of the 4th MCP was full but painful, while the Plaintiff was as yet unable to obtain full passive flexion of the 5th digit. Dr Seale instructed the Plaintiff, and repeated in his report to the Defendant, that the Plaintiff must continue his exercises diligently using his various orthotic devices. Dr Seale anticipated that the Plaintiff's joint flexion would improve, though he could not say with certainty if he would regain full flexion. The stiffness, he reported, was due to the long delay between the injury and the final beginning of therapy. The Plaintiff returned to St Vincent on 6 December 1998 with instructions to continue his exercises diligently using his various orthotic devices.

[5] Dr Seale examined the Plaintiff in Barbados again on 13 October 1999. The Plaintiff complained of persistent discomfort and pain over the site of the fracture. He complained that his finger still became swollen at intervals. He was also concerned that flexion of the 5th finger knuckle was incomplete. Examination showed that the flexion of his metacarpal phalangeal joint measured 50 degrees compared with 90 degrees at the other fingers. His grip was good but weak when small objects were held in the lateral aspect of the hand. X-ray of the hand confirmed that the fracture had fully healed and there was no evidence of any arthritis at the joint. Dr Seale's explanation for the residual pain was that it might

be related in part to the presence of the metal. The plate and screws could be removed. Dr Seale explained that once this was done the Plaintiff would have to begin his exercises over again, aimed at improving his joint flexion and hand function. In his report, Dr Seale advised that the Plaintiff's prognosis for return to function was good. The long period between the fracture and the beginning of rehabilitative therapy might result in some loss of flexion at the knuckle. The Plaintiff would have to again be involved in aggressive therapy to improve the range of movement and strength of his grip. Dr Seale's bill of 18 October 1999 for the office visits, surgical fees, anaesthetic fees, report fees, and anticipated fee for removal of plate was B$3,040.00. Ms Bethell's invoice for treatment in November and December 1998 was B$711.71. Neither of these invoices had been paid by October 1999.

[6] In cross-examination it was revealed that the delay in treatment and the cause of the litigation arose out of a dispute between the parties at the time of the second visit to Barbados. The Plaintiff had been given US$800.00 by the Defendant to cover his meals and miscellaneous expenses during the visit to Barbados in November/December 1998. That amount had proved insufficient to meet the expenses over the long period that the Plaintiff was required to remain in Barbados. The Defendant appears to have disputed the expense account produced by the Plaintiff at the time of the 1998 visit to Barbados, but the ground of the dispute has not been explained. The Plaintiff was willing to go to Barbados to have the plate removed and to do the necessary further work on his hand. He was impecunious, and had not been able to afford to purchase the airline ticket to go to Barbados on his own, to pay for accommodation, to pay the overdue medical bills, to pay for the further medical treatment to remove the plate, and to engage in the further necessary therapy with the unpaid Ms Bethell. Dr Seale was apparently unwilling to do the necessary further operation on the Plaintiff until his overdue bill was paid. The Defendant, which had made the arrangements for the medical treatment and had sent the Plaintiff to Barbados, had not paid Dr Seale's

and Ms Bethell's bills until 28 March 2000, two days before the hearing of the summons in this matter.

[7] The Plaintiff is presently unable to work at his trade. Since the accident he cannot use a hammer, a handsaw, or power tools effectively. He had tried, he said, but the trauma to his hand from the striking of a nail or the vibrations from power tools created severe pain, discomfort and personal worry over the well being of his hand. He expected that he would no longer be able to be hired as a skilled carpenter earning approximately $80.00 per day. By his calculation he would in the future be relegated to less skilful work earning approximately $40.00-$50.00 per day. He estimated that it would take as much as one year after the operation to remove the plate and the recommended aggressive therapy before he would recover the range of movement and strength to allow him to commence carpentry work. He gave no evidence of having sought alternative employment since the accident. Counsel for the Defendant submitted that it was his duty to mitigate his loss. He could not sit by month after month and expect the Defendant to continue to pay him for ever. However, as explained below, no finding on this issue is required of the court because of the way in which the Plaintiff framed his claim.

[8] Subsequent to the accident on 8 August 1998, the Plaintiff had been paid his salary of an average of EC$600.00 gross per fortnight up to the end of May 1999. He has been unpaid since then. In his affidavit evidence he deposed to loss of salary since June 1999. He, however, made no claim for special damages for loss of earnings. He also deposed to requiring compensation for loss of salary for a period sufficient to allow him to receive the necessary treatment in Barbados. Before the court, he asked for compensation for pain and suffering and loss of amenity, in losing his enjoyment of competitive Cricket at the national level and body building exhibitions. These are matters for general damages, and are not required to be pleaded. A party to an action claiming damages as a result of the negligence of the other party is required by our rules of pleading to both plead and to prove his special damages. The court cannot award damages for loss of wages

or salary, future or anticipated, in the absence of a claim for special damages. In his statement of claim, special damages are pleaded. But, the particulars are limited to the amount of EC$1,080 for the cost of the medical report. This bill the Defendant has now paid, and it is not due any longer. In the claim at the foot of the statement of claim, no mention is made of a claim for special damages. The Defendant could be forgiven for having assumed that the Plaintiff made no claim for loss of wages resulting the accident. As regards the evidence given at the hearing, other than the amounts set out in his Affidavit of 8 March 2000 of approximately EC$4,940.00 for the cost of travel, the operation, the occupational therapy, and lodging and transportation in Barbados, the Plaintiff does not suggest any specific loss. The Defendant's counsel submitted that the Defendant had already paid approximately $25,000.00 to the Plaintiff subsequent to the accident. This was made up of the Barbados expenses, and salary for some 10 months. The Defendant, she submitted, had been accommodating and generous to the Plaintiff. She submitted that the Plaintiff had not sought to mitigate his loss by finding alternative employment during the period. I may observe that if a claim for loss of wages had been made in the statement of claim and proved, the Plaintiff may well have been entitled to compensation for such loss. The statement of claim might have been amended at any time with leave of the court, but no application was made in this case.

[9] As a result of the injury, the Plaintiff had not been able to play Cricket. The weakness in his hand did not allow him to bowl, or to hold and wield a bat with sufficient strength and dexterity to play. The injury had prevented him from training. In cross-examination, he admitted that by the year 1998 his work had reduced the amount of time he could devote to Cricket. Meanwhile, his hand with its present injury could not stand the rigours of competitive weight training. He still did a certain amount of training and still exhibited at fund raising body-building activities and the like. He had been disappointed in not being able to represent his country any longer and to defend his championship in the subsequent body-building tournaments.

[10] As regards general damages for pain, suffering and loss of amenities, the Defendant relied on two first instance cases extracted in The Lawyer of January 1995. The first was the Trinidadian case of Alexander v Baptiste & Ryan, HCA No S 271 of 1985. In that case, the Plaintiff was a female sales representative whose right index finger was damaged when it was crushed on the windscreen of her car. At the time of the accident it bled a lot and was very painful. Four months after the accident, it was discovered that the flexor tendons were crushed. The finger was stiff and swollen at the joint. She underwent an operation in 3 stages and was referred to physiotherapy. Her finger remained stiff, unable to make a good fist, and her grip weakened. She continued to experience pain and could not use the finger as she could before the accident. The court accepted her evidence and awarded her the equivalent of US$2,591.00 general damages for pain, suffering and loss of amenities.

[11] The second case relied on by the Defendant was the unreported first instance Barbados case of Skeete v Edwards No 1515 of 1989. The Plaintiff in that case was a tractor driver and operator aged 30 at the date of the assessment, who was injured in a quarry collapse when falling rocks crushed his left hand. The wounds healed, but with a severe limitation of flexion of the left index finger. The flexor tendon had become tethered and had to be released under general anaesthetic 3 months after the accident. The long-term prognosis was good though there might be 10% functional loss of integrity of the hand. Damages for pain, suffering and loss of amenities were assessed by Williams CJ in 1990 at US$2,759.00

[12] The Plaintiff had no legal authorities for the assistance or guidance of the court, but submitted that the several months of pain, the further need for an operation with the further pain that this will entail, the further months of physiotherapy that will be necessary if the Plaintiff is to recover the strength of the damaged part of his hand, the loss of ability to compete at a national level in the game of Cricket and the activity of body-building, the loss of the Plaintiff's right to defend his body-

building crown, or to represent his country in Canada, all distinguish this case from those relied on by the Defendant. Counsel called for an award of a significant sum by way of general damages.

[13] This is not a case where liability is in issue. No question arises as to whether or not the Plaintiff was contributorily negligent in relation to his injury. The question is solely how much more the Defendant should pay to compensate the Plaintiff for the loss and damages occasioned, it is accepted by the Defendant, by the negligence of the Defendant. We are looking solely at the claims for pain and suffering and loss of amenities. There is no formula that a court can objectively follow in these issues. The court can only apply what appears to be common sense principles, and hope that if it is in error that error will be corrected. In this case what stands out is that the Plaintiff has been ready and willing to go back to Barbados to have the steel plate taken out of his hand and to undergo the physiotherapy that will be necessary for his hand to regain strength. It also stands to reason that the longer he delays in this the less likely that his hand will regain its original strength. I agree with counsel for the Plaintiff that the two cases cited by the Defendant can be distinguished. First, they are a decade old, and the value of money has changed since then. Second, the extended period of pain and disability suffered by the Plaintiff is largely due to the Defendant not having honoured the obligation it correctly assumed in securing medical treatment for the Plaintiff's injury. Third, the loss of such a status, highly valued in our West Indian communities, as a nationally recognized amateur sportsman, is a matter for compensation. Fourth, the loss of form suffered by the Plaintiff due to the delay in treatment caused by the Defendant may never be recovered despite the best efforts of the Plaintiff. The Defendant accepted responsibility to get him to Barbados, the accepted location of the nearest specialists for this type of treatment. The Defendant did not honour the obligation it had accepted, and that has been the principal cause of the length of the Plaintiff's suffering the pain and disability he is under. In assessing damages, the court must take into account, in addition to the usual matters in these cases, the likelihood that as a result of the

prolongation of the necessary treatment, the Plaintiff will never regain the necessary condition to play Cricket at a national level or to compete at national level at body-building. I take in to account that the Plaintiff at the age of 32 is approaching the age at which he would normally retire from competitive sport. The delay in paying Dr Seale and Ms Bethell has unnecessarily prolonged the agony that the Plaintiff must go through to be made whole again. The cost to the Defendant occasioned by this delay will necessarily be greater than if it had paid promptly to carry out its responsibilities. Taking all the above into account a fair and reasonable award would be:

Pain and suffering from the time of the accident and continuing until some time after the operation that will be necessary to remove the steel plate and the physiotherapy sessions –	$20,000.00
Loss of amenities –	$40,000.00
Total	$60,000.00

The Plaintiff shall have his costs to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge