THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SAINT LUCIA

CLAIM No. SLUHCV 2002/449

BETWEEN:

CHARLES GILBERT

Claimant

AND

JULIAN MONERVILLE

Defendant

Appearances:

Miss Clemar Hippolyte for Claimant
Miss Kate Wilson for Defendant

……..

2005: 16 March
18 March
8 April

……

Introduction

1. SHANKS, J: The Claimant was injured in a road accident on 29 January 2001. He issued a claim against the Defendant and a default judgment was entered dated 11 June 2003. On 16 March 2005 I heard the assessment of damages. At the conclusion of the hearing I delivered an ex tempore oral judgment and awarded him damages of $199,729.

2. On further consideration overnight I came to the view that I may have gone wrong in my assessment and awarded the Claimant too much. I therefore called the attorneys back on 18 March 2005. I stated my understanding of the law which is that until a judgment or order of the court has been perfected (i.e. formally drawn up and sealed), it is open to a judge, if he believes on substantial grounds that he might have made an error, to revise his decision. There was no dissent from that proposition and I therefore indicated that I would reconsider matters and issue a written decision. I heard further brief submissions from the attorneys on points that were concerning me and now issue this written decision.

Factual Background

3. The Claimant was 53 at the time of the accident and is now 57. He suffered a sprained right ankle and a much more serious injury to his right knee in the accident. According to the medical reports (Jeffers 8.1.02, Marker 17.4.01, St. Rose 3.5.01, Jeffers 11.11.02 and Jeffers 11.8.04), he suffered an "undisplaced osteochondral fracture of the lateral condyle of the femur". Unfortunately the fracture became infected. He was referred from Victoria Hospital to St. Jude Hospital on 6 February 2001 and he underwent incision and drainage of the right septic knee. He was discharged on 15 February. On 26 March 2001 the knee was infected again and he underwent re-aspiration and manipulation of the knee joint.

4. By the time Dr. Jeffers reported in January 2002 he was still suffering from pain when walking and had to take pain killers. X-rays showed gross osteoarthritic changes of all compartments of the knee. He was unable to stoop, bend down or climb a ladder or

stairs, all activities necessary for the performance of his job (as described to Dr. Jeffers) as a mason. Dr. Jeffers expressed the view that he may not be able to return to work as a mason and that retraining may be appropriate and that long term he may require a total knee replacement as the arthritic right knee became more and more painful and functionally disabling.

5. At an examination in November 2002 Dr. Jeffers noted that he walked with a marked limp using a walking stick and a knee brace and that there was wasting of the right quadriceps muscle with painful restriction of knee movement. He recorded that the Claimant had not been able to return to his occupation "as a mason/farmer" as a result of his ongoing knee problem. In August 2004 Dr. Jeffers reported that the knee arthrosis had got worse and was increasingly affecting his daily life. He said that the Claimant should have a right knee operation "at the earliest" and gave cost estimates for such an operation to be carried out in Martinique or Barbados.

The issues

6. Happily, there was agreement on a number of items of damage:

ITEM	LOSS $
Loss of vehicle	10,500
Travel expenses to hospital	2,100
Ambulance	800
Medical costs	3,054
Employment of Baston Denis	190
Food lost in accident	2,260
Traffic Report	200
Damaged clothing	125
TOTAL	$19,229

7. The outstanding areas of dispute are:

(1) whether the Claimant was guilty of contributory negligence in allowing his knee to become infected
(2) general damages
(3) cost of future medical care
(4) past and future loss of earnings
(5) cost of travel to have sea baths claimed at $1,100.

Contributory negligence

8. Surprisingly, Ms. Wilson for the Defendant suggested that the Claimant was guilty of contributory negligence in allowing his knee to become infected and, she said, this had exacerbated the injury unnecessarily. I would accept that, in principle, if a Claimant acted in a wholly unreasonable way in defiance of his doctor's orders and made things worse, his damages for injuries resulting may be reduced. In this case, however, the facts come nowhere near to establishing contributory negligence.

9. The high point of Ms. Wilson's case is a comment in Dr. Jeffers' report of 8 January 2002 on page 2 where he observes that the development of infection in a knee fracture is rare and he notes that the Claimant did not attend for medical attention until 30 January 2001 (four days after the accident). The Claimant in cross-examination was adamant that he was admitted to Victoria Hospital immediately after the accident on 26 January and had been discharged home and that he had returned on 30 January because an infection had developed in the meantime and he was in great pain. I accept that evidence which is confirmed by Dr. St. Rose's report from Victoria Hospital dated 3 May 2001. It would appear that Dr. Jeffers either did not have or overlooked the records showing that the Claimant had attended Victoria Hospital on the day of the accident and that he had been

under the care of the doctors there from that date. In any event, I reject any suggestion of contributory negligence.

General Damages

10. Ms. Hippolyte in her skeleton argument suggested a figure of $45,000 based on various cases she cited and the facts of this case. Ms. Wilson's skeleton argument mentions a figure of $22,000 on page 4. It is not clear whether she has reduced the figure to take account of her case on contributory negligence. In any event, I think Ms. Hippolyte is much closer to the mark and I propose to award the Claimant $45,000 for pain, suffering and loss of amenity.

Future medical care

11. Dr. Jeffers says in his report of 11 August 2004 that the operation he recommended will cost BDS$14,000 and that because of the possibility of reactivation of the infection the cost may need to be increased by 15 to 20% to allow for an extended stay in hospital. It was not disputed that BDS$14,000 is equivalent to $18,900. Ms. Wilson opposed any award for future medical care and, for obvious reasons, was particularly opposed to any increase to take account of the risk of re-infection. It seems to me that Dr. Jeffers' report of 11 August 2004 is sufficiently certain about the need for the operation to merit an immediate award by the full cost of the operation. He does not say what the risk of re-infection is but I propose to increase the figure of $18,900 to a round $20,000 to reflect this.

Loss of Earnings

12. The evidence about loss of earning was very unsatisfactory. Although the Claimant had told the Doctor he was a mason there was nothing about this in his witness statement except that he did "odd jobs as a mason". He said he worked as a banana farmer for which he earned about $800 per week. He produced notes from the St. Lucia Banana Corporation to show that during the year 2000 there was production of $17,451 from land registered with the corporation in the name of Leonard Emmanuel and production of $18,271 from land registered in his name.

13. In evidence he stated that Emmanuel owned both pieces but he was working Emmanuel's farms. He stated that he had been away in Tortola helping his sister build a house for the whole of 2000, but his wife had operated the farms. He stated that he had had four people working for him at $40 per day for five days a week. He accepted that the price of bananas had gone down. He said the land was now just empty. I think he was driven to accept (it was not clear by this stage in the proceedings) that the receipts for previous years had been highly erratic.

14. I do not see how I can sensibly assess damages for loss of past or future earnings on the conventional multiplier/multiplicand basis on the strength of this evidence. It is all far too speculative and uncertain and, as Ms. Wilson would maintain, it raises all kinds of questions about causation and mitigation. In the circumstances I am driven, I think, to consider an award of a round sum for "loss of earning capacity", which he has undoubtedly suffered. The figure will inevitably be modest or Claimants may be

encouraged not to present proper evidence as to loss of earnings in the hope of receiving a substantial sum without exposing their case to proper scrutiny. Ms. Wilson's skeleton argument at page 5 proposes a sum of $10,557 under this heading although I am not sure I understand the basis of this concession. In any event, I think the most generous award I can make is $15,000.

Sea Baths

15. Ever assiduous in her client's interest Ms. Wilson challenged a claim for taxi expenses of $1,100 for trips to have sea baths at Dennery. She said there was no evidence that the doctors had recommended sea baths and the associated costs could not therefore be the subject of a claim. Even assuming her premise to be true, I accept the Claimant's clear evidence in cross examination that both the nurse and doctor treating him told him to go and bathe his knee in the sea and that he did so. I award $1,100 under this head.

Conclusion

16. I will award the following:

(1) Agreed special damages	$19,229
(2) General Damages	$45,000
(3) Future Medical Care	$20,000
(4) Loss of earning capacity	$15,000
(5) Sea baths	$ 1,100
Total	$100,329

I will award interest at 6% on items (1), (2) and (5) (total $65,329) from January 2001 to March 2005, which I assess at $16,500. The total award will therefore be $116,829.

17. I therefore order as follows:

(1) Damages inclusive of interest assessed at $116,829

(2) Judgment for the Claimant for $116,829.

Unless there are any submissions to the contrary I shall also order the Defendant to pay costs assessed at 60% of the prescribed amount for an award of $116,829.

MURRAY SHANKS
HIGH COURT JUDGE (ACTING)